In the Court of Appeal of the State of California
Second Appellate District, Division 5

Appeals Case No. B281994

GLENDALE COALITION FOR BETTER GOVERNMENT,
Respondent and Cross-Appellant,
v.
CITY OF GLENDALE,
Appellant and Cross-Respondent.

Appeal from the Superior Court of the State of California, County of Los Angeles, Case No. BS147376
Honorable James C. Chalfant, Judge Presiding

COMBINED RESPONDENT'S BRIEF & CROSS-APPELLANT'S OPENING BRIEF

Benjamin T. Benumof, Ph.D., Esq. (SB #227340)
550 West "C" Street, Suite 530
San Diego, CA 92101
Tel: (619) 232-0331
Fax: (619) 232-4019

Attorney for Respondent and Cross-Appellant, GLENDALE COALITION FOR BETTER GOVERNMENT

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

These entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate or (2) a financial or other interest in the outcome of the proceeding that the Justices should consider in determining whether to disqualify themselves:

None.

(Cal. Rules of Court, rule 8.208(e)(2).)

Executed on April 10, 2018, at San Diego, California.

Benjamin T. Benumof, Ph.D., Esq.
Attorney for Respondent/Cross Appellant Glendale Coalition for Better Government

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

California Constitution

California Statutes

Rules

Other Authorities

PREFATORY STATEMENT

"Power tends to corrupt and absolute power corrupts absolutely."
British Nobleman John Acton (1834-1902)

"Honesty is for the most part less profitable than dishonesty."
Plato (428-347 B.C.)

At the heart of this matter lies the City of Glendale's ("City" or "Appellant") purposeful neglect and persistent failure to properly fund wear-and-tear maintenance of its own electric utility at the great expense of, and with great detriment to, its citizen ratepayers.

Respondent Glendale Coalition for Better Government ("the Coalition") could not, and cannot now, sit on the sidelines and silently allow the City to be the architect of its own financial demise when the City's Charter – its "supreme law" – provides a "roadmap" for sustainability and transparency.

For years on end, and ***continuing*** today, the City chose to use its electric utility (Glendale Water & Power ("GWP") as its

illegal cash cow[1], overcharging its electric ratepayers and then improperly diverting approximately $20 million per year from the electric works directly to the City's General Fund to finance non-electric related services and operations. This illegal practice has now necessitated a ~$500-million upgrade of the City's electric works – all of which the City must fetch with borrowed money because there are ***zero*** dollars set aside "sufficient to meet the normal depreciation of the electric works" as required by the mandatory provisions of the City's Charter.

The use of the City's "Electric Works Depreciation Fund" as a cash budgeting tool for capital improvement projects is completely inconsistent with the City's Charter – again, its *"supreme law*" –and flies in the face of Proposition 26, a Constitutional mandate borne out of the Constitutional cost-of-service and proportionality mandates of Proposition 218 that shall be ***liberally construed*** to effectuate its purposes of ***limiting local governmental revenue*** and ***enhancing taxpayer consent***.

[1] The 2012/2013 Los Angeles County Grand Jury initiated an investigation to determine if the City of Glendale was in violation of articles XIII C and XIII D of the California Constitution, specifically Propositions 26 and 218, by charging excessive rates and illegally transferring monies from GWP to the City's General Fund. The Grand Jury found such a violation and stated that the City of Glendale may not "use GWP as its ***'piggy bank'*** to satisfy budgetary shortfalls." (10 JA 2387.)

Indeed, the whole purpose of the Electric Works Depreciation Fund per Section 17 of Article XI of the Charter is to receive monies from the "Electric Works Revenue Fund" to cover the normal depreciation of the electric works so that repairs, replacement, betterment and extensions of the electric works plant and equipment can be performed.

The result, as Judge Chalfant highlighted in his trial court decision on the merits of the Coalition's Petition, is that the "City has budgeted varying amounts of capital expenditures in the Electric Works Depreciation Fund **without *any regard* for wear-and-tear depreciation**." (11 JA 2796, emphasis added.)

Put simply, the City ran its own utility into the ground under the corruption of power[2] and the ease with which accounting magic could divert many millions of dollars to non-utility purposes without hitting the radar. Today, however, the damage is done; eight (8) of the City's nine (9) electric generation units are on their last legs and at least two (2) of the units are completely non-operational. The City simply drove its electric utility into shambles.

Now, after a trial on the merits, the City asks this Court to excuse its constitutional violations even though the City has not

[2] Hence, the relevance of the Coalition's opening quote by British Nobleman John Acton (1834-1902): "Power tends to corrupt and absolute power corrupts absolutely."

come close to providing specific, credible evidence or legal argument that would disturb the trial court's judgment vindicating Proposition 26 and Proposition 218 interests. Neither the trial court (which did not) nor this Court needs to provide any deference to the abysmal showing made by the City after an extended hearing below.

In addition to the Proposition 218 and 26 claims, the trial court also ruled that the City was in violation of the mandatory provisions of its Charter, yet ruled that no remedy was required. In this single instance, the trial court clearly erred; indeed, the Charter represents the "supreme law" of the City of Glendale and it is well-settled that an act in violation of a city's Charter is void as a matter of law. Period.

The City's Charter was put in place to protect against this very sort of conduct. The Charter has a roadmap to follow when the City moves electric revenue within the City's various funds. This roadmap ensures that wear-and-tear depreciation gets adequately funded for ongoing maintenance. But the City disregarded the roadmap to avoid backlash from the electorate and to deceptively fund non-electric works services and operations.

Why the trial court declined to provide a remedy for these Charter violations is unclear. It cited the City's "discretion," and said it would be an idle act to require the City to comply. As

explained further below, this was error. The Court was required to **void** transfers of funds that did not comply with the City's Charter provisions because the City enjoyed no discretion to deviate from them. Voiding the transfers would have forced the City to preserve millions of dollars to fund wear and tear depreciation as the Charter requires.

Ultimately, the evidentiary record is clear as to why the City increased electric rates without a vote. **The City knew full well that the electorate would not agree**.[3] Thus, the City chose to neglect its electric utility and deprive the electorate of the right to vote on whether or not electric fees should be used for the General Fund. This is precisely what Propositions 26 and 218 were intended to prevent.

Today, on appeal, nothing has changed, except for the City's interjection of a slew of distortions, mischaracterizations, *ipse dixits*, and arguments either waived, forfeited, or not worthy of disturbing the result on the Coalition's Proposition 26 claims.

This Court should **AFFIRM** the trial court's judgment that: (1) "the City's inclusion of the GFT in the 2013 electric rate violated Proposition 26" (11 JA 2801); and (2) "[t]he City's funding and accounting practices do not comply with its Charter"

[3] Hence, the relevance of the Coalition's opening quote by Plato (428-347 B.C.): "Honesty is for the most part less profitable than dishonesty."

(11 JA 2796 – 2797), and **REVERSE** its judgment that the Charter violations did not demand a remedy. (11 JA 2797 – 2798.)

STATEMENT OF APPEALABILITY

This brief constitutes the Coalition's response to the City's AOB and also constitutes its opening brief on its cross-appeal of the January 27, 2017 judgment following the Coalition's writ petition hearing. (14 JA 3390.) The City served notice of entry of judgment on February 14, 2017. (14 JA 3399.) The City timely appealed the judgment and denial of its post-judgment motions on April 11, 2017. (14 JA 3440.) The Coalition timely filed this cross-appeal on April 24, 2017. (See Code Civ. Proc. § 904.1, subd. (a)(1); Cal. Rules Ct., Rule 8.108(g)(1).)

STATEMENT OF FACTS

The Coalition is a nonprofit corporation duly incorporated in the State of California and operates within the City of Glendale, County of Los Angeles, State of California. (2 JA 273:1 – 4.) The Coalition consists of numerous residents and taxpayers who reside within the City of Glendale and want to make Glendale a better place to live, work and visit. (2 JA 273:3 – 4.)

The Coalition is committed to the idea that a dynamic and healthy city is one where important issues are addressed in an open and honest dialogue between the City Council and the city's informed and concerned citizens. The Coalition's Mission is to

"promote accountability, responsiveness, transparency and integrity in Glendale City Government through the dissemination of accurate information." The Coalition has a track record of positively contributing to the sustainable growth of business, population and government by acting as the voice of residents and business owners. The Coalition's labor consists of educating and engaging residents and business owners in the dynamics of City management and politics and supporting political candidates that represent transparency, accountability, integrity and responsiveness. (2 JA 273:3 – 4.)[4]

Appellant City of Glendale is a charter city within the County of Los Angeles, State of California. (2 JA 273:5 – 6.) Glendale Water and Power ("GWP") is a City owned utility consisting of an Electric Works and Waterworks. (2 JA 273:15 – 16.)

The City's charter requires that the City maintain a number of funds with dedicated purposes and functions.

Section 14 (of article XI)[5] establishes the "General Fund Budget" which receives all revenue from property tax levies and fees from various licenses, permits and fines, **excluding those from the GWP,** and disburses all appropriations budgeted for

[4] See also website for the Coalition: http://www.glendalecacoalition.org/about-us
[5] Each of the charter sections discussed in this section are found in article XI.

general municipal purposes. The credit balance at the end of a fiscal year is transferred to the General Reserve Fund (Fund 15.)

Section 15 establishes the "General Reserve Fund," a "permanent revolving fund" that is for the purpose of keeping the payment of the running expense of the City on a cash basis by advancing money to the other funds as needed until the ad valorem (property) tax revenue is realized.

Section 17 establishes the "Electric Works Depreciation Fund" that receives the funds that the City Council must "annually set aside" from the Glendale Water Department's Electric Works Revenue Fund, in an amount sufficient "to meet the normal depreciation of the electric works."

Section 20 establishes the "Electric Works Revenue Fund"[6] ("Electric Fund") that receives the revenue generated by the GWP from the sale of electric energy or otherwise derived from the electric works of the city. The credit balance, if any, or any part thereof, at the end of the fiscal year, is transferred to the GWP Surplus Fund (Fund 22).

Section 22 establishes the "Glendale Water and Power Surplus Fund" which is credited with any surplus cash remaining in the Electric Works Revenue Fund (and the Waterworks

[6] This fund also received waterworks revenues which are maintained in a "waterworks revenue fund."

Revenue Fund) after the requirements of other related funds, including the Electric Works Depreciation Fund, are met.

Section 22 also provides that:

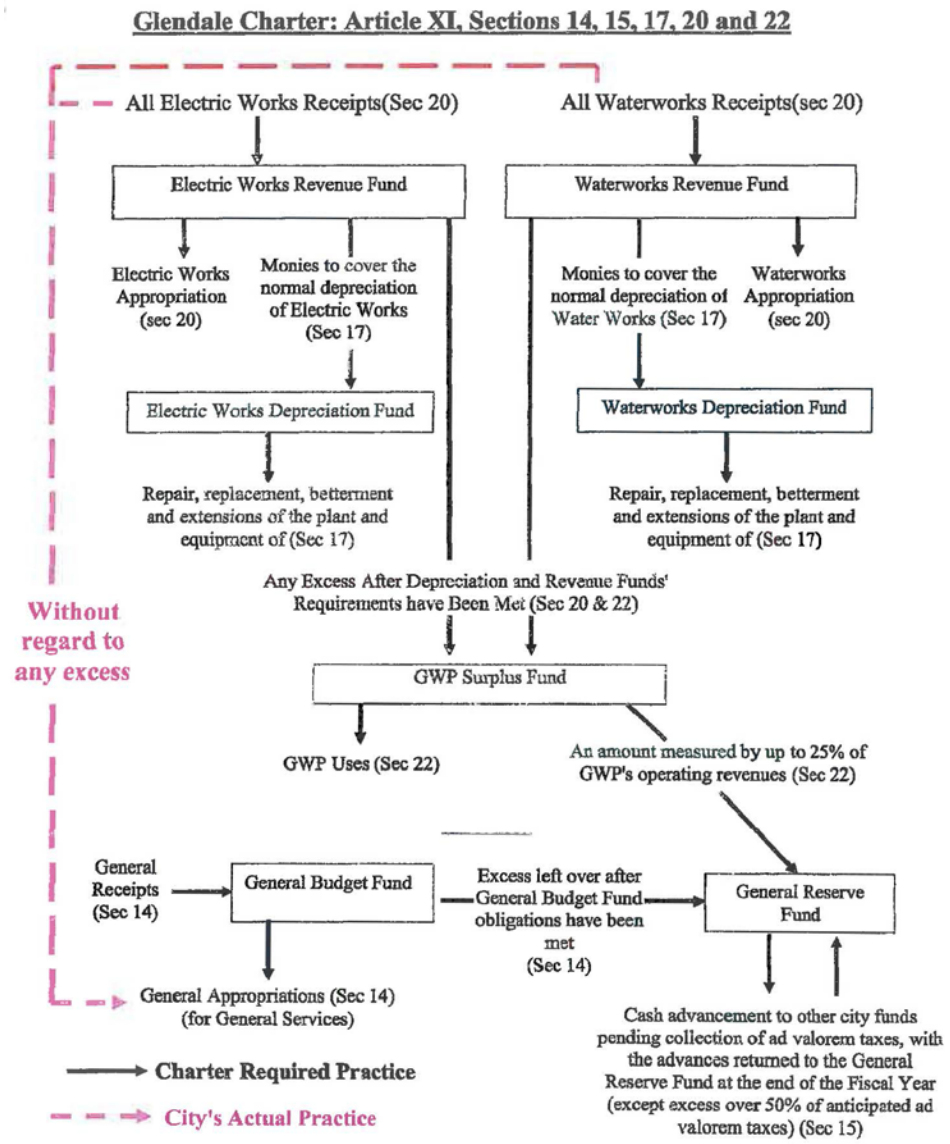
> "At the end of each fiscal year an amount equal to twenty-five (25) per centum of operating revenues of the Department of Glendale Water and Power for such year…shall be transferred from said Glendale Water and Power surplus fund to general reserve fund."

This roadmap, as created by the Charter, may be summarized as follows:

- The Electric Fund receives revenue from multiple sources including from electric rate payers.
- The Electric Fund pays all outstanding demands and liabilities and places into the Electric Works Depreciation Fund, an amount sufficient "to meet the normal depreciation of the electric works."
- After payment of all outstanding demands and liabilities, and setting aside the amount to cover depreciation, the excess, if any, is transferred to the GWP Surplus Fund.
- Subject to the right to reduce or waive, an amount **measured** by 25% of the operating revenues of GWP shall

be transferred from the GWP Surplus Fund to the General Reserve Fund. (2 JA 441.)

A diagram of what the Charter requires and what the City actually did is as follows:



(2 JA 441.)

In November 2012, City sought to ***amend*** those sections of the Charter pertaining to Glendale Power & Water and the required transfer of monies to the various Charter funds by eliminating, among others, the General Budget Fund, the General Reserve Fund, the Waterworks Revenue Fund, the Electric Works Revenue Fund, and the GWP Surplus Fund. (2 JA 425:16 – 21.)

The ballot measure seeking to amend the Charter ***failed***. (2 JA 425:23 – 24.)

The Glendale City Manager, who is the executive head of the various departments of the City (2 JA 482 – 483), presented the City with estimated depreciation amounts for electric works and waterworks for fiscal years ending June 30, 2011, June 30, 2012, June 30, 2013, and June 30, 2014. These amounts are reported in the CAFR. (2 JA 425:26 – 426:2.)

In Fiscal Year End June 30, 2011, the City transferred **$19,107,000** from the Electric Fund directly to the City General Fund. The City transferred no monies to the Electric Works Depreciation Fund, nor to the General Reserve Fund, nor to the GWP Surplus Fund. (2 JA 432:11 – 15.) The City's Comprehensive Annual Financial Report ("CAFR") identifies the electric works depreciation to be **$19,962,000.** (2 JA 432:15 – 16.)

In Fiscal Year End June 30, 2012, the City transferred **$21,107,000** from the Electric Fund directly to the City General

Fund. The City transferred no monies to the Electric Works Depreciation Fund, nor to the General Reserve Fund, nor to the GWP Surplus Fund. (2 JA 432:22 – 26.) The City's CAFR identifies the electric works depreciation to be **$22,226,000.** (2 JA 432:26 – 27.)

In Fiscal Year End June 30, 2013, the City transferred **$20,857,000** from the Electric Fund directly to the City General Fund. The City transferred no monies to the Electric Works Depreciation Fund, nor to the General Reserve Fund, nor to the GWP Surplus Fund. (2 JA 433:1 – 5.) The City's CAFR identifies the electric works depreciation to be **$26,262,000**. (2 JA 433:5 – 6.)

In Fiscal Year End June 30, 2014, the City transferred **$20,607,000** from the Electric Fund directly to the City General Fund. The City transferred no monies to the Electric Works Depreciation Fund, nor to the General Reserve Fund, nor to the GWP Surplus Fund. (2 JA 433:8 – 12.) The City's CAFR identifies the electric works depreciation to be **$26,264,000.** (2 JA 433:12 – 13.)

On August 13, 2013, City increased electric rates to be imposed on City ratepayers over a five-year period. (2 JA 427:14 – 16.) The August 13, 2013, electric rate increase was not submitted to a vote of the electorate. (2 JA 427:18 – 19.) A component of the rate to be imposed on ratepayers consists of an

amount to cover a transfer of $21,107,000 from the Electric Fund to the General Fund (i.e. GFT Transfers.) (2 JA 427:21 – 22.)

THE TRIAL COURT RULING AND JUDGMENT

After a trial on the merits, the trial court found that "[t]he City's funding and accounting practices do not comply with its Charter." Specifically, with regard to the Charter violations, the trial court determined, *inter alia*, that "the City has not funded the Electric Depreciation Fund as required by Charter Section 17 [and] [t]he result is that the City has budgeted varying amounts of capital expenditures in the Electric Depreciation Fund without regard for wear and tear depreciation." (11 JA 2796.)

On the Proposition 26 claims, the trial court ruled that "[t]he 2013 electric rate increase includes the GFT which is imposed as part of the electric charges to retail customers in fiscal year 2014 and for the ensuing four years through the transfer to the General Reserve Fund. The City's inclusion of the GFT in the 2013 electric rates violated Proposition 26." (11 JA 2801.)

Consequently, the trial court ruled that the Coalition was entitled to a declaration that the City's 2013 electric rate increase violated Prop 26 and an injunction preventing the City from increasing electric rates in the future based on the GFT without submitting the increase to a vote. In addition, it ruled that "the Coalition is entitled to a writ of mandate compelling City to credit

ratepayers with the amount of the GFT paid from August 2013." (12 JA 3056.) As discussed in the trial court's ruling on remedy and agreed by the City at trial, the amount refunded should be the difference between the lawful rate and the rate charged to rate payers. (12 JA 3055.) At trial, the evidence indicated that the appropriate amount of the remedy as if fiscal 2016 year-end (June 30, 2017) was $61,071,000, which increased by $1,654,750 per month in fiscal year 2017 and $1,633,917 in fiscal year 2018. (12 JA 3056.)

On the Charter claims, the trial court ruled that "a declaratory judgment will issue that the City has a duty to comply with Charter Sections 17, 20, and 22." (12 JA 3056.) But it ordered no remedy with regard to the City's prior Charter violations. Specifically, it declined to order the City to void the transfers. (11 JA 2798 – 2801.)

STANDARD OF REVIEW

A. Proposition 26 / 218 Claims

The Coalition concurs with the City that the proper standard of review on appeal with respect to the judgment on the Proposition 26/218 claims is an exercise of independent judgment by this Court. (See *Silicon Valley Taxpayers Association, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal. 4th 431, 448; *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 933.)

In applying the independent judgment standard of review, the reviewing court "will not provide any deference to the [City's] determination of the constitutionality of its rate increase." (*Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892.) And, even when this Court exercises its independent judgement, it does not "take new evidence or decide disputed issues of fact." (*Id*. at p. 912.) In fact, the "**substantial evidence"** standard applies to a "**trial court's resolution** of factual disputes against a party, **accepting all evidence to support the successful party, drawing all reasonable inferences to support the result below, and refusing to reweigh the evidence, to re-determine the credibility of witnesses, or to resolve conflicts in the testimony".** (*Id*. at p. 916, emphasis added.)

Furthermore, **Proposition 218 must be liberally construed for the purpose of enhancing taxpayer consent**. (*Bay Area Cellular Tel. Co. v. City of Union City* (2008) 162 Cal.App.4th 686, 692–693.)

Indeed, the City admits in its AOB that "the City has two burdens under this standard of review: the burden to produce an adequate record to support its electric rates ([citing *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 235-236]…and the burden to persuade the Court that the Challenged Rates are not taxes under Proposition 26 ([citing Cal. Const., art. XIII C, section 1, subd. (e)].) (AOB 33.)

B. Charter Violation Claims

With respect to the judgment on the City charter claims, this Court must review questions of law de novo and apply the substantial evidence standard of review to the trial court's findings of fact. (See *Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981 [reviewing judgment based on a statement of decision following a bench trial].)

"Under this deferential standard of review, findings of fact are liberally construed to support the judgment and [this Court] consider[s] the evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in support of the findings." (*Id.* [citation omitted].)

ARGUMENT

I. PROPOSITION 218 AND 26 VIOLATIONS

A. A Tax, Is A Tax, Is A Tax, Is A Tax…

Adopted by California voters in 1996, "Proposition 218" added articles XIIIC and XIIID to the California Constitution. Article XIIIC, section 2 subd. (b) provides:

> "No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved."

Under Proposition 218, a "general tax" is a tax imposed for general governmental purposes. (Art. XIIIC, § 2, subd. (b).)

Similarly, California Constitution, article XIIIC, § 2 subd. (d) provides:

> "No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote. A special tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved."

A "special tax", therefore, is any tax imposed for specific purposes, even if the proceeds are placed in the general fund. (Art. XIIIC, section 1(d).) A special tax is one limited to use for a specific purpose, even if there are multiple purposes for which revenues may be spent. (11 JA 2800, citing *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal.App.4th 1178, 1185 [measure that limited electric utility's charges for appropriation solely to police, fire, parks and recreation or library services was special tax].)

Yet, despite Proposition 218's mandates and the voters' clear intent to restrict the government's ability to raise taxes without voter consent, local governments began increasing "fees" in lieu of seeking voter approval of new, extended, or increased taxes and imposing surcharges that were later transferred to

general funds, to be spent for broad public use. From an economic perspective, these types of non-transparent, non-compliant "fees" and "charges" are nothing more than disguised taxes.

As a result, in 2010, Proposition 26 was presented to California voters to account for the problem of taxes disguised as fees. According to the Voter Information Guide, Gen. Elect. (Nov. 2, 2010) (hereinafter "Voter Information Guide"), under Proposition 218, "State and local politicians are using a loophole to impose Hidden Taxes on many products and services by calling them 'fees' instead of taxes." The Voter Information Guide listed "Electricity", "Gas", and "Water" as "a few examples of things [politicians] could apply **Hidden Taxes** to unless we stop them." (*Id.,* emphasis added.)

Proposition 26 thus broadened the definition of "tax" for the purposes of California Constitution, article XIIIC to include "any levy, charge, or exaction of any kind imposed by a local government" with seven enumerated exceptions. (Cal. Const., art. XIIIC, § 1, subd. (e)(1)-(7).)

To determine whether the City's electric fees were a tax requiring voter approval, it must be determined whether (a) it falls into one of the seven enumerated exceptions and (b) whether the City imposed, increased, or extended it after Proposition 26's passage (in 2010.)

As discussed below there is no dispute that the City imposed and increased electric rates on August 13, 2013 and that those rates included an amount designed to make GFTs to the City's General Fund.

The City's arguments that voters approved an electric users tax in 1941 are disingenuous.

B. The City's 2013 Electric Rates Were Illegal Taxes Imposed

Because the 2013 electric rate increase did not purport to limit the revenue collected to a specific purpose, it was a general tax unless one of seven enumerated exceptions applied under Cal. Const., art. XIIIC, § 1(e)(1)-(7). (11 JA 2800.)

> As made clear in trial court's ruling on the merits:
>
> "There is no dispute that the City 'imposed,' 'extended,' and 'increased' its electric charges in 2013. In fiscal year 2014, the City charged an increased electric rate that includes the amount of GFT set by a discrete budget resolution at the beginning of the fiscal year and a second implementing resolution at the end of the year. The GFT occurs for the purpose of meeting the City's general service needs, and is a 'non-operating' cost of GWP. The electric charges including the GFT meets the definition of a tax under Prop 26."

(11 JA 2800.)

Not surprisingly, the trial court did not agree with the City's unavailing arguments about why the illegal GFTs cannot fairly be described as a cost of providing electric service. (11 JA 2801.) Rather, it emphasized that:

(1) "The GFT is an internal City transfer from its proprietary GWP to its General Reserve Fund that the City Council may reduce or waive if GWP's financial position is unsound"; and

(2) "Any contrary conclusion would **defeat the purpose of Prop 26** by permitting a city to drain monies from its public utility as an alleged cost and then impose that cost on the utility's customers without a vote of the electorate." (11 JA 2801, emphasis added.)

The evidentiary record is clear as to why the City increased electric rates without a vote. **The City knew full well that the electorate would not agree**. Thus, the City chose to deprive the electorate of the right to vote on whether or not electric fees should be used for the General Fund. This is precisely what Proposition 218 (see Sections 2 and 5) and Proposition 26 (see Section 1(e)) were intended to prevent. (2 JA 449 – 452; 458 – 459.)

Not so ironically, the following are comments of City Manager Ochoa to the GWP Commission on July 22, 2013, when responding to a commissioner's suggestion that the City could

replace the practice of transferring monies from the electric fund to the general fund by raising taxes:

> **"…**the **idea of a general tax or even a public safety augmentation was something that was completely *anathema* to [the council]."**

(10 JA 2413:1 – 3, emphasis added.)

C. The City's Retroactivity Arguments Are A Red-Herring; The Challenged Action Occurred In 2013

The City spills much ink arguing that Proposition 26 is not retroactive. (AOB 42 – 49.) This is a strawman argument that the Court need not consider. The Coalition **agrees** that Proposition 26 does not have retroactive application. A law has retroactive effect when it "change[s] the legal consequence of ***past*** conduct by imposing new or different liability based on such conduct." (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 231 [emphasis added].) A law is therefore deemed to be retroactive only when "it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was *completed* before the law's effective date." (*In re E.J.* (2010) 47 Cal.4th 1258, 1273 [italics in original].) Furthermore, a law is not retroactive "merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment." (*Id.* at p. 1274 [citing *Kizer v. Hanna* (1989) 48 Cal.3d 1, 7].)

Retroactivity is not at issue here because the challenged conduct – the City's legislative enactment of new electric fees and charges that exceed the cost of providing electric service – occurred on August 13, 2013, nearly ***three years after*** voters approved Proposition 26. As stipulated by the parties:

- On August 13, 2013, the City of Glendale ***increased*** electric rates to be charged to City rate payers annually over a five-year period.
- The August 13, 2013 electric rate increase was based on a 2013 Cost of Service Analysis ("2013 COSA").
- A component of the rate to be charged to ratepayers under the 2013 COSA consists of an amount to cover a transfer of $21,107,000 from the electric fund to the general fund.

(2 JA 511:1 – 10.)

Under Proposition 26, "any levy, charge, or exaction of any kind imposed by a local government" is ***by default*** a tax unless it meets one of seven enumerated exceptions that the agency must establish by a preponderance of the evidence. (See Cal. Const., art. XIII C, § 1, subd. (e).) Thus, to place the City's electric fees and charges outside this constitutional definition (and to escape the voter approval requirement), the City was required to carry its burden of proving that the electric rates adopted on August

13, 2013 represented the true cost of providing electric service.[7] (See Cal. Const., art. XIII C, § 1, subd. (e)(2).)

Here, it is undisputed that the City increased and imposed a "charge" "of any kind," through legislative enactments in 2013 and affirmatively embedded an amount designed to fund a $21 million transfer to the General Fund for general fund purposes. (See *Kahn v. East Bay Municipal Utilities Dist.* (1974) 41 Cal.App.3d. 307, 409 ["fixing or re-fixing of rates for a public service is legislative, or at least quasi legislative"].)

When the City took this ***legislative act***, it was required to comply with the law as it existed at that time. Indeed, the policies underlying the general presumption against retroactivity are not implicated. (See *Russell v. Superior Court* (1986) 185 Cal.App.3d 810, 814 ["retroactive laws are generally disfavored because the parties affected have no notice of the new law affecting past conduct."].) The City adopted new electric rates with full notice that they were required to comply with Proposition 218 and Proposition 26. But City did not even attempt to prove that this embedded amount was a cost of providing electric service.

Faced with these undisputed facts, the City pivots away from the adoption of the 2013 rates and argues that "[t]he City's voters established its electric transfer decades before the 2010

[7] Technically speaking, the City could have attempted to establish any one of the seven exceptions, but only subdivision (e)(2) seems to offer an appropriate framework; the City agrees. (AOB 43.)

adoption of Proposition 26..." and "Proposition 26 does not invalidate local legislation enacted before 2010, like article XI, section 22 of the City's Charter authorizing the transfer." (AOB 41, 44.) This argument is unavailing for two reasons.

First, article XI, section 22 of the Charter simply authorizes transfers of ***surplus*** funds from one fund to another as measured by the prior year's electric operating revenues. The transfers do not violate Propositions 26 and 218 on their own, and thus, there is no need to consider the issue of retroactivity as it pertains to section 22. In fact, the transfers represent the proceeds of monies illegally obtained through **previously-imposed** electric rates that exceed the cost of providing service. The Coalition prevailed on their seventh and eight causes of action that challenged the August 2013 rates, not the transfers. (11 JA 2798 – 2801.) And the trial court properly framed the issue as such: "This means that the **2013 rates** that include the GFT are unlawful unless they are a reasonable cost of electric service." (11 JA 2800 [emphasis added].)

Second, even if it were appropriate to examine the annual transfers as the alleged illegal activity, the City "imposed" and "extended" them **after 2010**. Glendale Finance Director Robert Elliot explained that the City Council **annually** budgets for the projected amount of the transfer "which is normally somewhere between 10 and 12 percent of the electric utility's gross operating

revenue…" (3 JA 625:12 – 13.) At the end of the fiscal year, the City acts **by resolution** to set the amount of the GFT. (3 JA 625:18 – 19.) In other words, the amounts transferred are subject to the City's annual and recurring budgeting and legislative enactments, and the amounts (both in terms of dollars and percentage) apparently change from year to year. [City transferred $19,107,000, $21,107,000, $20,857,000, and $20,607,000 in Fiscal Years ending 2011, 2012, 2013, and 2014.] (2 JA 508:11 12; 509:9 – 10; 510:9 – 10; 511:20 – 21.) Indeed, the City Charter requires the preparation and adoption of an annual budget by resolution. (Charter sections 6, 7). The resolution "operates as an appropriation of funds to the amounts and for the purposes set forth in the budgets so adopted." (Charter section 7.)

Thus, even accepting the faulty premise that the transfers represent the alleged illegal action, they are "imposed" each year. (See *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.4th 924, 944 [explaining that "create," "establish," "impose," and "enact" have been used interchangeably].) Likewise, the transfers have been "extended" each year. (See Government Code section 53750 subd. (h) ["extend" means a decision by an agency to extend the stated effective period for the tax or fee or charge . . ."]; see also *Citizens Ass'n of Sunset Beach v. Orange County Local Agency Formation Com'n* (2012) 209 Cal.App.4th

1182, 1194-1195 (*Sunset Beach*) [explaining " 'extend' is normally thought of in terms of time" and a "chronological prolongation"].)

Further support is found in *Barratt American, Inc. v. City of Cucamonga* (2005) 37 Cal.4th 685, 703 ("*Barratt"*). In *Barratt,* the California Supreme Court considered the effect of adopting fees through a new resolution when the amount of the fees remained unchanged. The court held that, "[a]lthough the amount of the [] fees remained the same, resolution No. 02-023 changed the duration of the fee by ***extending*** its applicability, and by implication its validity." (*Id*. at p. 703 [emphasis added.]; see also *California Public Records Research, Inc. v. County of Yolo* (2016) 4 Cal.App.4th 150 [considering *Barratt* reenactment rule in context of Proposition 26 retroactivity argument].) Here, each transfer is confined to a single fiscal year. The City extends the transfer ***each time*** it annually budgets for it and sets the amount by resolution (i.e. a chronological prolongation). Without these (post 2010) legislative actions there would have been no transfers.

The Impartial Analysis in the Proposition 26 ballot pamphlet explained to voters:

> **"Some Fees and Charges are Not Affected**. The change in the definition of taxes would not affect most user fees…In addition, most other fees and

charges in existence at the time of the November 2, 2010 election would not be affected unless:

- ❖ The state or local government later increases or extends the fees or charges. (In this case, the state or local government would have to comply with the approval requirements of Proposition 26.)"

The City has taken numerous actions post November 2, 2010 including the adoption of budgets reflecting transfers, the adoption of resolutions fixing the amounts of the transfers, and the enactment of electric rates embedding amounts to fund the transfers. It is implausible that the voters wanted to shield such post-2010 actions from Proposition 26's restrictions. And it cannot be forgotten that these actions resulted in additional taxes being extracted from ratepayers without their consent.

In addition, the City contends that the City 'imposed' the transfer when it adopted charter section 22 in 1941, not when the transfers were actually made. (AOB 51.) This is disingenuous. If section 22 were self-executing as the City suggests, there would be no need to engage in legislative actions each year regarding the amount of the transfers. Section 22 does only two things, neither of which authorizes a fixed tax to be charged through electric rates. One, it creates a surplus fund which is funded in "amounts in **excess of the requirements** of the several funds"

(i.e. Electric Revenue Fund). Two, it authorizes a transfer from the surplus fund in an amount that is measured by the operating revenues of the GWP (25%). The City may reduce or waive that amount; apparently it only transfers 10 to 12 percent of operating revenues (as explained by Finance Director Elliot.) The City interprets the adoption of section 22 to mean to that "Glendale voters intended utility ratepayers to fund the general fund transfer" and that "[v]oters therefore understood the revenue to fund the transfer would primarily be retail rate proceeds, as the Utility has few funding sources but wholesale and retail revenues." (AOB 50 – 51.)

There is ***nothing*** before this Court that reflects that the voters understood section 22 as imposing a 25% tax on their electricity bills. There are plenty of reasons why "surplus funds" may exist in any given year; i.e., unexpected cost savings, additional electricity consumption during extra hot summer, liquidation of physical assets, revenues from other lines of business, etc. Indeed, according to the City, the operating revenues in 1941 comprised "accounts 600-615" which included, in addition to retail revenues, "rents," "forfeited discounts and penalties," "service to customers' installations on their property," and "miscellaneous revenues, including 'fees and charges for changing, connecting, and disconnecting service." (AOB 20 – 21.)

Put simply, the fact that the voters wanted to pass along said surplus funds to reduce "revenues required to be raised by taxation" (AOB 51) does not mean that it wanted to fund such through massive taxes on their electric rates. That would amount to "Robbing Peter to Pay Paul." If the City, when it proposed this charter amendment, wanted voters to approve a 25% tax on their electric rates, it should have said so plainly and unequivocally. Notably, nowhere in section 22 is the word "tax" used.

D. Voters Have Not Approved The Tax

The City contends that voters approved the tax twice – in 1941 and 1946 when they approved amendments to the City's charter, Article XI, § 22. (AOB 56 – 59.) But for the same reasons discussed, *supra*, as to why the taxes were not **imposed** in 1941, voters did not **approve** taxes in 1941 (or 1946.) Indeed, in reviewing a charter amendment for the purpose of assessing voter approval, general canons of statutory construction apply. (*Prof'l Eng'rs in California Gov't v. Kempton* (2007) 40 Cal.4th 1016, 1037.) If the plain meaning of the words is ambiguous – as is the case here because section 22 does not refer to a tax whatsoever – then voters cannot be presumed to know that non-existent factual technicalities exist (e.g., the hidden tax here buried in ostensible transfer provision.) (*Howard Jarvis Taxpayers Ass'n v. Cnty. of Orange* (2003) 110 Cal.App.4th 1375,

1385 [rejecting contention voters are presumed to have known factual technicalities not present in initiatives].) While the tax imposed need not be absolutely definite, it nonetheless must contain within itself some articulable limit against which it is anchored. (*See generally Cnty. of Orange*, *supra*, 110 Cal.App.4th 1375; *AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747; *Davis et al v. City of Berkeley* (1990) 51 Cal.3d 227; *Sacramento Municipal Utility District v. All Parties and Persons, etc.* (1936) 6 Cal.2d 197.)

In sum, the enactment of new (and increased) electric rates in 2013 is not immune from constitutional scrutiny just because Proposition 26 is not retroactive. When the City took legislative action in 2013, it was required comply with the law as it existed at that time. It failed to do so and it cannot now rely on a 1941 transfer provision to argue that its actions are grandfathered in. To draw upon section 22 language as voter approval of a tax is to fundamentally rely upon conjecture; such an interpretation is decidedly not in reliance upon the express language of the provision. (*See Cnty. of Orange, supra*, 110 Cal.App.4th at p. 1385 ["As a rule, courts should not presume an intent to legislate by implication."].)

E. Public Utilities Code Section 10004.5 Does Not Save The City Because It Is Inapplicable

The significant portion of City's appeal relies on a highly strained and desperate interpretation of Public Utilities Code ("PUC") section 10004.5 ("section 10004.5"). Specifically, the City argues that the Coalition's challenge to the August 2013 rate increase was filed 166 days after the September 13, 2013 effective date of the August 13, 2013 Resolution adopting electric rates, it is time-barred by section 10004.5, which provides for a 120-day statute of limitations for any "judicial action or proceeding against a municipal corporation that provides electric utility service, to attach, review, or set aside, void, or annul an ordinance, resolution, or motion fixing or changing a rate or charge for electric service." (PUC section 10004.5(a).) (AOB 34 – 40.)

Section 10004.5, however, is inapplicable because the Coalition is not attacking the "***ordinance***…***fixing*** or ***changing*** a rate or charge for an electric commodity or an electric service ***furnished***" as expressly required by section 10004.5 (emphasis added.) Rather, the Coalition argues that if the City includes an amount designed to fund GFTs in the electric rates, then the City must put it to the voters for approval.

Proposition 26 says that the amount that exceeds cost-of-service is a tax. "Hidden taxation" is the whole point of Proposition 26 and here the tax was hidden; bottom line is when

the City passed the rates, the tax was buried in sophisticated documents that it took experts to assist the trial court in understanding and uncasing! Indeed, even from an accrual standpoint, a statute of limitations does not run when the underlying violation it is not even capable of being known, such as vis-à-vis a sophisticated rate study and except through highly contested and protracted litigation.

Furthermore, the Coalition's claim is not based upon the adoption of the ordinance, per se. Rather, **it is based upon the continuing accrual of each illegal collection of the tax.** The trial court found that the City has been violating, and continues to violate, Proposition 26.

The Supreme Court in *Howard Jarvis Taxpayers Association v. City of La Habra* (2001) 25 Cal.4th 809 has expressly addressed this very issue and has made the distinction between a claim seeking to invalidate an ordinance and a claim asserting a continuous violation.

Indeed, the *La Habra* court decision is dispositive on point and explains, in pertinent part, that the plaintiffs in that case were seeking redress for *two* types of injury: the violation of their right to vote on new taxes, and the City's continued collection of the tax without valid legal authority. At the heart of the matter was the very practical argument made by plaintiffs; i.e., that the City was under no compulsion to continue collecting the tax,

alleging "[e]very month the City choose…to send out another round of bills and collect more money without voter approval, it commits a new injury." (*Id.* at p. 819.)

The *La Habra* plaintiffs had consistently claimed the City's continued collection of its utility tax was illegal and had consistently sought equitable remedies and writ relief to prevent further illegal collections. The question at bar was whether, having abandoned their refunds claim, they had timely sought such prospective relief – specifically, a declaration of the tax's invalidity and a writ ordering the City to cease collecting the tax or put it to a vote based on the City's recent and continuing collection of the tax. (*Id.* at pp. 813-814.)

In short, the *La Habra* plaintiffs had alleged (1) an ongoing violation of Proposition 62's commands, for which they sought relief in mandamus (Code Civ. Proc., § 1085, subd. (a)); and (2) a then presently existing actual controversy between themselves and the City over the validity of the utility tax, which they sought to resolve by declaratory judgment (Code Civ. Proc., § 1060.) (*Id.*)

The *La Habra* court found that those causes of action are not barred merely because similar claims could have been made at earlier times as to earlier violations, or because plaintiffs did not at that time also seek a refund of taxes paid. (*Id.* at pp. 823-825.) The court held, "Proposition 62 prohibited the imposition of a general tax 'unless and until such general tax is submitted to

the electorate.' (Gov. Code, § 53723.) That command is allegedly violated each time the City collects its utility tax through the service providers. As already noted, no statute or decision requires an aggrieved taxpayer to establish the tax's invalidity *before* suing for refund or to prevent its collection." (*Id.*)

Emphasizing the court's distaste for the City's disregard for constitutional protections, the court further stated at pages 824-825:

> "The local governments' suggestion, 14 years after the passage of Proposition 62 and [25 Cal. 4th 825] five years after *Guardino's* resolution of the constitutional questions (*Guardino, supra*, 11 Cal.4th 220), that their budgetary planning processes will be disrupted if Proposition 62's requirements are enforced, is not well taken. Cities and counties must eventually obey the state laws governing their taxing authority and cannot continue indefinitely to collect unauthorized taxes."

What's more, the legislative history of Section 10004.5 demonstrates that the provision was intended ***narrowly*** for lawsuits by public school districts over fees intended to pay the capitalization costs of a public utility.

(14 JA 3387.) An entirely different set of circumstances than the case at bar.

The City nevertheless contends that the plain language of section 10004.5 applies to all challenges to electric rates and is not limited to disputes between public agencies (AOB 34 – 36), but as highlighted by Judge Chalfant in his ruling on the City's motion for new trial, the overriding function of statutory interpretation is to effect legislative purpose.

Literal construction should not prevail if contrary to the legislative intent apparent in the statute, and intent prevails over the plain language. (14 JA 3387 – 3388, citing *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) Section 10004.5 does not state its purpose and the court may resort to legislative history to determine it. (14 JA 3388.)

Importantly, the legislative history shows that AB 1674 was codified partly in section 10004.5, and also in Government Code section 54999.35. The two codified provisions must be interpreted together in order to glean their purpose.[8]

[8] All parts of a statute should be read together and construed in a manner that gives effect to each, yet does not lead to disharmony with the others. [Citations.]" (*City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 468.) "[L]egislation must be construed as a whole while avoiding an interpretation which renders any of its language surplusage. [Citation.]" (*Ibid.*)

As articulated by Judge Chalfant, "[t]hat purpose was for a public utility to provide notice to certain school-related public entities that a capital facilities fee would be imposed, and to give those public entities a short 120-day window to challenge them." (14 JA 3388.) As such, section 10004.5's 120-day limitations period does not apply to a Proposition 26 challenge. (14 JA 3388.)

Importantly, there is not a single legislative reference in AB 1674 or in any of the statutes amended or added in accordance with the statutory scheme or in any appellate court decision that suggests Public Utilities Code section 10004.5 applies to ***individuals***. On its face, it applies to public agencies providing utility service to other public agencies. Section 54999.35 states, in pertinent part: "**This section shall apply only to a local publicly owned electric utility or other public agency providing public electric utility service to a public agency in its service territory…**"

What's more, as a practical matter, Public Utilities Code section 10004.5 was enacted in 2000; so, there is no way it could have even contemplated usurping the Constitutional protections of Propositions 26.

One of the significant cases that discusses the impact of a shortened 120-day statute of limitations is that of

Utility Cost Management v. Indian Wells Valley Water District (2001) 26 Cal.4th 1185, a case cited by the City of Glendale on appeal and at the lower level. Upholding a short 120-day statute of limitations, the Supreme Court discusses the relationship of two public agencies vis-à-vis Government Code section 54999.2 and states at page 1189, "[s]ection 54999.2 authorizes public utilities to impose a 'capital facilities fee' on public entities…."

The Supreme Court continues at page 1190, "[t]herefore, application of this provision would require state agencies and educational entities to keep close watch on public utilities at the time they adopt their rate ordinances and to bring prompt challenges…."

The Supreme Court concludes at page 1196, "[i]n a case such as this one, where the ordinance creating the fee clearly applies to public entities…."

It is also most significant that we consider the holdings of the California Supreme Court with respect to the importance of legislative history and the intent of a statute. The Supreme Court holding in *Lungren v. Deukmajian* (1988) 45 Cal.3d 727, 735 is directly on point herein:

> "Literal construction should not prevail if it is contrary to the legislative intent apparent in the

statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations omitted.] An interpretation that renders related provision nugatory must be avoided [citation omitted]; each sentence must be read not in isolation but in the light of the statutory scheme."

Our Court of Appeal recently joined in this interpretation in *Wells Fargo Bank, N.A. v. 6354 Figarden General Partnership* (2015) 238 Cal.App.4th 370, 380 and held:

> "The plain meaning of words of a statute may be disregarded only when the application of their literal meaning would (1) produce absurd consequences which the Legislature clearly did not intend or (2) frustrate the manifest purposes which appear from the provisions of the legislation when considered as a whole in light of its legislative history [citations omitted]."

There is ***not*** one single suggestion in the legislation that Public Utilities Code section 10004.5, which is part of the extensive and all-encompassing statutory scheme that became effective on July 21, 2000, applies to individuals. To hold that a ratepayer has only 120 days to object to an

illegal tax enacted in violation of the state Constitution and that the City would be entitled to impose that illegal tax in perpetuity is an absurd result and clearly not intended by the statutory scheme of which Public Utilities Code section 10004.5 is a part.

F. Public Utilities Code Section 10004.5 Does Not Pertain To Taxes

The City's August 13, 2013 resolution increasing City electric rates purported to increase "fees." It did not increase "fees." **It increased taxes without a vote.** There is a legally recognized distinction between fees and taxes and the Supreme Court has repeatedly made that distinction in cases dealing with a shortened statute of limitations.

As noted above, in June 2001, the Supreme Court handed down *Howard Jarvis Taxpayers Association v. City of La Habra* (2001) 25 Cal.4th 809 which is based upon the City's ***continued*** collection of a ***tax*** without valid legal authority. In December 2001, the Supreme Court handed down *Utility Cost Management v. Indian Wells Valley Water District*, supra. While the Supreme Court upheld a 120-day limitation therein, it is distinguished from *City of La Habra* at page 1195:

> "In this regard, our opinion in *Howard Jarvis Taxpayers Association v. City of La Habra* (2001) 25 Cal.4th 809 [] can be distinguished. In that case, we held that a new violation of Proposition 62 occurred

> every time a city attempted to collect a ***tax*** under an ordinance that had not been approved by the requisite majority vote of the electorate. Therefore, though the plaintiffs' challenge was to the underlying validity of the ***tax*** ordinance, a separate limitations period ran from each individual collection of the tax. (*Howard Jarvis*, at pp. 821-822.) But there, we were construing the three-year statute of limitations applicable to "an action upon a liability created by statute." (Code of Civ. Proc., section 338, subd. (a).) That statute ran from the date the action accrued, which we construed to mean the date the ***tax*** was collected. (*Howard Jarvis*, at p. 821.) Government Code section 66022, however, expressly states that it runs from the "effective date" of the ***fee*** legislation."

The Supreme Court continued at page 1196:

> "In a case such as this one, where the ordinance creating the fee clearly applies to public entities, it is the ***enactment*** of an improper fee, not the mailing of the charge, that violates the exemptions…."

In July 2004, the Supreme Court again addressed a short statute of limitations in *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757. In Travis, the plaintiff sought to challenge a zoning ordinance. The Supreme Court, while upholding the short

limitation, acknowledged *City of La Habra* in its decision at page 774:

> "Plaintiffs also argue the action as a whole is timely under Code of Civil Procedure section 338 because it was brought "within three years of two applications of the Ordinance – one to the Sokolows in 1998 and one to Travis in 1999. They rely on *Howard Jarvis Taxpayers Assn. v. City of La Habra*, supra, [citations omitted], **in which we deemed a facial attack on a local utility *tax* to accrue every time the city collected the tax**. [Emphasis added.]"

As the Supreme Court has repeatedly recognized in highlighting the distinction between a fee and a tax, we should look at the state Constitution and the significance of Proposition 218 (enacted in 1996) and Proposition 26 (enacted in 2010), the focus of this case. For example, the Court of Appeal in *Silicon Valley Taxpayers Association v. Garner* (2013) 216 Cal.App.4th 402, 407 emphatically stated, **"[w]hen construing a constitutional provision [e.g., Proposition 26] enacted by initiative, the intent of the voters is the paramount consideration."**

The state constitution makes it clear that fees are not taxes and that, pursuant to Proposition 218, a city may not increase taxes without a vote. **Public Utilities Code section 10004.5**

pertains to *fees*, not *taxes*. The application of section 10004.5 would illegally diminish the impact and importance of Proposition 26.

G. The City Waived / Forfeited Its Statute Of Limitations Defense

The City did not specifically plead section 10004.5 as a statute of limitations defense in its Answer. (14 JA 3386.) Its First Amended Answer ("FAA") alleges only that "[t]he Petition and each cause of action contained therein are barred by the applicable statutes of limitation, including, but not limited to, section 338 of the Code of Civil Procedure." (2 JA 333:1 – 4.) Nor did it assert it as a defense in its opposition brief. Instead, it raised for the first time orally at the June 9, 2016 hearing on the merits. (RT 103:28 – 104:24.) The trial court refused to consider section 10004.5 because the City had failed to raise it previously. (RT 104:27-28.) It argued it in its brief during the remedies phase, but the trial court ruled, "the City may not raise a PUC section 10004.5(a) statute of limitations in its remedy brief." (12 JA 3055.)

In support of its motion for new trial and motion to vacate, the City briefed section 10004.5 in its moving papers. (13 JA 3176 – 3178.) It argued, citing *616 Croft Ave., LLC v. City of West Hollywood* (2016) 3 Cal.App.5th 621, that its FAA's "including, but not limited to" language was sufficiently broad to encompass

section 10004.5 and thus, its affirmative defense was properly pled. It also asserted that the Coalition failed to challenge the sufficiency of FAA (i.e. by demurring to it.) (13 JA 3261 – 3262.)

The trial court ruled that the City's FAA did not constitute a waiver, citing the fact the Coalition had not challenged the adequacy of the pleading. (14 JA 3387.) But critically, it ruled that "[i]t is not enough…for the City to have adequately pled a statute of limitations defense…It also must timely raise it. A properly pled cause of action may nonetheless be waived by a party's failure to argue the issue in the trial brief." (14 JA 3387, citing *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 799 [holding, an argument raised in the complaint, but not discussed in the opening brief, is waived and may not be raised in a reply brief].)

Moreover, as the trial court noted, "any time a party asserts a point, but fails to support it with reasoned argument and citation to authority, the point may be treated as waived." (14 JA 3387, citing *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784, 785; *Solomont v. Polk Development Co.* (1966) 245 Cal.App.2d 488 [point made which lacks supporting authority or argument may be deemed to be without foundation and rejected].)

Ultimately, Judge Chalfant ruled that "[t]he City waived[9] section 10004.5 as an affirmative defense when it failed to present in its trial brief any argument or citation to authority concerning the passage of the section 10004.5 limitations period." (14 JA 3387.)

On appeal, the City contends that "[a]lthough the City did not argue Public Utilities Code section 10004.5 in its pre-trial brief, it raised it: (a) at trial, (2) in its briefing on remedy, and (3) in its new trial motion." (AOB 39.)

The oral statement at the June 9, 2016 writ petition hearing fails for two reasons. First, it was devoid of any analysis, reasoned argument, or citation to authority (other than the statute itself.) (See *Solomont v. Polk Development Co.* (1966) 245 Cal.App.2d 488.) Second, while the writ petition hearing has been nominally referred to as a "trial," the vehicle for adjudicating this matter was through a peremptory writ / noticed motion procedure.

Los Angeles Superior Court Local Rule 3.231 proscribes very specific procedures the parties must follow with regard to writs. In the case of peremptory writs (as in here), the court sets a briefing schedule, dates for record preparation, and a hearing

[9] "Forfeiture" may be a more appropriate term. See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 529, n6 [explaining waiver is an intentional relinquishment or abandonment of a known right whereas forfeiture is the failure to make the timely assertion of a right.].)

date which "is the trial of the case." (Rule 3.231(b)(1).) Briefs are subject to the page limits set forth in California Rules of Court, rule 3.1113(d), must provide a statement of facts, and scope of review. (Rule 3.231(i).) Notably, either a record, or written evidence (declarations, deposition testimony and documentary evidence) must be lodged with the moving papers and oral testimony is rarely permitted. (Rule 3.231 (g) & (h).) Thus, the briefs do not serve as an "aid" to the Court, as the City suggests. (AOB 39.) They (together with the evidence cited therein) are intended to reflect the scope of the legal issues and evidence duly before the Court for its review and consideration. The reference to Rule 3.231(m) that the "trial" consists of "oral arguments" plainly means that unlike a bench trial, there are no examination of witnesses or need to introduce exhibits. If the City's position were correct, the writ petition hearing would be an opened-ended, free-for-all where opposing counsel would need to spontaneously respond to new arguments. This would be totally inefficient and unfair to the court and the parties.

The City's argument regarding section 10004.5 in the trial court remedies briefing was inappropriate because the hearing on remedies already contemplated that the City's defense had been denied. The City's remedies brief was not a motion for reconsideration. And the remedies hearing was limited to the

Prop 26 remedy and the statute of limitations on a water issue not on appeal. (RT 126:25-127:5.)

With regard to the motion for new trial and motion to vacate, a new legal argument that was not previously raised before judgment cannot be argued post-judgment.

H. The City Is Estopped From Enforcing 120-Day Limitation Because The August 13, 2013 Resolution Contains Express Misrepresentation Of Fact

Even if section 10004.5 were found to be applicable and the City did not forfeit its right to assert it, the City is estopped from asserting it. Resolution no. 13-138, which created the illegal tax, states:

> **Section 3. The Electric Rates attached hereto as Exhibit A:**
>
> **(a) Do not exceed the actual or estimated reasonable costs to the City of providing the services to which the fees relate;**
>
> **(b) Are reasonable and necessary to enable the City to provide the benefit or privilege, service or product to which they relate; and**
>
> **(c) Have been allocated in a manner such that the costs to the payor bear a fair and reasonable relationship to the payor's burden on, or benefits received, from the City.**

If the foregoing were true, there would be no basis upon which to object as Proposition 26 provides that if the increase in rates constitutes the reasonable cost of service, the increase is not a tax. If the foregoing were true, a challenge would be futile and fail. But, in fact, the Resolution, which states that the increase constitutes the reasonable cost of service, is a misrepresentation.

The Supreme Court addressed the estoppel argument in *Utility Cost Management, supra*, and stated at page 1198:

> "To the extent a public entity such as Kern can show that it was unable to bring its action within the limitations period because critical information was improperly withheld, or its disclosure improperly delayed, then a court might reasonably estop the defendant from asserting the statute of limitations…Therefore, if Indian Wells (whether deliberately or not) improperly accounted for some or all of its capital facility expenses as if they were recurring operational costs, and thus "buried" as ordinary user charges what should have been designed as capital facilities fees, and if by burying the fees in this way, Indian Wells failed to comply with its statutory disclosure duty (54999.3, subd. (c)), then Kern (or UCM as its assignee) might reasonably make out a case for estoppel."

A city that makes a $57 million misrepresentation of fact in a resolution cannot then assert a 120-day statute of limitations particularly since the transfer of the money to the General Fund did not being until sometime after the September 13, 2013 effective date of the Resolution. When a ~$60 million misrepresentation is made, the doctrine of estoppel applies. At the very least, the issue should be remanded to the trial court.

II. CHARTER VIOLATIONS: THE COURT ERRED WHEN IT FAILED TO REMEDY THE CITY'S CHARTER VIOLATIONS

A. The City Violated its Charter

Petitioner alleged and proved at trial, that the City did not comply with its Charter provisions related to the transfer of electric revenues. Specifically, and as explained further above, instead of funding the City Electric Works Depreciation Fund with an amount sufficient to meet the normal depreciation of the electric works and funding the GWP Surplus Fund with the excess (i.e. after all liabilities and normal depreciation were funded), the City transferred funds directly from the Electric Works Revenue Fund to the General Fund.

These Charter violations are made even more disturbing by the fact that they City ***attempted, but failed to amend*** the sections of the Charter that pertain to GWP and the transfer of

monies by eliminating the "roadmap" in order to reflect what the City actually does. (2 JA 432:1 – 4.)

The City's Charter violations had a profound consequence. It allowed the City to improperly transfer amounts that it would not have been able to transfer under Section 22 had it followed the Charter roadmap. This is because the most that City can transfer in any given year is the entire balance of the GWP Surplus Fund (but no case, more than an amount representing 25% of the electric operating revenues.) In other words, the amount that the City can transfer from the GWP Surplus Fund is constrained by two factors: the balance in the GWP Surplus Fund and the amount of electric operating revenues.[10] Had the City first set aside funds to cover normal depreciation as required, there would have been no "surplus" amount to transfer to the GWP Surplus Fund.[11] As explained above, the amount of depreciation in the Electric utility was more than $20 million per year! Thus, the failure to make these transfers deprived the Electric Works Depreciation Fund of critical operational funds.

At trial, the City justified its Charter violations by first arguing that it maintains two sets of accounting records: one for GAAP purposes and one for Charter purposes. For purposes of the Charter, the City claimed that the Electric Works Revenue

[10] Of course, this applies to waterworks operating revenues too.
[11] Even if there had been a surplus, the City violated Section 22 by transferring the funds to the General Fund rather than the General Reserve Fund.

Fund "acts like the income statement," and the GWP Surplus Fund operated "like the electric utility's balance sheet fund." (3 JA 623:18 – 21.) With regard to the Electric Works Depreciation Fund, the City stated (through its expert Elliot) that:

> "The Electric Works Depreciation Fund is a Charter "fund" that operates differently than the Revenue and Surplus Funds. The Electric Works Depreciation Fund accounts for amounts budgeted for the Electric Fund Capital Improvement Program. This Charter "fund" is a mechanism created by the Charter to budget for estimated capital expenditures, and if necessary, to budget for alternative funding sources (e.g. bonds or assessments) as necessary to fund the Capital Improvement Program for the electric utility."

(3 JA 624:1 – 6.)

The City asserted that the "existence of a surplus in the Electric Works [] is irrelevant because article XI, section 22 requires the GFT to be calculated based on operating revenues alone, not on net revenues, i.e. whether there is surplus in a given year." (3 JA 553:1 – 3.) It also claimed that "whether the GFT flows through income statements, as modern accounting requires, or from balance sheet to balance sheet, as the Coalition prefers, the result is always the same – the GFT is reflected in

the cumulative net position/fund balance of both the Utility and the City's General Fund." (3 JA 553:7 – 9.)

The City's argument defies the plain language of Section 22. To comply with the Charter, only "surplus" funds may be transferred into the Surplus Fund, which contemplates that all liabilities and expenses be accounted for first – including amounts to be set aside for the Electric Works Depreciation Fund. Section 22 certainly applies a **measure** of calculating the transfer, i.e., 25% of operating revenues. But there must be a **surplus** in the GWP Surplus Fund before a transfer may be made. The trial court agreed: "It is true, as the City contends, that the amount of the GFT is based on gross operating revenues, not net revenues, but it is not true that this fact means there will always be funds available for the GFT."

Because the City never funded its Electric Works Depreciation Fund to the tune of nearly $20 million per year, any amounts that the City transferred under that amount could not have represented an Electric Fund "surplus." The City claimed that it set aside an amount for normal depreciation when it funded its Capital Improvement Program. (3 JA 547:1 – 6.) ["The Electric Works Depreciation Fund … accounts for amounts budgeted for the Electric Fund Capital Improvement Program … and thus, reflects the Charter's requirement that the City Manager estimate the amount to be spent on capital

improvements in a fiscal year, i.e., amount "sufficient to meet normal depreciation of such electric works."]

But what one "budgets" for capital improvements may or may not be related to an amount that must be "set aside" to fund "normal depreciation of such electric works" which here, was nearly $20 million per year. The trial court agreed:

> "The City uses the Electric Works Depreciation Fund to record the amount budgeted and expended for capital expenditures only. This use of the Electric Works Depreciation Fund as a budgeting tool for capital expenditures is inconsistent with Charter section 17, which requires that the money for estimated depreciation be set aside, and that the depreciation estimate include both capital expenditures and wear-and-tear on equipment. The result is that the City has budgeted vary amounts of capital expenditures in the Electric Works Depreciation Fund without regard for wear-and-tear depreciation."

(11 JA 2796).

The trial court also rejected the City's argument that the GWP Surplus Fund was utilized in a manner consistent with the Charter. It ruled that the GWP Surplus Fund "should be a cash fund and should not be non-liquid balance sheet items like plant

assets. Yet, the City's Electric Surplus Fund is a balance sheet for the electric operations of GWP and includes not only surplus cash, but also the value of physical plant assets and liabilities. Thus, the City's Electric Surplus Fund does not serve as a repository for the Electric Utility's surplus cash, but is simply an accounting balance sheet reporting the profits, losses, assets, liabilities, and equities of GWP." (11 JA 2797).

B. The Trial Court Improperly Refused To Remedy The Charter Violations

Although the trial court recognized that the City violated its Charter by transferring funds directly from its Electric Revenue Fund to its General Fund, and entered a declaratory judgment accordingly, it failed to provide any remedy. This was error.

The City of Glendale is a Charter city. The Charter represents the "supreme" law of a city. In fact, an act in violation of the Charter is void as a matter of law. The following is from our Supreme Court in *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 170-171 (emphasis added):

> "We begin with the ***cardinal principle*** that the charter represents the ***supreme law*** of the City, subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law. (See *Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 161.) In this regard, "[t]he

charter operates not as a grant of power, but as an ***instrument of limitation and restriction*** on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation…"

…

"***It is <u>well settled</u> that a charter city <u>may not</u> act in conflict with its charter***. [Citations omitted] ***Any act that is violative of or not in compliance with the charter is <u>void</u>."***

In 2015, the Court of Appeal added the following in *San Diegans For Open Government v. City of San Diego* (2015) 242 Cal.App.4th 416, 443:

"Under settled rules of statutory interpretation, the ***various sections of a charter must be construed together***, giving effect and meaning so far as possible to ***all parts thereof***, with the primary purpose of ***harmonizing*** them and ***effectuating the legislative intent as therein expressed***." (<u>Citing</u> *Creighton v. City of Santa Monica* (1984) 160 Cal.App.3d 1011, 1017, emphasis added.)

The Coalition alleged five causes of action for writ of mandate pertaining to the illegal transfers from the Electric

Works Revenue Fund to the General Fund (one for each fiscal year 2011 through 2014, and then prospectively.) (2 JA 276:7 – 279:14.) It sought a writ directing the City to "comply with the Glendale City Charter and return to electric works revenue fund all monies illegally transferred to the general fund…" (*Id.*; see also Prayer for Relief, [2 JA 284:9 – 285:23].)

Despite ruling that the City violated its Charter sections, the trial court declined to provide any remedy with respect to its prior violations. It explained that "Petitioner Coalition fails to discuss the fact that Section 22 permits, but does not require, the City Council to reduce or waive the GFT 'if, in its opinion' doing so will 'insure the sound financial position' of GWP" and "Section 22 thus provides the City Council with discretion to make a GFT in each of the fiscal years 2011-2015." It further stated that the "Coalition does not contend that this discretion was exercised in the fact of an improper accounting, and to do so arguably would intrude on legislative discretion."

This decision and ruling were puzzling. Whether the City Council had discretion to make, reduce, or waive the GFT is irrelevant as to the question of whether the City violated its Charter. When the City exercised its discretion to make a GFT, it was required to exercise it in compliance with the Charter. (See *Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara Cty. Open Space Auth.* (2008) 44 Cal. 4th 431, 448 ["a local agency acting in a

legislative capacity has no authority to exercise its discretion in a way that violates constitutional provisions or undermines their effect."].) Furthermore, the Coalition did not allege an abuse of discretion cause of action. But most importantly, a Charter City may not act in conflict with its Charter and any act in violation is **void**. (*Domar*, *supra*, 9 Cal.4th 161, 170-171; see also *San Diego City Firefighters, Local 145, AFL-CIO v. Bd. of Admin. of San Diego City Employees' Ret. Sys.* (2012) 206 Cal.App.4th 594, 610 [holding "agreement could not be **given effect** because doing so would conflict with the City Charter…"].

The Court also said that it did want to engage in "idle acts" (RT 102:25 – 103:2) and cited the fact that the GWP's net position has always been positive – in the $300 million range. (11 JA 2798.) It appears that the Court believed that ordering the City to void the transfers would make no difference because the City had sufficient funds on hand to transfer. This was error.

First, the figures in the $300 million range included non-cash assets which are obviously not available for transfer. (9 JA 2164 – 2203.) Second, the trial court recognized that the City failed to properly set aside money for normal depreciation (which would reduce the surplus.) Indeed, the parties stipulated that the amount was approximately $20 million per year. It is true that City "budgeted" for capital improvements, but those figures may not bear any resemblance to this annual $20 million

depreciation figure. Thus, what amount was truly available in the GWP Surplus Fund for transfer to the General Reserve Fund is unknown.

The Coalition submits that rather than **speculating** that there was "no harm, no foul," the cleanest and most appropriate way to address the City's Charter violations is to force it to reverse the illegal transactions. If thereafter, the City enjoys a true "surplus" after meeting its Charter obligations, it should be free to make any Charter-compliant transfers. The Coalition met its burden of proving the Charter violations. The City's acts are void. It was not the Coalition's burden to engage in hypotheticals to prove what might have been.

III. THE TRIAL COURT DID NOT IMPROPERLY RELY ON "EXTRA-RECORD" EVIDENCE

The City contends that "the Coalition's claims sought judicial review of legislation, which must be tried on the administrative record, subject to an exception for expert testimony to illuminate technical jargon in the record under *Western States Petroleum Association v. Superior Cour*t (1995) 9 Cal.4th 559, 577 (*Western States*) …" (AOB 27). Specifically, it claims that the trial court may not consider any "extra-record evidence" and more specifically, expert witness David Vondle's supplemental declaration which offered testimony on the amount the City owed as credits for its Proposition 26 violations. (AOB 67

– 70.) It also argues that allowing Vondle's testimony into evidence amounted to "trial by ambush." (AOB 68.)

The City's complaint about being "ambushed" is not justified. The Reply Declaration was submitted in the companion *Saavedra* case that was consolidated with the present case for trial. (1 JA 258.) "Whether to accept new evidence with the reply papers is vested in the trial court's sound discretion, and [the appellate court] may reverse the trial court's decision only for a clear abuse of that discretion." (*Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 241.)

And importantly – and not only for this case[12] – the City's premise that an action alleging Proposition 218 and 26 violations must be tried on a so-called administrative record is specious. The holding in *Western States* was based entirely on the fact that the alleged violation of law at issue therein (California Environmental Quality Act (CEQA)) was governed by the abuse of discretion / substantial evidence standard of review. Because that standard − the undergirding for the holding in *Western States* – is not applicable here, the bar on extra-record evidence likewise does not apply.

In *Western States*, an oil industry trade group challenged CEQA regulations adopted by a state agency, the Air Resources

[12] The Coalition's counsel has litigated this issue in other Proposition 218 and 26 cases wherein City's counsel represented the government entity.

Board ("ARB"). The Supreme Court found that the adoption of the regulations was "quasi-legislative"[13] and thus, should be reviewed under traditional mandamus. (*Id*. at p. 567.) At issue was whether extra-record evidence was admissible to challenge the ARB's adoption of the regulations.

To answer this question, the high court began by examining the standard of review that governs a trial court's consideration of a quasi-legislative CEQA decision. It explained that:

> "…the trial court may consider only "whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or the determination or decision **is not supported by substantial evidence**." [citation.] The issue now before us is whether a court may consider evidence outside the administrative record in determining whether a quasi-legislative administrative decision was an **abuse of discretion** under this statute."

(*Id*. at pp. 568-569 [emphasis added.])

The Supreme Court next explained that:

---

[13] "Quasi-legislative rules and regulations are the product of delegated legislative power conferred on the agency to make law. An agency acts in its quasi-legislative capacity when it adopts rules or regulations to fill in the details of the statute enacted by the Legislature." (*Megrabian v. Saenz* (2005) 130 Cal. App. 4th 468, 478.)

> "The admissibility of extra-record evidence turns on whether the existence of substantial evidence is a question of fact that may be disputed by contradictory evidence or whether it is instead purely a question of law."

(*Id*. at p. 570.)

The court concluded that there was no meaningful difference between the substantiality of the evidence standard used by appellate courts in reviewing factual determinations of trial courts – which is a question of law -- and the substantiality of evidence rule applicable in CEQA proceedings. It cited three reasons:

- First, "when the Legislature included the words 'substantial evidence' in Public Resources Code section 21186.5, it intended them to have their established legal meaning."
- Second, "the legislative branch is entitled to deference from the courts because of the constitutional separation of powers. . . . Were we to hold that courts could freely consider extra-record evidence in these circumstances, we would in effect transform the highly deferential substantial evidence standard of review in Public

Resources Code section 21168.5 **into a de novo standard** …"

- ❖ Third, "[t]he propriety or impropriety of a particular legislative decision is a matter for the Legislature and the administrative agencies to which it has lawfully delegated quasi-legislative authority; such matters are not appropriate for the judiciary."

(*Id*. at pp. 570-573.)

After the court determined that the substantial evidence standard of review in a CEQA challenge is a question of law (based on the foregoing), it held:

> "[W]e are persuaded that the factual bases of quasi-legislative administrative decisions are entitled to the same deference as the factual determinations of trial courts, that the substantiality of the evidence supporting such administrative decisions is a question of law, and that both types of substantial evidence review are governed by similar evidentiary rules."
>
> ***
>
> "According, a court generally may consider only the administrative record **in determining whether a quasi-legislative decision was supported by**

> **substantial evidence** within the meaning of Public Resources Code section 21168.5."

(*Id*. at p. 573.)

The court expanded its holding to non-CEQA cases. (See *id*. at p. 574.) But the entire basis for doing so was that non-CEQA cases are governed by a standard similar to the one governing CEQA actions, the "arbitrary and capricious" standard. (*Ibid*. ["Although these standards are not fungible . . .there is no sound reason why CEQA and non-CEQA cases should be governed by different evidentiary rules."].)

Unlike in most writ actions, here the trial court was required to exercise its ***independent review*** when adjudicating the Proposition 218/26 claims. As explained in *Capistrano Taxpayers Ass'n, Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493:

> "There [in *Silicon Valley*], the high court made it clear in Proposition 218 challenges to agency action, the agency had to bear the burden of proof of demonstrating compliance with Proposition 218, and both trial and reviewing courts are to apply an independent review standard, not the traditional deferential standards usually applicable in challenges to government action."

(*Id*. at pp. 1506-1507.)

Because the linchpin of *Western States* is not present, the general rule against extra-record evidence is simply not applicable to cases challenging Proposition 218. (See also *Western States*, *supra*, 9 Cal.4th 559 at p. 575-576 ["The appropriate degree of judicial scrutiny in any particular case is perhaps not susceptible of precise formulation, but lies somewhere along a continuum with non-reviewability at one end and **independent judgment** at the other."] [emphasis added] [citing *Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 232.].)

In other words, a trial court is not confined to reviewing an "administrative record" in Proposition 218 cases because it is not bound to give any deference to the legislative body's findings. Instead, it must determine, upon an independent review, whether the actions comply with Proposition 218.

With regard to the Coalition's Charter claims, this amounts to a clear violation of a ministerial duty[14] (rather than a challenge to an agency decision) where facts are in dispute. (See *Rodriguez v. Solis* 1 Cal.App.4th 495, 501-502 ["A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority

[14] Arguably, the Proposition 218/26 claims are likewise violations of a ministerial duty because the City has no discretion to set rates in a manner than violates the California constitution.

and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state a fact exists. Discretion, on the other hand, is the power conferred on public functionaries officially according to the dictates of their own judgment."].) The Supreme Court held that when courts review ministerial actions, "there is often little or no administrative record," and thus, "we will continue to allow admission of extra-record evidence in traditional mandamus actions challenging ministerial or informal administrative actions if the facts are in dispute." *(Western States*, *supra*, 9 Cal.4th at p. 575-576 [citing Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 1993) § 23.49, pp. 960-961.].)

However, ***at the very least***, and as admitted by the City in its AOB (AOB 69), there are notable *exceptions* to the general rule precluding the consideration of extra-record evidence in traditional mandamus actions. (*Outfitter Properties, LLC v. Wildlife Conservation Bd.* (2012) 207 Cal.App.4th 237, 251.) Extra-record evidence "may be admissible to provide ***background information*** regarding the quasi-legislative agency decision, to establish whether the agency ***fulfilled its duties*** in making the decision, or ***to assist the trial court in understanding the agency's decision***. (*Id.* citing *Western States, supra*, 9 Cal.4th at pp. 578–579; *Asarco, Inc. v. U.S.*

E.P.A. (9th Cir.1980) 616 F.2d 1153, 1160; *Ass'n of Pac. Fisheries v. Environmental Protection* (9th Cir.1980) 615 F.2d 794, 811–812, emphasis added.)

Here, for all of the foregoing reasons, the expert testimony of Vondle on highly sophisticated subject matter significantly aided the trial court in making its determination and this Court would be correct in recognizing that the trial court may consider such expert testimony in a legislative matter where all relevant evidence is admissible.

IV. THE CITY'S ARGUMENT THAT THE TRANSFER APPROXIMATES TAXES A PRIVATE UTILITY IS MEANINGLESS

The City argues, without citing any evidence, that "[t]he transfer is a reasonable cost of service because it approximates what a private utility would pay in property taxes and franchise fees." (AOB 59 – 60.) This argument is unavailing.

First, the City is not a private utility and the whole point of Proposition 218 and 26 was to limit taxes. GWP is simply a department within the City and thus, there would never be any occasion to "tax" itself.

Second, there was no evidence before the trial court that an investor-owned utility is charged as much as 25% of its operating revenues in local taxes. The ad valorem tax in California is 1%. And importantly, that 1% is split amongst many local entities

(counties, cities, special districts.) (See Cal. Const., art. XIII A, § 1, subd. (a).)

Third, there is no authority for the proposition that a local government may charge itself a "franchise fee" and for good reason: a franchise fee is compensation paid by an investor-owned utility to the government for the franchise rights. (See *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 255 ["[a] franchise to use public streets or rights-of-way is a form of property right [] and a franchise fee is the purchase price of the franchise."].) A valid franchise fee is one that bears a reasonable relationship to the value of the property interests transferred. (*Id*. at p. 270.) No property interests have been transferred here. But even assuming that the City could charge itself franchise fees (which it certainly cannot), the City did not adduce any evidence regarding the *value* of those franchise rights. (For sake of comparison, *Jacks* involved a 1% valid franchise fee plus an additional 1% fee that the parties disputed whether was valid.)

CONCLUSION

Ultimately, this case boils down to the City of Glendale's purposeful neglect and persistent failure to properly fund wear-and-tear maintenance of its own electric utility at the great expense and detriment of its citizen ratepayers.

Respondent Glendale Coalition for Better Government did not, and continues to not, sit on the sidelines and silently allow

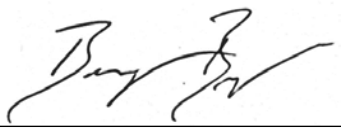
the City to be the architect of its own financial demise when the City's Charter – its "supreme law" – provides a "roadmap" for sustainability and transparency.

Respondent Coalition therefore respectfully asks this Court to **AFFIRM** the trial court's findings that: (1) "the City's inclusion of the GFT in the 2013 electric rate violated Proposition 26" (11 JA 2801); and (2) "[t]he City's funding and accounting practices do not comply with its Charter" (11 JA 2797), yet **REVERSE** the trial court's determination that the "impact" of the Charter violations was not an "abuse of discretion." (11 JA 2797 – 2798.)

The City violated not only Proposition 26, but the City Charter as well. Judge Chalfant was correct in concluding that any other result would circumvent these strict Constitutional protections.

Dated: April 10, 2018

Respectfully submitted,



Benjamin T. Benumof, Ph.D., Esq.
Attorney for Respondent/Cross Appellant Glendale Coalition for Better Government

CERTIFICATE OF WORD COUNT

I certify pursuant to California Rules of Court, Rule 8.204(c)(4), that the text of this brief, as counted by Microsoft Word 2016, consists of 14,125 words (including footnotes, but excluding the tables of contents and authorities, this certificate and the proof of service) and therefore has fewer than the 28,000 total words permitted by the Rules of Court.

Dated: April 10, 2018

Benjamin T. Benumof, Ph.D., Esq.
Attorney for Respondent/Cross Appellant Glendale Coalition for Better Government

Proof of Service

Glendale Coalition for Better Government v. City of Glendale
Second Appellate District, Division 5
Case #B281994

I, Robin Griffin, declare as follows:

I am employed in the County of San Diego, State of California. At the time of service, I was at least 18 years of age and not a party to this legal action. My business address is: Krause, Kalfayan, Benink & Slavens, LLP, 550 West "C" Street, Suite 530, San Diego, CA 92101 and my electronic service address is: rgriffin@kkbs-law.com.

On April 10, 2018, I electronically filed and caused to be served, via electronic service on the parties listed below, the **Combined Respondent's Brief and Cross-Appellant's Opening Brief** with the California Court of Appeal, Second Appellate District, Division 5 (per California Rules of Court, Rule 8.70) and with the Supreme Court of California (per California Rules of Court, Rules 8.44(b)(1) & 8.212(c)(2)) through the Court's electronic filing system, (TrueFiling).

SEE ATTACHED LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: April 10, 2018

Robin L. Griffin

SERVICE LIST

Glendale Coalition for Better Government v. City of Glendale
Second Appellate District, Division 5
Case #B281994

via: electronic service

Michael G. Colantuono, Esq.
mcolantuono@chwlaw.us
David J. Ruderman, Esq.
druderman@chwlaw.us
Jon R. di Cristina, Esq.
jdicristina@chwlaw.us
Colantuono, Highsmith & Whatley, PC
790 E. Colorado Blvd., Ste. 850
Pasadena, CA 91101-2109

Counsel for Appellant/Cross-Respondent, City of Glendale

via: electronic service

Michael J. Garcia, Esq.
mjgarcia@ci.glendale.ca.us
Dorine Martirosian, Esq.
dmartirosian@ci.glendale.ca.us
City of Glendale
613 E. Broadway, Ste. 220
Glendale, CA 91206

Counsel for Appellant/Cross-Respondent, City of Glendale

via: electronic service
(Courtesy Copy)

D. William Heine, Esq.
dwh@ssdslaw.com
Daniel E. Curry, Esq.
dec@ssdslaw.com
Schwartz, Steinsapir, Dohrmann & Sommers, LLP
6300 Wilshire Blvd., Ste. 2000
Los Angeles, CA 90048-5268

Counsel for Respondents/Cross-Appellant Juan Saavedra, et al.

via: UPS - overnight mail

Clerk of the Superior Court
County of Los Angeles
Stanley Mosk Courthouse
111 North Hill Street
Los Angeles, CA 90012

Judge James C. Chalfant, Trial Court Judge