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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PAJARO VALLEY WATER MANAGMENT AGENCY, Plaintiff and Respondent, v. RAY AMRHEN et al., Defendants and Appellants.	H027817 (Santa Cruz County Super. Ct. No. CV146754)

Plaintiff and respondent Pajaro Valley Water Management Agency (Agency) brought this validation proceeding for a judicial determination that its 2003 ordinance increasing the groundwater augmentation fee to be charged to operators of wells within its jurisdiction is valid. Defendants and appellants Ray Amrhein, Guy George, Mark Pista, San Andreas Mutual Water Company, Patrick Layhee, and John Sheffield (Objectors) appeared in opposition to the requested decree. After taking evidence, the trial court held the ordinance valid, rejecting contentions that the matter was not proper for a validation proceeding, that two Agency board members had a disqualifying conflict of interest, and that the ordinance contravened several constitutional provisions limiting the power of local entities to impose property taxes, assessments, and property-related charges. Objectors brought this appeal, contending that the court erred in each of these determinations. We find no error, and affirm.

BACKGROUND

The area subject to the Agency's jurisdiction is home to around 80,000 persons, about half of them in Watsonville. This area lies atop the Pajaro Valley Groundwater Basin, which was described by Agency witnesses as essentially a single interconnected groundwater basin.[1] Extraction of groundwater through wells supplies slightly over 95 percent of the water used in the basin.[2] The remainder comes from a variety of surface sources including sloughs, rivers, creeks, and springs. About 86 percent of the water used within the basin goes to agriculture.

Since the 1950's the basin's groundwater supply has been subjected to chronic overuse, resulting in overdraft and seawater intrusion. Overdraft directly depletes supply by extracting more water than is replenished or "recharged" by natural processes. Recent annual extractions from the basin total about 70,000 acre-feet, which reflects an overdraft of about 9,000 acre-feet. This in turn leads to seawater intrusion, which occurs when fresh groundwater is drawn below sea level, causing seawater to flow into the neighboring freshwater, rendering it too saline for use. Freshwater has been drawn to below sea level throughout much of the basin. An Agency witness testified that if seawater were allowed to intrude unimpeded into the areas of declining ground water elevation, "it would eventually fill that void with seawater. The entire basin would be impacted." As it is, seawater intrusion renders unusable an additional 11,000 acre-feet of fresh groundwater every year.

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[1] This characterization was disputed by an expert testifying for objectors, but the trial court presumptively resolved that conflict in favor of the Agency.

[2] We will use the term "basin" to describe the area subject to the agency's jurisdiction although the groundwater basin as geologically defined is only imperfectly contiguous with that area.

Because of the depletion that has already occurred, seawater intrusion would not be halted merely by eliminating the 9,000 acre-feet per year of overdraft, or even the 20,000 acre-feet of overdraft plus water lost to increased salinity. Rather, the Agency estimates that to achieve exclusion by reduced extractions alone would require cutting extractions by about 44,000 acre-feet per year.

In 1984 the Legislature created an agency to address these problems through its enactment, as an urgency measure, of the Pajaro Valley Water Management Agency Act. (Stats. 1984, ch. 257, §§ 1 et seq., pp. 798 et seq.; 72B West's Ann. Wat. - Appen. (1995 ed.) ch. 124 et seq.) (PVWMAA). The agency is composed of a seven-member board of directors, each of whom must be a voter and resident of the basin. (Stats. 1984, ch. 257, § 402.) Four directors were to be elected from districts to be defined by the board. (*Id*., §§ 402-406.) One each would be appointed by the boards of supervisors of Monterey and Santa Cruz Counties and the city council of Watsonville. (*Id*., § 402.) The appointed members were required to "derive at least 51 percent of their net income from the production of agricultural products" and could be selected from "lists . . . submitted to the appointing power for each vacancy by the Santa Cruz County Farm Bureau and the Monterey County Farm Bureau." (*Id*., § 402, p. 805.)

In creating the Agency the Legislature found that "the management of the water resources within the Pajaro Valley Water Management Agency for agricultural, municipal, industrial, and other beneficial uses is in the public interest and that the creation of a water agency pursuant to this act is for the common benefit of all water users within the agency." (Stats. 1984, ch. 257, § 101, p. 798.) The declared purpose of the Agency is "to efficiently and economically manage existing and supplemental water supplies in order to prevent further increase in, and to accomplish continuing reduction of, long-term overdraft and to provide and insure sufficient water supplies for present and anticipated needs within the boundaries of the agency." (*Id*., § 102, subd. (f), p. 799.) It decreed that the Agency "should, in an efficient and economically feasible manner,

utilize supplemental water and available underground storage and should manage the groundwater supplies to meet the future needs of the basin." (*Id*., § 102, subd. (g), p. 799.) It decreed that the management of water resources under the Act should be carried out in light of a number of objectives, including "the avoidance and eventual prevention of conditions of long-term overdraft, land subsidence, and water quality degradation" (*id*., § 102, subd. (a), p. 799), the establishment of "reliable, long-term supplies" rather than "long-term overdraft as a source of water supply" (*id*., § 102, subd. (b), p. 799), the reduction of long-term overdraft "realizing that an immediate reduction in long-term overdraft may cause severe economic loss and hardship" (*id*., § 102, subd. (c), p. 799), and the achievement of economic efficiency by "requir[ing] that water users pay their full proportionate share of the costs of developing and delivering water (*id*., § 102, subd. (d), p. 799). The Legislature anticipated that "long-term overdraft problems may not be solved unless supplemental water supplies are provided." (*Id*., § 102, subd. (g), p. 799.) Accordingly it declared that the Agency could appropriately "acquire, buy, and transfer water and water rights in the furtherance of its purposes." (*Id*., § 102, subd. (e), p. 799.) It declared that "[a]gricultural uses shall have priority over other uses under this act within the constraints of state law." (*Id*., § 102, subd. (d), p. 799.)

The PVWMAA specifically empowers the Agency to adopt ordinances levying "groundwater augmentation charges on the extraction of groundwater from all extraction facilities within the agency for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water for use within the boundaries of the agency." (Art. 10, § 124-1001, at p. 1001, p. 687.) It also authorizes the Agency to "regulate, limit, or suspend extractions from extraction facilities" (art. 7, § 124-711, p. 680), and provides criteria for the allocation of rights to use available groundwater (*id*., § 124-712). It empowers the Agency to commence a "groundwater rights adjudication" (art. 11,

§ 124-1106, p. 690), which would effect "the determination of substantially all rights in the groundwater basin or the area subject to the adjudication" (art. 3, § 124-310, p. 666).

An economist testified about the effects on the local economy of a "worst case scenario" in which a groundwater rights adjudication would reduce groundwater extractions to 24,000 acre-feet per year, of which 12,000 would be allocated to residential use, leaving about 0.4 acre-feet per acre for farmers. He testified that this scenario would result in the loss of 9,000 jobs and an annual reduction in agricultural production of $360 million.[3]

In 2002, the Agency enacted, by unanimous vote, a Revised Basin Management Plan (BMP), which evaluated the problems of overdraft and seawater intrusion, examined a variety of potential solutions, identified a preferred solution, and recommended specific projects to implement it. The result was a plan whose primary components were (1) construction of a 23-mile pipeline from San Benito County to the coast; (2) construction of a coastal distribution system for delivery of water to the area west of Highway 1 within the Basin; (3) procurement of water, or water rights, from owners in the Central Valley; (4) development of additional water supplies from local sources[4]; and

[3] According to the Basin Management Plan, strawberries and raspberries require 2.8 and 3.7 acre-feet per acre of applied water, respectively, while deciduous crops—apparently meaning orchard crops other than citrus—require 0.7 acre-feet per year. In 1997, about 8,700 acres were devoted to strawberries and vine crops while deciduous crops took up about 3,900 acres. Another 14,000 acres bore vegetable row crops while assorted other agricultural uses took up about 8,000 acres. The BMP did not set out the water demands for each of these other uses but noted a general trend toward more water-intensive crops and a corresponding movement away from the less water-intensive deciduous crops. These figures coupled with the cited testimony, however, appear to support a finding that even deciduous crops could not be reliably sustained under the "worst case scenario" described in the testimony.

[4] These sources would include recycled wastewater from Watsonville and water from the Harkins Slough project, already in place. The Agency would also establish supplemental wells to help maintain water deliveries in drier years. In addition it would seek to promote conservation.

(5) eventual delivery of the resulting supplies to coastal farmers as well as some farmers along the pipeline route.[5]

An Agency expert opined that the plan represents a reasonable engineering approach to achieving Agency goals, and is the most reasonable of many alternatives considered in terms of cost, environmental effects, and ability to meet those goals. The plan would bring in a total of about 18,500 acre-feet composed of of 1,000 from Harkins Slough, 4,000 in recycled Watsonville water, and 13,400 in pipeline imports. The plan also sought to achieve savings of about 5,000 acre-feet through conservation. An Agency witness opined that these measures would solve the problems of overdraft and seawater intrusion, even though they fall well short of the amount by which extractions exceed the safe yield. He gave two reasons for this conclusion, the first of seemed to be that by eliminating coastal extractions and replacing them with irrigation from outside sources, the plan would raise the groundwater level along the coast, which in turn would retard seawater intrusion. The second reason is unintelligible as stated in testimony, having been rendered so, we surmise, by mistranscription.[6] In any event, the witness testified

[5] The plan apparently contemplates at least three phases. Phase One was mainly the Harkins Slough project, with additional minor elements including the acquisition of an assignment of water rights at Mercy Springs, which would supply 25 to 30 percent of the anticipated water imports. The current phase is Phase Two, consisting largely of the coastal distribution system, Watsonville wastewater recycling facilities, and acquisition of additional water rights. Phase Three apparently consists of an "inland distribution system," providing water to inland farms at greater distances from the pipeline. As presently designed, however, the plan will supply imported water to inland farmers only when supply exceeds the coastal demand. However, depending on the success of the Agency's arrangements for secure water supplies, there could be many years when this condition was present.

[6] According to the transcript, the witness said, "The second thing that occurs in that respect is that the groundwater table declined and the cost is reduced and, therefore, water is not flowing as well through the coast so, therefore, more water is available." It is doubtful that the witness used the word "declined," highly unlikely that he said "cost is reduced," and all but certain that he did not utter the string of words here rendered. The

that if the projected solution "does not work . . . ." the plan will have put the infrastructure in place to "expand the existing system." Another expert witness testified that the application of 18,500 acre-feet at the coast would produce a hydraulic gradient equivalent, for purposes of excluding seawater, to reducing overall extraction by 45,000 acre-feet.

Funding for the project was expected to come from groundwater augmentation charges, such as that at issue here, along with (higher) charges on imported water, grants, and some public funds. More precisely, those portions not funded by grants or public funds would be financed by certificates of participation or selling bonds to be paid off from augmentation and delivery charges.

The Agency first collected a groundwater augmentation charge in 1994. The charge was increased from time to time by ordinance. At issue here is the Agency's Ordinance 2003-01, which increased the charge from $80 to $120 per acre-foot. An Agency witness testified that this was not sufficient to implement the BMP and that the charge would eventually rise to $158 per acre-foot. The water delivery charge would be $316 per acre-foot.

The augmentation charge is assessed against all extractors of groundwater. Many large users have metered wells; in those cases the owner of the well is charged according to actual consumption. Few if any residential well users have meters; they are charged an "estimated use rate per dwelling" of 0.6 acre-feet per year, which is the estimated average rate of consumption. For unmetered agricultural use, the Agency estimates consumption based on a number of factors. For example, the Agency assumes that an apple orchard consumes one acre-foot per year per cultivated acre of land. The Agency can adjust

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transcript contains numerous other possible or probable mistranscriptions and might well support entitling litigants to electronically record court proceedings on which their rights depend.

estimated charges if a well owner shows that the amount does not accurately reflect the amount extracted. While Agency witnesses knew of no cases where this had occurred with residential well users, it has occurred with other users billed on an estimated basis.

The Agency bills these charges to the owner, as identified in parcel records, of the land on which a well appears. Upon request, the Agency will bill a tenant, but it will send a duplicate bill to the owner, whom it considers ultimately responsible. The Agency has pursued collection proceedings against tenants and has entered into payment arrangements with tenants in arrears. The general manager testified that if a case arose in which a well were shown to belong to a person other than the landowner, the Agency would bill the well owner.

On July 1, 2003, the Agency brought this action for a declaration of the validity of the ordinance increasing the augmentation charge to $120 per acre-foot. Pursuant to Code of Civil Procedure section 860 et sequitur, the Agency named as defendants all persons interested in the validity of the ordinance. Objectors filed an answer generally denying the allegations of the complaint and asserting a number of grounds for invalidating the ordinance, including that (1) the charge constitutes "a property based tax or assessment" not enacted in compliance with governing law including Proposition 218; (2) the charge is invalid "inasmuch as certain members of the Board of Directors who voted on the Augmentation Charge Increase had a conflict of interest within the law, including but not limited to the provisions of Government Code section 87100, et seq."; and (3) the Agency is estopped to deny that the charge is an assessment on "rural domestic wells" in view of its own prior directive to the tax collectors of the affected counties to collect the charge as an assessment. A separate answer was filed by Pajaro Valley Citizens for Long Term Water Solution [*sic*], a nonprofit corporation, supporting the Agency's position.

After hearing testimony from witnesses for the Agency and Objectors, the trial court entered a judgment declaring the ordinance valid. Objectors moved to set the

judgment aside on the ground that the court had allowed insufficient time for them to propose contents for, and object to, the requested statement of decision. The trial court granted that motion and filed a new judgment and statement of decision. Objectors filed this timely appeal.

I. *Jurisdiction*

Objectors assert that the trial court lacked jurisdiction "to decide the validity of the augmentation charge in a validation action." The argument apparently proceeds as follows: (1) a validation proceeding will only lie to determine the validity of official action where authorized "under any other law" (Code Civ. Proc., § 860); (2) the Agency predicated its complaint here on Government Code section 66022, which authorizes a validation proceeding "to . . . review . . . an ordinance . . . modifying or amending an existing fee or service charge, adopted by a local agency"; (3) for purposes of this statute, "fee or service charge" means a capacity charge; (4) the augmentation charge at issue here is only partly a "capacity charge" subject to a validation proceeding under these provisions; and (5) the trial court therefore lacked jurisdiction to render a validation judgment with respect to those portions of the charge that are not a "capacity charge."

We fail to discern how this argument can affect the outcome of this appeal. Objectors raised the point below in a trial brief alluding to another lawsuit, which was then on appeal before this court, challenging an Agency augmentation charge by reverse validation action. The trial court there had dismissed the matter for failure to comply with the special limitations period applicable to such proceedings. (Code Civ. Proc., § 863.) After this matter was tried, but before judgment entered, a panel of this court rendered an unpublished decision in that case, holding that the augmentation fee was only partly a "capacity charge" and that insofar as it was not such a charge, the plaintiffs' objections were not subject to the special statute of limitations. (*Scurich v. Pajaro Valley Water Management Agency* (May 27, 2004, No. H025776) [nonpub. opn.] (*Scurich*).)

Objectors cited that decision to the court below, arguing that it affected the outcome here in some way. However, they later entered into a stipulation declaring that "[i]nsofar as there is any portion of the augmentation charge . . . that is not within the jurisdiction of this court for a validation action, the complaint may be deemed to have been amended to state a second cause of action among the defendants who have appeared, and the plaintiff, for declaratory relief as to the validity of Ordinance 2003-01. Nothing contained in this stipulation shall prevent the parties from raising any issue on appeal which was part of the proceedings in this case." The stipulation was executed by the Agency, Objectors, other appearing defendants, and the trial judge.

Despite this stipulation, Objectors persist in arguing that the trial court lacked jurisdiction to adjudicate the matter *as a validation proceeding*. The intended effect of this assertion is left to surmise. The point was offered below as a defense to the action, i.e., that the trial court lacked subject matter jurisdiction. As far as we can tell, no authority was ever provided for this proposition. In any event it would provide at most a partial defense, because Objectors do not appear to claim that the conditions for a validation proceeding are entirely lacking, only that *part* of the fee is not subject to adjudication in such a proceeding. The practical significance of this proposition, were we to accept it, is obscure at best. In the unpublished decision cited by Objectors, the question had the practical effect of resurrecting part of a lawsuit that the trial court had completely terminated. Here the error, if any, was the opposite—the court tried *too much* of the action as a validation proceeding, when only part of it was subject to such treatment. Since all parties before the court actively sought such an adjudication, this hypothetical error had no apparent effect on them. The record fails to establish, and Objectors make no attempt to demonstrate, that their argument entitles them to any particular *relief*.

This would follow even if Objectors had not stipulated away whatever objection they otherwise had. If a complaint contains allegations that would otherwise oust the trial

court of jurisdiction, but the facts alleged would support a declaratory judgment, the complaint may be construed—even without a stipulation—to pray for such relief. (See *Minor v. Municipal Court* (1990) 219 Cal.App.3d 1541, 1547-1548.) Here the Agency's right to seek declaratory relief is reinforced by Code of Civil Procedure section 869, which declares that an agency's entitlement to pursue a validation proceeding "shall not be construed to preclude the use by such public agency . . . of mandamus or any other remedy to determine the validity of any thing or matter." Thus assuming that some or all of the augmentation fee could not properly be adjudicated in a validation proceeding, the trial court's jurisdiction could, and as far as this record shows should, be saved by viewing the judgment as one in declaratory relief.

Under the circumstances here, the only apparent distinction between a validation judgment and a declaratory judgment is its effect on *absent persons*. A validation proceeding is "in rem" (Code Civ . Proc., § 860), and yields a judgment that is "forever binding and conclusive . . . against the agency and against *all other persons*" (*id.*, § 870, subd. (a), italics added). A declaratory judgment, on the other hand, is in personam (*Mills v. Mills* (1956) 147 Cal.App.2d 107, 116), and generally has preclusive effect only on those who were joined or represented in the action (*Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328, 1334).[7] Thus if someone other than Objectors sought to relitigate some of the issues concerning the validity of the charge, it might be open to that person to contend that some aspects of the present judgment are not conclusive on the world but only on Objectors. In no sense does it appear that the court lacked fundamental jurisdiction to adjudicate the issues before it or to issue a judgment binding on the parties

[7] That is to say, other parties are not bound by the preclusive doctrines of res judicata (claim preclusion) or collateral estoppel (issue preclusion). The precedential effect of an appellate decision on the same issues presents a separate question.

now before us. This makes it unnecessary to consider the Agency's arguments that the reasoning in *Scurich*, *supra*, H025776, does not pertain here.[8]

II. *Conflict of Interest*

A. *Introduction*

Objectors contend that two of the board members voting for the augmentation charge had a disqualifying financial interest in the decision, and that their participation renders the ordinance void under the Political Reform Act, Government Code sections 87100 et seq. (PRA), and regulations adopted under it.[9]

The PRA was adopted by initiative in 1974. It declares that "[n]o public official . . . shall . . . participate in making . . . a governmental decision in which he knows or has reason to know he has a financial interest." (Gov. Code, § 87100.) It then states that a public official has a "financial interest" in a decision that will foreseeably have "a material financial effect, *distinguishable from its effect on the public generally*, on the official, a member of his or her immediate family," or certain other sources of potential financial gain or loss. (Gov. Code, § 87103, italics added.)

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[8] It also makes it unnecessary to consider whether the parties' mutual citation and discussion of *Scurich* violates rule 977 of the California Rules of Court.

[9] Objectors assert that the statutory exceptions cited by the trial court do not apply here because their participation was not "legally required" as that phrase is used in Government Code section 87101. We need not analyze this argument too closely, because it depends on a flatly incorrect statement of law. Objectors state, "A public official who has a conflict of interest can only participate in a matter in which he or she is personally interested if no other public official is available to act [Government Code § 87101]." The cited section merely provides another ground of exemption from disqualification, declaring that the PRA "does not prevent any public official from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made." (Gov. Code, § 87101.) The PRA clearly contemplates that a public official may act, whether or not his action is legally necessary for the decision to be made, and notwithstanding that the decision will have a "material financial effect" him, unless the decision's effect on him is "distinguishable from its effect on the public generally . . . ." (Gov. Code, § 87103.)

Here Objectors claimed that the PRA disqualified Director Capurro from acting on the ordinance because he held an interest in a family partnership that grew vegetables in the coastal distribution area, as well as an ownership interest in some of the property farmed by that partnership.[10] Director Gallino was employed as a sales manager for California Giant, Inc., a strawberry shipper and grower farming property in the coastal distribution area and elsewhere. Objectors' principal argument is that these financial interests in coastal agriculture disqualified Capurro and Gallino from participating in the decision to increase the augmentation charge because that charge would finance the central element of the Basin Management Plan, which is to secure and deliver water from outside the basin to replace the deteriorating groundwater now being used by these farmers.

The Agency stipulated below that both Capurro and Gallino had sufficient personal interest to disqualify them from participating in the adoption of the ordinance unless they were excepted by the requirement that the decision's effect on them be "distinguishable from its effect on the public generally . . . ." (Gov. Code, § 87103.) The Agency contends that under regulations governing application of this requirement, the trial court properly found the interests of Capurro and Gallino to be indistinguishable from those of the public generally. The Agency particularly relies on (1) a rule governing certain ratemaking and similar decisions (Cal. Code Regs., tit. 2, § 18707.2, subd. (c)) (§ 18707.2(c)); (2) a rule addressing certain decisions that affect a "significant segment" of the jurisdiction (Cal. Code Regs., tit. 2, § 18707.2, subd. (a) (§ 18707.2(a)), which is elsewhere defined to include a predominant industry (Cal. Code Regs., tit. 2, § 18707.7, subd. (b) (§ 18707.7(b)); and (3) the "General Rule" concerning effects on the "Public Generally" (Cal. Code Regs., tit. 2, § 18707.1 (§ 18707.1)).

[10] Capurro also had an interest in a separate family entity engaged in the vegetable-shipping business.

B. *Ratemaking Decision*

The first rule on which the Agency relies provides that "[t]he financial effect of a governmental decision on the official's economic interest is indistinguishable from the decision's effect on the public generally if . . . [¶] . . . [¶] (c) The decision is made by the governing board of a water, irrigation, or similar district to establish or adjust assessments, taxes, fees, charges, or rates or other similar decisions, such as the allocation of services, which are applied on a proportional or 'across-the-board' basis on the official's economic interests and ten percent of the property owners or other persons receiving services from the official's agency." (§ 18707.2(c).) The Agency contends that all the conditions for application of this rule are present: (1) the Agency is a "water, irrigation, or similar district," (2) the decision effected an adjustment to charges or rates, and (3) the ordinance applies the charges proportionally and across the board to persons receiving services from the Agency.

Objectors challenge the first and third premises. They assert that the Agency is not a "water, irrigation, or similar district" as contemplated by the regulation because its mission is not to supply water but to manage existing groundwater supplies. Little pertinent argument is offered in support of this assertion, and the only authority cited is the definition of "district" found in Water Code section 55012, i.e., "any county irrigation district or county waterworks district . . . ." This definition appears, unsurprisingly, in the County Waterworks District Law, Water Code sections 55000 through 55991. Objectors offer no reason, and we can think of none, to import definitions from a "county waterworks" law into regulations governing application of the PRA. If the framers of section 18707.2(c) had meant to extend it only to county waterworks and irrigation districts, they could quite easily have said so. Instead they explicitly extended it to all water, irrigation, or similar districts.

The Legislature itself described the Agency as a "water agency." (PVWMAA, art. 1, § 124-101.) Numerous sources refer to an "agency" as a "district," including

Government Code section 1090, which addresses certain conflicts of interest on the part of government officials including "district" officers and employees. It defines "district" as "any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries." (Gov. Code, § 1090; see *id.*, § 56036, subd. (c)(1)(F), (I) [defining " 'district' or 'special district' " to include, except under specified circumstances, a "water replenishment district" or "water agency"]; *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 233 [local transportation authority was a "district" for purposes of Proposition 62, *infra*].) Indeed, in its concluding clause, section 18707.2(c) itself uses the term "agency" to refer back to the "district" described in the first clause.

Since the term "district" can readily be applied to an "agency," the real question is what is meant in section 18707.2(c) by "similar," i.e., what is the common characteristic of irrigation and water districts that underlies the rule embodied in that section? Objectors wish us to suppose that the defining feature is the *delivery* of water, so that the regulation reaches only decisions to impose or adjust charges for such delivery.[11] They offer no reason to adopt this view, and we perceive none. The narrow intention they propose seems flatly contrary to the regulation's express extension to decisions affecting "assessments, taxes, fees, charges, or rates or other similar decisions." (§ 18707.2(c).)

In the absence of a cogent reason to conclude otherwise, we believe a groundwater conservation agency is a "water, irrigation, or similar district" for purposes of section 18707.2(c) and that the ordinance in question, adjusting a "charge" by that district for groundwater extraction, is within the contemplation of the regulation.

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[11] In another context the Legislature has defined "[w]ater" broadly to mean "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water." (Gov. Code, § 53750, subd. (m).)

The more difficult question is whether the decision under scrutiny involved a charge that is "applied on a proportional or 'across-the-board' basis on the official's economic interests and ten percent of the property owners or other persons receiving services from the official's agency." (§ 18707.2(c).) The difficulty owes much to the opacity of this language.[12] It appears to require us to (1) identify the interests of the challenged official that are implicated by the decision and determine how the charge is "applied" to those interests; (2) identify the interests of others that are affected by the decision and determine how the charge is applied to *those* interests; (3) compare the two applications thus identified; and (4) determine whether the effects are "proportional or 'across-the-board' " as between the official's economic interests and at least 10 percent of others receiving services from the agency. (§ 18707.2(c).).

The augmentation charge affects those on whom it is imposed in two distinct ways. First and most directly, it *burdens* them with an expense they would not otherwise bear. This is the type of effect to which the language of the regulation most readily lends itself; a charge or burden may be readily conceived as borne "across the board" or not. It is just as plain that in this respect, the ordinance satisfies the terms of the regulation. Everyone on whom the charge is imposed will bear it proportionately to the amount of groundwater they extract; it is imposed "across the board" on all water extractors. Insofar as that is the kind of effect contemplated by the regulation, the ordinance here appears to fall squarely within it.

[12] Indeed the regulations are riddled with puzzling constructions and syntactical misadventures. One can stare with prolonged bafflement at a phrase such as "assessments, taxes, fees, charges, or rates or other similar decisions, *such as the allocation of services*." (§ 18707.2(c), italics added.) We are unable to conceive what the drafters found in an "allocation of services" that resembles a decision to impose a tax, charge, or rate, yet distinguishes both types of decisions from other decisions.

Seeking to avoid this conclusion, Objectors contend that the ordinance affects coastal owners differently than other persons because "[t]hose who receive delivered water like Capurro and Gallino/CalGiant, will pay a different rate that those who merely pump groundwater but do not receive delivered water . . . ." Objectors neglect to mention that the anticipated charge for delivered water will be *higher* than—indeed, twice as high as—the anticipated charge for ground water: $316 per acre-foot, as opposed to $158 per acre-foot.[13] More fundamentally, they overlook the fact that *neither* of those charges was imposed by the present ordinance. It did one and only one thing: it imposed a uniform increase in the groundwater augmentation charge from $80 to $120 per acre-foot. The supposed discrepancy noted by Objectors appears not in the ordinance at issue but in the "recommended rate plan" set forth in the BMP. That plan cannot take effect until the system for importing and distributing water is completed. Even then, all persons extracting water—including any coastal users who continue to do so—will pay a uniform augmentation charge per acre-foot extracted. That the anticipated charge for imported water exceeds the uniform charge for extracted groundwater has no tendency to establish that the augmentation charge is applied to the interests of extractors in a manner that is anything other than "proportional [and] 'across-the-board.' " (§ 18707.2(c).)

The more difficult question is whether the *beneficial* effects of the ordinance (as distinguished from its burdens) are shared proportionately by at least 10 percent of those

[13] An Agency witness stated that the two-to-one ratio between these figures was a "coincidence." The BMP notes that when the cost of pumping water is taken into account, the real cost to extractors would be about $250 per acre foot, which more nearly approaches the cost to importers. The Agency manager testified that once the imported water is available coastal owners might be "required" to use it; however, he conceded that the Agency had yet to address the question whether a coastal owner with a good well might be able to continue using it, paying the augmentation fee rather than the imported water charge. This testimony, of course, detracts further from objectors' depiction of a class of coastal farmers uniquely affected by the ordinance.

affected. It appears to us that the beneficial economic interest ultimately implicated by the decision is one in the continued availability of usable groundwater. It is true that the failure to protect this interest would affect at least some coastal farmers sooner, and perhaps more dramatically, than others. Capurro in particular acknowledged the diminishing availability of well water of sufficient quality to irrigate his crops. He testified that if the single primary well now serving about 300 acres of his family's property became unusable for irrigation, the family "couldn't farm," and would probably try to subdivide the property for residential development. He expressed the understanding that if a supplemental water supply is not found, perhaps in 10 years or so, one result might be that half or all of the coastal land might be "taken out of production," with consequent economic effects throughout the valley. Gallino's interest appears to have been somewhat more attenuated, but his income was dependent on the welfare of his employer, another coastal farmer whose success as a farming operation would presumably be jeopardized by the lack of new water supplies.[14]

However, nothing in this record required the trial court to find that the elimination of this threat to coastal farmers is materially distinguishable from, or disproportionate to, its effect on other farmers, who face a similar threat in the form of a groundwater rights adjudication. That is, while increasing salinity may render coastal farmers unable to irrigate at present levels in the relatively near future, inland farmers may also find their ability to irrigate severely restricted if the BMP is not carried out. The intended effect of

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[14] Objectors state in their brief that Gallino's compensation was "based upon salary, bonus *and commission*." (Italics added.) The cited deposition testimony establishes only that Gallino received a salary and that "[i]f we have a good year, we get a bonus . . . ." Seven lines later he testified, "There is no commissions or anything like that. It's strictly salary plus bonus, if you get it." He then acknowledged that his salary, "or at least raises," was "dependent in part on how [he] perform[ed]." Counsel is admonished that misrepresentation of the record, even if merely negligent, represents a serious departure from acceptable appellate practice.

the BMP is to relieve all farmers in the basin of this danger, at least for the present. Farmers all thus share the same ultimate economic interest—one in maintaining sufficient supplies of water to keep them in business. The BMP—and the augmentation fee that helps to finance it—confer on them the same benefit by avoiding this fate.

It may be argued with some force that the benefit to *residential* users is distinguishable from, and not proportional to, that conferred on farmers. As described by an Agency witness, a "worst case" adjudication would allot 12,000 acre-feet of water per year to residential use. This is approximately equal to the amount currently consumed by such users. Residential users might thus claim with some justice that an adjudication would do them little immediate harm and being spared an adjudication does them far less good than it does farmers.[15] But accepting these premises for purposes of argument, the question then is whether farmers, all of whom are proportionately affected by the charge, constitute more than 10 percent of the total number of persons whose interests are affected by the ordinance. The answer appears to be affirmative; the Agency manager identified 660 owners of non-residential wells, and there are apparently about 3,660 persons paying the augmentation fee. The former number is well over 10 percent of the latter, even when adjusted to reflect that a small number of the 660 wells are operated by non-agricultural commercial interests or by mutual water companies.[16]

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[15] Supporting a contrary argument is the testimony of the Agency's expert economist that the failure to preserve current irrigation levels would have devastating effects throughout the basin on such matters as employment, property values, and public services. We need not decide in this case whether benefits of this type can be deemed "proportional" to those conferred on farmers for purposes of the legal questions now before us.

[16] We agree with objectors that it is impossible to sustain the trial court's finding that "[c]oastal water users represent at least 10% of those persons using water within the Agency's boundaries." Although the Agency manager testified at one point that there were about 660 property owners with wells, of whom 69 had wells in the coastal district, he elsewhere acknowledged that there were some 3,000 residential well owners who were also subject to the augmentation charge. We need not attempt to fathom this testimony

Further, Objectors' own insistence on lumping Gallino with coastal farmers even though he is not a farmer himself suggests that the class of persons similarly affected by the charge goes far beyond those who actually pay it and use the water it preserves, extending also to those whose income depends more-or-less directly on farming as currently carried out in the basin. By Objectors' logic, anyone employed by a farmer or otherwise deriving income from farming shares the benefit farmers will receive from maintaining current levels of irrigation. In this view, the special benefit Objectors perceive in the coastal distribution of imported water begins to look quite a bit less disproportionate.

It thus appears that the charge in question is "applied on a proportional or 'across-the-board' basis on the official's economic interests and ten percent of the property owners or other persons receiving services from the official's agency." (§ 18707.2(c).) All persons who are extracting water, and who thus presumptively share an interest in its continued availability, are charged in proportion to their use. Eventually, coastal owners will pay not for extracted water but for imported water, but they will still pay in proportion to their use, reflecting their proportionate interest in—their hypothetical demand on—the groundwater supply. Farmers in general may receive a more direct and dramatic benefit than is received by residential extractors, but even assuming this qualifies as a disparate effect it extends proportionally to all farmers, who constitute more than 10 percent of all persons affected. Accordingly, the interests of Capurro and Gallino appear indistinguishable from those of the public generally under section 18707.2(c), and they did not have a disqualifying conflict of interest under the PRA.

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because in our view the only colorable disproportion is between agricultural extractors (about 660) and residential ones (about 3,000).

C. *Other Regulations*

The Agency also contends that these directors' participation in the vote on Ordinance Ordinance 2003-01 was made distinctly permissible by section 18707.2(a), which provides that a decision's effect on an official's economic interest is indistinguishable from its effect on the public generally if "[t]he decision is to establish or adjust assessments, taxes, fees, charges, or rates or other similar decisions that are applied on proportional basis on the official's economic interest and on a significant segment of the jurisdiction, as defined in 2 Cal. Code of Regulations, section 18707.1(b)." As relevant here, this provision differs from section 18707.2(c) in that (1) it extends to all bodies, not just water, irrigation, or similar districts; and (2) it permits the official's participation if the effect on his interest is the same as that on a "significant segment" of the jurisdiction, rather than on 10 percent of those affected by the decision. The Agency contends that the ordinance affected a "significant segment" as that term is defined in section 18707.7, which states that with respect to officials such as Capurro and Gallino, an industry, trade, or profession may constitute a "significant segment" when it is "predominant" in the official's jurisdiction. The Agency contends that agriculture is a predominant industry within the basin and therefore constitutes a "significant segment" of the jurisdiction which is affected by the ordinance in the same manner as Capurro and Gallino are affected.

Objectors contest this reasoning on two grounds. First they assert that not all farmers are affected in the same manner as Capurro and Gallino who, along with other coastal farmers, are uniquely benefited by the Ordinance. We rejected substantially the same argument in the preceding section of this opinion. The benefit ultimately to be derived from the ordinance (and more directly, from the BMP) is the same for all farmers: they can continue farming substantially as they have been, rather than suffer the demise or dramatic diminution in their enterprises that would follow from a failure to arrest seawater intrusion.

Objectors second argument is more colorable. They contend that in order to constitute a "predominant" industry under section 18707.7, farming concerns must constitute "fifty percent or more of business entities in the jurisdiction of the official's agency or the district the official represents . . . . (§18707.7(b).) Objectors note the absence of direct evidence that farming concerns satisfy this criterion within the Basin.

Here again we must wrestle at the threshold with bewildering regulatory language. Section 18707.7 begins by asserting that where a decision affects a industry, trade, or profession, the industry "constitutes a significant segment' of the jurisdiction only as set forth below." It then declares that, with respect to unelected officials, "an industry, trade, or profession constitutes a significant segment of the public generally if that industry, trade, or profession is a predominant industry, trade, or profession in the official's jurisdiction or in the district represented by the official. An industry, trade, or profession that constitutes fifty percent or more of business entities in the jurisdiction of the official's agency or the district the official represents is a 'predominant' industry, trade, or profession for purposes of this regulation. For purposes of this subdivision, a not for profit entity other than a governmental entity is treated as a business entity." (§ 18707.7(b).) This provision is rife with puzzles, but the primary one for our purposes is whether the reference to 50 percent is intended as an *exclusive* definition of predominance for purposes of this regulation. If it is, we doubt that any agency whose jurisdiction includes a town of any size can be said to have a predominant industry, even if there obviously *is* a predominant industry by any other measure, as indeed there is in this case.[17] Most obviously, an old-fashioned "company town" in which nearly everyone worked for a single employer would not have a "predominant industry" if it contained a handful of independent restaurants or retailers. Indeed, since a nonprofit entity is counted

[17] The Agency's expert economist testified that agriculture is the predominant industry in the area he studied, i.e., the Basin.

as a business entity, a company town would lack a predominant industry if it contained *two churches*. The patent absurdity of such a reading compels us to conclude that despite the seeming mandate of the first sentence—itself awkward and obscure—the reference to 50 percent must not be intended as an exclusive definition of a "predominant" industry.

Certainly it would have been easy to clearly express an intent to make the 50 percent measure an absolute requirement. The conventional method of doing so would be to state, "For purposes of this regulation, an industry is 'predominant' only if more than half of the business entities within the district are engaged in that industry." Better yet, the "predominant industry" concept might be dispensed with altogether and the regulation could go directly to the 50 percent requirement. Instead it states that if more than half the business entities are engaged in a given industry, that industry is predominant. This is a classic conditional statement (if more than 50 percent, then predominant), and it is elementary that the converse (if predominant, then more than 50 percent) is not logically true. In other words, it is one thing to say "a sedan is an automobile," and quite another to say "an automobile is a sedan." The former statement is obviously true, but the latter can only be true if it is intended in some special sense, such as a definition for a particular purpose. The statement at issue here can readily be viewed as stating merely one form or type of predominance. We choose to so read it, in part because, as we have noted, the alternative would appear to produce an absurd result.

Nor does it appear that the Fair Political Practices Commission (FPPC) has provided a considered construction of the regulation. We have found and examined eight advice letters in which the "predominant industry" requirement is discussed in connection with section 18707.7(b). In several of them, Commission counsel appears to treat the 50 percent requirement as absolute or definitional. (FPPC, advice letter No. A-05-222 (Dec. 29, 2005) [2005 WL 3606337, at p. *7] ["it would appear unlikely that the real estate industry constitutes fifty percent or more of all the business entities in the City of Corning and is therefore the predominant industry within the jurisdiction"]; FPPC, advice

letter No. A-05-142 (Aug. 31, 2005) [2005 WL 2303329, at p. *5] [official's business "does not constitute a significant segment under regulation 18707.7(b) because it is not a predominate [*sic*] industry in the official's jurisdiction as it does not constitute fifty percent or more of business entities in the jurisdiction of the official's agency"]; FPPC, advice letter No. I-05-022 (Mar. 11, 2005) [2005 WL 658813, at p. *8] ["it would appear unlikely that the hotel industry constitutes fifty percent or more of all the business entities in Carlsbad and is therefore the predominant industry within the jurisdiction"].) In others, counsel merely quotes, paraphrases, or alludes to the regulation without implicating the 50 percent clause. (See FPPC, advice letter No. I-03-010 (Jun. 10, 2003) [2003 WL 21436594, at p. *4] [possible, though facts fail to establish, that wine grape grower is within predominant industry in his rural Amador County district]; FPPC, advice letter No. A-03-029 (Apr. 3, 2003) [2003 WL 1875281, p. *4] [where developer was sole landowner within district, its business was sole and thus predominant industry]; FPPC, advice letter No. A-01-151 (Sept. 20, 2001) 2001 WL 1190605, at pp. 1, 5, fn. 6 [although milk production is a "major agricultural industry" in Kings County, data presented by officials did not establish it as predominant industry]; FPPC, advice letter No. A-01-150 (Sept. 20, 2001) [2001 WL 1190603, at pp. *1, *10, fn. 9] [same]; FCCP, advice letter No. A-01-017 (Mar. 8, 2001) [2001 WL 754619, pp. *7-*8] [counsel had no information suggesting that regulation applied].) In none of these cases does the Commission appear to have considered the point implicit in the Agency's argument here, that the 50 percent requirement is not an absolute requirement for finding an industry "predominant." Needless to say, an advice letter is no more authority for a point not considered than is a judicial opinion. (See *People v. Neely* (1999) 70 Cal.App.4th 767, 783.)

Further, the Commission has written that "[t]he purpose of the predominant industry exception is '. . . to avoid disqualification in such cases as a farmer elected in a rural community in which agriculture is the major industry.' (*In re Ferraro* (1978)

4 FPPC Ops. 62.) The exception is limited to the situation where a local economy is based on one industry so that almost any public official would have an economic tie to that industry. (Woods Advice Letter, No. A-94-164.)" (FPPC, advise letter No. A-05-222 (Dec. 29, 2005) [2005 WL 3606337, at p. *6].) While the city of Watsonville may no longer be considered a "rural community," and while its economy may include more than one industry, there can be no doubt that the basin as a whole, and little doubt that Watsonville itself, depend very heavily indeed on the agriculture industry. Again, the Agency's expert economist testified without contradiction or controversy that "[a]griculture production" (so transcribed) is in fact the "predominant industry" in the basin.

The Agency also argues that the decision falls within a regulation defining a "Significant Segment" as "(i) Ten percent or more of the population in the jurisdiction of the official's agency or the district the official represents; or [¶] (ii) 5,000 individuals who are residents of the jurisdiction." (§ 18707.1(b)(1)(A).) As far as we can discern, the number of persons who will pay the augmentation charge is no greater than 3,660, which does approach 5,000, let alone the 8,000-plus who would comprise 10 percent of the basin's population. The Agency's argument depends on the premise that the charge affects *everyone* in the basin because "[e]veryone in the population has the right to pump water . . . ." By this reasoning the vast majority of decisions made by public officials could be seemingly be brought within the cited regulation on the theory that everyone will have an inchoate or hypothetical right to engage in whatever activity a decision contemplates. The PRA is not concerned with such theoretical effects. The question is who *will* be foreseeably and materially affected. We cannot discern any answer to this question that would yield the numbers contemplated by this regulation.

The Agency makes a substantially identical argument with respect to the regulation defining a "significant segment" as either 2,000 business entities, or 25 percent of all business entities in the district, provided they are not all in the same industry.

(§ 18707.1(b)(1)(C).) The Agency argues that this test is satisfied because "the decision applies to every business in the District" in that "[e]ach may choose to pump water, and if so is charged." We reject this contention for reasons already stated; the question is not who *may* or *might* incur the charge but who *will* incur the charge.

D. *Validity of Regulations*

Objectors contend that insofar as the regulations may be understood to permit Directors Capurro and Gallino to participate in the decision to increase the charge, the regulations are inconsistent with the PRA and therefore invalid. We have no doubt that the legal premise is correct: to the extent that the regulations conflict with the act they are intended to apply, they must give way. (See Gov. Code, § 83112 [empowering Fair Political Practices Commission to adopt regulations consistent with PRA]; *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 269 [regulations must be consistent with statute authorizing their adoption].)

The question is whether the regulations are inconsistent with the act. Objectors offer no basis for an affirmative answer. They merely assert that directors Capurro and Gallino had a financial interest in the decision under scrutiny and that any regulation authorizing them to participate in that decision was ipso facto inconsistent with the PRA. This argument depends, for any substance it possesses, on a certain infelicity in the drafting of the PRA, which begins with a ringing declaration that no public official may participate in any decision in which he knows or should know he has a "financial interest" (Gov. Code, § 87100), but then qualifies that principle by defining "financial interest" in a manner foreign to common usage, i.e., as applying only when a decision's effect on a participating official is "distinguishable from its effect on the public generally . . . ." (Gov. Code, § 87103.) In ordinary language, of course, one has a "financial interest" (or not) regardless of whether someone else, or everyone else, has a similar interest. The regulations apparently seek to rectify the statute's awkward and confusing approach by abandoning the compromised term "financial interest" in favor of

"disqualifying conflict of interest." Thus the regulations restate the general rule of disqualification as follows: "No public official . . . may . . . participate in making . . . a governmental decision in which he/she knows or has reason to know he/she has a disqualifying conflict of interest. A public official has a conflict of interest if the decision will have a reasonably foreseeable material financial effect on one or more of his/her economic interests, unless the public official can establish either: (1) that the effect is indistinguishable from the effect on the public generally, or (2) a public official's participation is legally required."[18] (Cal. Code Regs., tit. 2, § 18700.) This approach is perfectly consistent with the letter and spirit of the PRA.

Objectors have simply seized upon the presence of a "financial interest" in its ordinary sense and ignored the definitional qualification of that term by Government Code section 87103. The regulations merely elaborate on the qualification in a manner not shown by Objectors to conflict in any way with the PRA. We discern no basis for holding the regulations, or any of them, invalid.

E. *Common-Law Conflict of Interest*

Objectors assert in passing that Directors Capurro and Gallino were disqualified by a common law conflict of interest as discussed in *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170-1172 (*Clark*). Objectors merely quote a passage from that case, cite an opinion by the Attorney General on the same general subject, and assert

[18] Unfortunately the authors of the regulations seemed to have little more grasp of the act of legislative draftsmanship than did the authors of the PRA. In the regulation just cited, they conflated "conflict of interest" with "disqualifying conflict of interest." The regulation should (1) recite the general rule, as it does; (2) define "conflict of interest," as it starts out to do; and (3) state separately that a conflict of interest disqualifies the official unless the stated conditions are shown. The drafters apparently set out to do this but then inexplicably combined the second and third elements so as to introduce a pointless illogicality.

that the ordinance is void "since a common law conflict of interest existed at the time Ordinance 2003-01 was adopted."

Assuming this is a sufficient presentation to tender an issue for our consideration, it falls far short of persuading us that the ordinance is void. In *Clark* a city councilmember was held to have acted under a common law conflict of interest by voting against a development that would interfere with ocean views from his rented home, and against the proponents of which he harbored personal animosity. (*Clark, supra*, 48 Cal.App.4th at pp. 1172-1173.) The court fell back on common law principles because the facts did not establish a *financial* interest in violation of the PRA. (*Id.* at p. 1173, fn. 19.) The case bears no material similarity to this one.

Moreover, as the Agency points out, Directors Capurro and Gallino were implicitly authorized by the Legislature to act for agricultural interests, since they were required to derive more than half of their income from agriculture and were authorized to be nominated by the Farm Bureaus of their respective counties. (PVWMAA, art. 4, § 124-402.) To hold that this created a common-law conflict of interest would defy the manifest legislative intent.

The trial court did not err in concluding that Directors Capurro and Gallino were not disqualified from participating in the decision to adopt Ordinance 2003-01.

III. *Tax, Assessment, or Property-Related Charge*

A. *Tax*

Objectors contend that the groundwater augmentation change could not validly be imposed without complying with the provisions of Propositions 218 (Cal. Const., arts. XIIIC & XIIID, § 3) and 62 (Gov. Code, § §§ 53720-53730), under which it constituted a tax, property assessment, or charge incidental to property ownership.

Objectors argue that the charge is a "special tax," which is defined by Proposition 218 as a "tax imposed for specific purposes." (Cal. Const., art. XIIIC, § 1, subd. (d).) They focus on the *benefit* to be derived from the charge and its relationship to the manner

in which the charge is *distributed*. In essence they contend that, with the exception of coastal farmers who will receive imported water, those paying the charge will receive no benefit beyond that enjoyed by the general public. In Objectors' view, this makes the charge a tax, not a fee. The Agency focuses on the relationship between the *amount* of the charge and the *cost* of the services it is earmarked to finance, contending that since the charge does not exceed the costs of groundwater remediation, it is not a tax.

We need not choose between these methodologies because even accepting Objectors' conception of a "special tax," we cannot adhere to their analysis of the facts here. The charge is imposed upon users of groundwater and is applied to the remediation of the effects of that use. It basically operates to internalize a cost that extractors have otherwise been able to shift to others, while financing improvements to preserve a resource that would otherwise undergo continuing degradation. As noted in the BMP, the increased charge also has a desirable regulatory effect, "promot[ing] water conservation" by "encourag[ing] users not to waste water." The beneficiaries of the charge are not only coastal farmers, who have already begun to feel the effects of seawater intrusion, or future users, who will eventually experience that or other consequences of groundwater depletion. The beneficiaries are all extractors, whose supply of groundwater will be secured by the activities financed, in part, by this charge. This is precisely the class of persons on whom the charge is imposed.

It is undoubtedly true, as Objectors assert, that the benefits of this program will also inure to the general public. If the Agency's economist is to be credited, as basic principles of appellate review require, the continued depletion of groundwater would eventually have devastating effects not only on extractors but on all those who depend on them for a livelihood or for public services financed by their taxes. But it is difficult to conceive of a government program of which something similar cannot be said. It might be argued with some force that *all* well-conceived programs ultimately benefit the general public. It does not follow that all fees imposed to finance them are taxes. To

suggest otherwise is like saying that municipal parking fees earmarked for new parking facilities are a "special tax" because without the new facilities, the general public will suffer from an overall lack of adequate parking.

Objectors cite several cases in connection with their contention that the charge here is a tax, but none supports the conclusion they seek. In *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal.App.4th 1178, 1182, the court considered a local ballot measure that sought to ratify a preexisting "utility user's tax" and to earmark its proceeds for police, fire, parks, recreation, or library services. There was no question about the charge's status as a "tax"; the only question was whether it was a "general tax," that could be imposed by a majority of the voters, or a "special tax," requiring a two-thirds vote. (See *id.* at pp. 1183-1184, 1186.) In *Santa Clara County Local Transportation Authority v. Guardino*, *supra*, 11 Cal.4th 220, 232, the court held, unremarkably, that a sales tax earmarked for transportation projects was a " 'special tax' " subject to the two-thirds requirement. Indeed the point was scarcely contested; the only real issue was whether the taxing authority was a " 'district' " for purposes of Government Code section 53722. (*Id.* at pp. 232-233.) In *San Marcos Water Dist. v. San Marcos Unified School District* (1986) 42 Cal.3d 154, 158, 165, 168, the court held that a one-time "sewer capacity fee" was a "special assessment" for purposes of a rule exempting publicly entities from paying such assessments, rather than a "user fee" which such an entity could be required to pay. In *Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, 597, the court held that a "utility lien" imposed by a city to aid in collecting unpaid utility charges was not a special tax, special assessment, regulatory fee, or development fee, but "[a]t most . . . a user fee . . . ."

The only factually similar case appears to be *Orange County Water District v. Farnsworth* (1956) 138 Cal.App.2d 518, 522, which considered the validity of a "replenishment assessment" charged by a water district to purchase water "for the purpose of replenishing the underground water supplies of said district . . . ." According

to Objectors, "*Farnsworth* held that 'the charge in question is in the nature of an excise tax levied upon the activity of producing ground water by pumping operations.' " ~(AOB 6)~ This critically misquotes the court, which in fact said that the charge was "*more* in the nature of an excise tax" than it was an ad valorem property tax or a special assessment. (*Id.* at p. 530.) The court went on to note the *sui generis* quality of the charge and to declare that this alone could not render it unconstitutional: "As was said in *County of Ventura v. Southern Cal. Edison Co.*, 85 Cal.App.2d 529, [193 P.2d 512], 'A holding that legislation is constitutionally invalid . . . cannot be founded upon a mere difficulty of categorization, but rather must be based upon a clear, substantial, and irreconcilable conflict with the fundamental law.' " (*Ibid*.) The court's allusion to an excise tax is understandable given the state of the law at that time; according to our electronic research, no published California decision prior to the issuance of that opinion had ever used the phrase "user fee." In the wake of Proposition 13 and its progeny, a veritable riot of new jurisprudence has developed around these issues. The court's describing the fee there as "more in the nature of an excise tax" hardly supports Objectors' position here.

Under modern law, the central distinction between a tax and a fee appears to be that a tax is "imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. [Citations.]" (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874; *Barratt American Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 727.) The charge here exposes the falseness of this supposed dichotomy. While it is intended to finance improvements, and thus to raise "revenue," it is also charged in return for the benefit of ongoing groundwater extraction and the service of securing the water supply for everyone in the basin.[19] Indeed, if not for

[19] Although the Agency does not appear to argue the point, it might be suggested that the augmentation charge operates in part to secure the "privilege" of avoiding more draconian measures, such as dramatic adjudicated reductions in permitted extractions.

the prohibitive cost of metering smaller wells, which necessitates charging those extractors on the basis of estimated usage, the fee might well be justified on regulatory grounds, as bringing the actual cost of groundwater nearer its true replacement cost and thus subjecting it to the regulation of the marketplace. This rationale might still be readily invoked with respect to metered extractions and perhaps those estimated based upon particular facts such as the nature of crops grown. In any event we are far from persuaded that the charge can be characterized as a "tax."

B. *Special Assessment*

Objectors contend that if the groundwater augmentation charge is not a tax it is a "special assessment." One core characteristic of a "special assessment," as used in this context, is that it constitutes a charge *on land*. Thus in *Trumbo v. Crestline-Lake Arrowhead Water Agency* (1967) 250 Cal.App.2d 320, 323, a "standby water charge" assessed by a water agency against certain properties whether or not water was used constituted not a tax but a "special assessment to be levied upon land according to the availability of water." (*Id*. at. p. 322.) The very law on which Objectors primarily rely defines " '[a]ssessment' " as "any levy or charge *upon real property* by an agency for a special benefit conferred upon the real property." (Cal. Const., art. 13D, § 2, subd. (b), italics added.)

The augmentation charge is imposed on the authority of article 10, section 124-1001 of the PVWMAA, which provides that the Agency "may, by ordinance, levy groundwater augmentation charges *on the extraction of groundwater from all extraction facilities* within the agency for the purposes of paying the costs of purchasing, capturing, storing, and distributing supplemental water for use within the boundaries of the agency."

The Legislature has granted the Agency broad powers to restrict or suspend extractions if that becomes necessary to carry out its functions. (See PVWMAA, art. 7, §§ 124-712, 124-713, 124-714.)

(Italics added.) This stands in contrast to another section, which empowers the Agency to "fix charges upon land within the agency for the purpose of paying the costs of initiating, carrying on, and completing any of the powers, projects, and purposes for which the agency is organized. The charge may be imposed on landowners within the district for benefits received by landowners from improved water management and planning." (PVWMAA, art. 9, § 124-902.) The latter provision arguably contemplates an "assessment" as defined in California Constitution, Article 13D, section 2, subdivision (b). The former does not; rather it contemplates a charge for an activity, to wit, "the extraction of groundwater . . . ." (PVWMAA, art. 10, §124-1001.) In adopting the ordinance here at issue, the Agency was clearly acting under this statute and not under the statute authorizing charges on land.

Objectors contend that whatever its intentions, the Agency in fact assessed the augmentation charge on real property because (1) it identified the presumptive owners of wells by consulting parcel tax records to determine who owned the land on which wells were situated; and (2) in at least some cases the Agency billed these owners through county taxing authorities, who included augmentation charges with their property tax mailings. Neither of these facts establishes that the charge was assessed on real property. The Agency's manager testified in essence that tax rolls were a convenient and reliable means of identifying the person responsible for extraction on the assumption that this was likely to be the owner of the land on which extraction was occurring.

The fact that property owners are presumed to be the operators and beneficiaries of wells situated on their premises does not convert a charge based on conduct into one assessed against land. The situation may be analogized to one in which an automobile is operated in a manner constituting a toll violation under Vehicle Code sections 40250 et sequitur. In general, the vehicle's owner is jointly liable with its operator unless he can show that the vehicle was used without his consent. (Veh. Code, § 40250, subd. (b).) This does not convert the resulting fine into a vehicle registration fee. It remains a charge

based upon *conduct*. It is assessed against the person most likely to be responsible for and to have control over the conduct, on the supposition that if he is not primarily responsible, he can obtain recompense from those who are. (See Veh. Code, § 40250, subd. (b) ["Any person who pays any toll evasion penalty, civil judgment, costs, or administrative fees pursuant to this article shall have the right to recover the same from the driver, rentee, or lessee"].) Here Agency witnesses testified that when a well was shown to be operated by a lessee or other occupant, that person could be billed; the Agency had even entered into payment arrangements with lessees in lieu of collection proceedings. We have never heard of a county tax collector who was willing to look to anyone other than the record owner for payment of property taxes or assessments. The Agency's willingness to do so here lends strong support to its contention that the augmentation charge is in fact and in law an activities-related charge and not a property assessment.

Nor does the former inclusion of augmentation charges with tax bills lead to a different conclusion. The Agency's manager testified that prior to 2003, some or all extractors had been billed for augmentation charges along with their property taxes. In 2003, however, the Agency adopted two ordinances "rescinding" this practice after receiving a letter from the office of the Santa Cruz County Counsel expressing the view that "it was inappropriate to be using the tax rolls for the collection of the augmentation charge." The practice would apparently continue only with respect to the Agency's property management fee, which is not at issue here, and which the manager acknowledged to be "a property related fee" intended to fund administrative expenses. (See PVWMAA, art. 8, § 124-902 .)

Objectors argued below that the Agency's practice of including the bill for groundwater augmentation with county property tax bills gave rise to an estoppel. On appeal Objectors appear to have abandoned this argument, which lacked substance in any event. In their brief below Objectors quoted some very general statements about the

availability of estoppel against public entities, but made no attempt to establish the presence of the actual *elements* of that doctrine. As the cited source notes, the essential ingredient of an estoppel is *detrimental reliance on misleading words or acts*. (13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 191, pp. 527-528.) In other words, the person asserting the estoppel must have been *induced to act* by some deceptive or inequitable statement or conduct on the part of the person to be estopped. Objectors have never suggested any way in which they or others were misled to their injury by the Agency's conduct in this or any other respect.

Objectors also argue that the charge must be a property assessment because it is a "capacity charge." As noted in part I, *ante*, Objectors argue in a different context that the charge is only partly a "capacity charge." Here they seem to imply that it is entirely a capacity charge, which in turn makes it a special assessment. We reject the notion that problems of this kind can be usefully addressed using this sort of lightfooted taxonomical reasoning. In any event it is flatly untrue that capacity charges are always or even "usually," as Objectors assert, special assessments for purposes of Proposition 218. Both of the cases cited by Objectors concerned the classification of certain *utility charges* as "special assessments" for purposes entirely foreign to the present controversy. (*Utility Cost Management v. Indian Wells Valley Water District* (2001) 26 Cal.4th 1185; *California Psychiatric Transitions, Inc. v. Delhi County Water Dist.* (2003) 111 Cal.App.4th 1156.) As the California Supreme Court has acknowledged with respect to a case central to both of those decisions, the application of the term "assessment" in other contexts is of little value in discerning its correct application in the present context. (*Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 422 (*Richmond*), distinguishing *San Marcos Water Dist. v. San Marcos Unified School Dist.* (1986) 42 Cal.3d 154.) In the present setting, as previously noted, the term "assessment" (or "special assessment") intrinsically implies a charge *on real estate*. (See Cal. Const., art. XIIID, § 2, subd. (b) [" '[a]ssessment' " defined as "any levy or charge *upon real*

property by an agency for a special benefit conferred upon the real property"].) In contrast, "[t]he characteristic that [the Supreme Court] found determinative for identifying assessments in *San Marcos*—that the proceeds of the fee were used for capital improvements—forms no part of article XIII D's definition of assessments. . . . San Marcos is not helpful, much less controlling, in this strikingly different context." (*Richmond*, *supra*, 32 Cal.4th at p. 422.)

We conclude that the augmentation charge was not a property assessment.

C. *Charge Incidental to Property Ownership*

The most difficult of the issues raised by Objectors is whether the augmentation charge is subject to Proposition 218 as a charge imposed "upon a . . . person as an incident of property ownership . . . ." (Cal. Const., art. XIII D, § 2, subd. (e).) The preceding discussion, however, largely anticipates the answer. The charge is not imposed upon owners of property as owners, or even owners of wells as owners, but upon persons *extracting groundwater* from the basin. This has included tenants in the past. The Agency considers the landowner ultimately responsible, but substantial evidence supports a finding that he bears this responsibility in the capacity not of landowner but of gatekeeper to extraction facilities on his property, with the presumptive ability to control the extraction of groundwater through those facilities. The charge is thus incidental not to the ownership of real property, but to the carrying out of specified activities that perforce occur, if at all, on real property.

The situation seems analogous to one in which a public agency assesses a noise abatement fee against motorcycle racetrack operators in order to purchase surrounding properties as a buffer zone, or a pollution abatement fee against water polluters to raise funds to construct water treatment facilities. Motorcycle races and water pollution necessarily take place on real property, but that does not make such fees incidental to property ownership. Nearly all human activities take place on real property, but to hold

them all incidental to property ownership for purposes of Proposition 218 would attribute an absurd intention to the electorate.

Objectors' chief argument for holding this charge incidental to property ownership is that such a result follows from the Supreme Court's analysis in *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409 (*Richmond*), which declares, according to Objectors, that "an owner who is involuntarily charged a fee for existing services is subject to the provisions of Proposition 218."

This is a grossly overbroad reading of that case. As pertinent here, the question before the *Richmond* court was whether two charges on new water connections, one a "capacity charge" to fund capital improvements, and the other a charge for fire suppression services, constituted assessments or charges incidental to property ownership for purposes of Proposition 218. The Supreme Court held that they did not, in part because they were predicated on "a property owner's voluntary application to a public entity" for new service. (*Richmond, supra*, 32 Cal.4th at p. 425; see *id.* at p. 426 ["A connection fee is not imposed simply by virtue of property ownership, but instead it is imposed as an incident of the voluntary act of the property owner in applying for a service connection"].) The court went on, however, to discern a distinction in this regard between a new connection charge and one imposed on owners with *existing* connections: "A fee for ongoing water service through an existing connection is imposed 'as an incident of property ownership' because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed 'as an incident of property ownership' because it results from the owner's voluntary decision to apply for the connection." (*Id.* at p. 427.) Such a distinction is reinforced, the court suggested, by Proposition 218's requirement that in order to enact a valid property-related charge the agency in question must identify the parcels on which the charge will be imposed. (*Id.* at pp. 427-428, citing Cal. Const., art. XIII D, § 6, subd. (a)(1).) This is impossible with new connections, "because the District cannot determine in advance

which property owners will apply for water service connection." (*Richmond, supra*, 32 Cal.4th at p. 428.) The impossibility of complying with this condition "strongly suggests that connection fees for new users are not subject to [California Constitution,] article XIII D's restrictions on property-related fees." (*Ibid*.)

Objectors apparently read *Richmond* to stand for the proposition that all fees related to water service for an existing connection are charges incidental to property ownership subject to the requirements of Proposition 218. We do not believe the court meant to go nearly so far. The charges alluded to there may have been flat charges imposed on all existing connections regardless of the amount of water used or whether any at all was used. It is impossible to be sure, because the only fees actually before the court were those imposed on new connections, and the only *evidence* of charges on existing connections, at least as mentioned in the opinion, was the District's stated intention to "divide the costs of new capital improvements between users receiving service through existing connections and users applying for new connections." (*Richmond, supra*, 32 Cal.4th at p. 420.) The court's rather lengthy discussion of charges on existing connections is troubling not so much because it is dictum, but because the actual nature of those charges cannot be ascertained from the opinion and the resulting pronouncements are therefore rife with potential for misconstruction. Here Objectors have relied on these remarks to extract a rule that would apparently require water companies to comply with Proposition 218 every time they sought to raise *rates*. We trust that the Supreme Court would not adopt such a breathtaking rule until the question had been tested by the adversary process in a case where it was actually presented.

As it is, we believe no such rule was intended in *Richmond*. First, as with the charge at issue there, a consumption-based charge is incurred only through voluntary action, not as an incident of property ownership. If one is charged only for water actually used, one can avoid the charge by not using water, or reduce it by using less. It is this

point that leads us to suspect that the charges on existing connections contemplated in *Richmond* were flat fees assessed regardless of usage.

Second, as in *Richmond,* it would be impossible for a water agency to comply with the requirements of Proposition 218 prior to imposing a consumption-based charge. In order to impose a valid charge, the agency would have to identify the parcels to be charged, *calculate the amount of the charge*, and send a notice to each affected owner including "[t]he amount of the fee or charge proposed to be imposed" and "the basis upon which the amount . . . was calculated . . . ." (Cal. Const., art. XIII D, § 6, subd. (a)(1).) Of course, where a consumption-based charge is concerned, a water agency cannot know the amount, or even that there will be a charge, until the end of a billing period. In *Richmond* the court noted the impossibility of identifying the parcels to be charged where new hookup fees are concerned, and refused to impute to the electorate an intention to preclude the assessment of such fees; it reasoned that they therefore must fall outside the provision. We likewise refuse to impute to the electorate an intention to render it flatly impossible for water or similar agencies to impose or modify any consumption based charge for water service.

Third, in the opening sentence of *Richmond*, *supra*, 32 Cal.4th at pages 414-415, the court cited with apparent approval its own earlier decision in *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830 (*Apartment Association*), where it held that an "inspection fee" imposed on residential landlords was not a charge incidental to property ownership because Proposition 218 "only restricts fees imposed directly on property owners in their capacity as such," and the fee there was "not imposed solely because a person owns property," but only "because the property is being rented." (*Id.* at p. 838.) The fee "ceases along with the business operation, whether or not ownership remains in the same hands." (*Ibid.*) The fee was not incidental to "property ownership" because it was "imposed on landlords not in their capacity as landowners, but in their capacity as business owners." (*Id.* at p. 840.) Comparing the fee

to one charged for a business license, Justice Mosk wrote that "[i]t is imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business." (*Ibid.*) Proposition 218, he wrote, governs "taxes, assessments, fees, and charges . . . when they burden landowners *as landowners*. The ordinance does not do so: it imposes a fee on its subjects by virtue of their ownership of a business—i.e., because they are landlords. What plaintiffs ask us to do is to alter the foregoing language—changing 'as an incident of property ownership' to 'on an incident of property ownership.' But to do so would be to ignore its plain meaning—namely, that it applies only to exactions levied solely by virtue of property ownership." (*Id.* at p. 842. fn. omitted, italics in original.)

The most nearly apposite case is *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 85 Cal.App.4th 79, 83 (*HJTA v. Los Angeles*), which rejected a contention that water rates "based primarily on the amount consumed" were subject to Proposition 218. "These usage rates are basically commodity charges . . . . They do not constitute 'fees' as defined in California Constitution, article XIII D, section 2, because they are not levies or assessments 'incident of property ownership.' (Subd. (e).) Nor are they fees for a 'property-related service,' defined in subdivision (h) as 'a public service having a direct relationship to property ownership.' As indicated by the ordinances setting water rates, the supply and delivery of water does not require that a person own or rent the property where the water is delivered. The charges for water service are based primarily on the amount consumed, and are not incident to or directly related to property ownership." (*Ibid.*)

Objectors cite *Howard Jarvis Taxpayers Ass'n v. City of Fresno* (2005) 127 Cal.App.4th 914 (*HJTA v. Fresno*), and *Howard Jarvis Taxpayers Ass'n v. City of Roseville* (2002) 97 Cal.App.4th 637 (*HJTA v. Roseville*), both of which held that "in-lieu fees" charged against publicly owned utilities in lieu of ad valorem property taxes were charges incidental to property ownership subject to Proposition 218. The fees under

scrutiny there bear so little resemblance to the one before us that we fail to see how either case can provide significant guidance here. The chief pertinence of *HJTA v. Fresno* seems to be its frank preference for the admitted "dicta" in *Richmond* (*HJTA v. Fresno* 127 Cal.App.4th at p. 925) over the "broad language" in *Apartment Association* (*id.* at p. 925, fn. 3). We find it unnecessary to choose between those cases, since we believe their holdings *and* their "broad language" can be reconciled.

In sum, we reject the suggestion that new or modified charges for water or similar commodities are invariably subject to Proposition 218 unless they are limited to new connections. Instead, consistent with the reasoning in *Richmond* and *Apartment Association,* a charge based on consumption must be viewed as outside the constraints of Proposition 218 because it depends on voluntary activity by the person charged and it cannot be imposed in compliance with the procedures contemplated by that provision.

Here the augmentation fee is clearly based on consumption. The only difficulty arises from the fact that the consumption of smaller users is estimated rather than metered, and this makes it resemble, in the case of residential users, a flat charge. This is because rural residential extractors are charged based on an "estimated use rate per dwelling" of 0.6 acre-feet per year. Smaller non-residential extractors may also pay an estimated charge based on factors such as acreage and crop type. Critically, however, these charges are *not* flat rates but estimates necessitated by the economic impracticability of metering small users.[20] This is borne out by the crucial fact that all estimated charges are subject to adjustment if an extractor can persuade the Agency that he actually extracted less than the estimated amount. The Agency had in fact made adjustments for unmetered agricultural extractors, including those who told the Agency

[20] The Agency manager testified that the cost of installing residential meters would exceed the annual charge. He was aware of nothing in the Agency's rules that would prevent a residential user from installing a meter and showing the results to the Agency as grounds for an adjustment.

they were not irrigating but "dry farming," and those who had surface water sources such as a spring. The Agency's manager was unable to cite an instance where a purely residential extractor had sought such an adjustment, but this may not be surprising in view of the relatively low charge incurred by such users, few of whom might find it worthwhile to prove that they drew less than the estimated 0.6 acre-feet. Prior to the increase here under review the augmentation charge was fixed at $80 per acre-foot, which meant that the residential estimate was $48. Earlier rates were even lower, providing even less incentive to contest the Agency's estimate.

Objectors also appear to contend that the augmentation charge is incidental to property ownership because it burdens an activity without which the property cannot be beneficially enjoyed. The implicit argument proceeds as follows: (1) Without water, no property can be productively used, e.g., farmed or lived upon; (2) the vast majority of water within the basin is derived by extraction; (3) extraction is thus necessary to the productive use of land within the basin; (4) a charge on an activity that is necessary to the productive use of property is "incidental to property ownership"; (5) therefore a charge on extraction is incidental to property ownership.

One flaw in this reasoning is that, again, the person extracting water is not necessarily the owner of the property, and when the Agency is satisfied that this is so, it will bill, and seek to collect from, the person actually extracting water. True, the Agency will apparently look to the landowner, as the presumptive well owner, if the immediate extractor fails or refuses to pay. But the evidence supports a finding that this is not because the charge ultimately runs against the property; rather it is because the well owner is ultimately responsible for the use made of his extraction facility. The Agency apparently reasons that a well owner who allows an irresponsible person to extract water, and thus deplete the groundwater supply, should bear the responsibility his permittee has shirked. Any other rule would threaten to embroil the Agency in disputes between landlords, tenants, and possibly others as to who had assumed responsibility for the

charge. The charge devolves upon landowners not because it is incidental to their status as ownership but in the interest of administrative convenience, efficiency, and necessity.

Nor can we accept Objectors' contention that without extraction, the properties in question are rendered useless or worthless, or what is much the same thing, that extraction is necessary to productive use of the property. In essence Objectors contend that those on whom the charge is imposed have no choice but to extract water and that the only way to avoid the charge is to abandon their property. This overlooks the fact that there are other alternatives, however expensive or inconvenient they might appear. The basin contains surface water sources which, though scarce, will spare some users from augmentation charges if they choose to tap them. Residential extractors have the options of using cisterns with captured or hauled water, as well as combinations of bottled water, composting toilets, and conceivably even seawater toilets. Agricultural extractors could move to less water-intensive crops or even, perhaps, "dry farming." The fact that these may be highly unpalatable alternatives does not mean that persons extracting water have "no choice" but to continue to do so. The question, ultimately, is not whether they could easily choose to do something else but whether the activity of extracting water is so intrinsic to the ownership of their property that a charge on one engaging in that activity is incidental to the ownership of the property. We believe the trial court correctly concluded that it is not.

D. *Proposition 62*

Objectors separately contend that the augmentation charge is a "special tax" requiring approval of two-thirds of the electorate under Proposition 62, and specifically Government Code section 53722. This argument suffers from the same infirmity we noted in response to a similar point offered in connection with Proposition 218: Objectors' entire argument, and all authorities cited in its support, are concerned with the distinction between a "general tax" and a "special tax." (See Gov. Code, § 53721.) Objectors make no cogent attempt to demonstrate that the charge is a "tax" in the first

place. This is the equivalent of attempting to prove that a conveyance is a dirigible rather than a glider, when in fact it is a sled. A sled may indeed have more features in common with a dirigible than it does with a glider, but it lacks a critical characteristic of each of them: it is not an aircraft.

DISPOSITION

The judgment is affirmed.

_____
RUSHING, P.J.

I CONCUR:

_____
PREMO, J.

BAMATTRE-MANOUKIAN, J., CONCURRING

I concur in the result reached by the majority. I write separately for two reasons. First, I wish to emphasize the standards that guide and govern our review and that are the "threshold issue" in every appeal. (*Clothesrigger, Inc. v. GTE Corp.* (1987) 191 Cal.App.3d 605, 611.) Secondly, after careful consideration of the arguments raised by the parties and the relevant precedential authority, I believe that the question whether the increased augmentation charge at issue in this case is a fee imposed "as an incident of property ownership" is a close one, with important implications. (Cal. Const., art. XIII D, § 2, subd. (e) (hereafter article XIII D).)

In this validation action under Code of Civil Procedure section 860 the trial court heard testimony and issued a comprehensive statement of decision setting forth its findings of fact and conclusions of law regarding the three issues argued below and raised again here on appeal: 1) whether jurisdiction was proper under section 860; 2) whether two members of the Board of Directors of the Pajaro Valley Water Management Agency (the Agency) had disqualifying conflicts of interest; and 3) whether the augmentation charge imposed by Ordinance No. 2003-01 violated provisions of the California Constitution added by voters in Propositions 13, 62 and 218.

As to the jurisdictional issue, the trial court made specific findings based on the evidence and supporting its conclusion that the augmentation charge was a capacity charge within the scope of Government Code section 66013, which made it a proper subject of a validation procedure under Code of Civil Procedure section 860. We defer to the trial court's findings resolving factual issues if supported by substantial evidence. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) In addition, as the majority notes, the parties stipulated in the trial court that if any portion of the augmentation charge was found not to be within the jurisdiction of the court under Code

of Civil Procedure section 860, the complaint would be deemed to be amended to include a declaratory relief cause of action, so that all issues relating to the augmentation charge could be addressed and preserved for appeal. I believe this record demonstrates that jurisdiction was proper.

In regard to the asserted conflict of interest, the trial court again made factual findings, based on the evidence at the trial, and applied the relevant law, namely the Political Reform Act (Gov. Code § 87100, et seq.) and the pertinent regulations (Cal. Code Regs., tit. 2, § 18700, et seq.), in concluding that there was no disqualifying conflict of interest because the effect of the ordinance in question on the two directors was not "distinguishable from its effect on the public generally." (Gov. Code, § 87103.) I believe this process presents mixed questions of fact and law for our review. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 800.) Where the trial court has made factual determinations such as those underlying the questions whether the financial burden and beneficial effect of the increased augmentation charge were "proportional," I believe we defer to those findings if they are supported by substantial evidence. To the extent that the court interpreted and applied the relevant statutes and regulations to the facts as found, or to those that were uncontroverted, we conduct independent review, as appellant contends. (See *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, 579.)

Applying these rules, I would agree in general with the conclusions of the majority: that the "public generally" exception applied (Cal. Code Regs., tit. 2, § 18707.2, subds. (a) & (c)); that agriculture is a "predominant industry" throughout the Agency's district (Cal.Code Regs., tit. 2, § 18707.7, subd. (b)); that the regulations are not in conflict with the statutory provisions in the Political Reform Act; and that there was no common law conflict of interest. Therefore, guided by our standard of review, and based on the trial court's statement of decision, the record, and legal authority, I would find that directors Capurro and Gallino did not have a disqualifying conflict of interest.

As to the constitutional issues, appellant contends that the question whether the augmentation charge complied with constitutional requirements is a question of law for this court to decide after independently reviewing the facts. I agree that as a general rule, we conduct de novo review when we are asked to interpret constitutional provisions and their application to a particular ordinance. (*Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874; *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal. 4th 830 (*Apartment Association*).) In the case before us, however, a hearing was held, testimony was taken, written evidence was received, and the court made numerous findings. To the extent that these are findings of fact, I believe we defer to the trial court's findings resolving disputed factual issues if they are supported by substantial evidence in the record.

In my view, the key constitutional issue in this case is whether the augmentation charge is a property-related fee or charge subject to the requirements of article XIII D of the state Constitution. Section 2 of article XIII D defines a fee or charge as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." (Art. XIII D, § 2, subd. (e).) A "property-related service" is further defined as a service "having a direct relationship to property ownership." (Art. XIII D, § 2, subd. (h).)

Many courts have undertaken to analyze the meaning of the phrases "as an incident of property ownership" and "having a direct relationship to property ownership," in response to constitutional challenges to various fees and charges. For example, in *Apartment Association, supra,* 24 Cal.4th 830, the Supreme Court found that a fee imposed on owners of apartment buildings was not imposed *as an incident of property ownership* because it was levied on landlords "not in their capacity as landowners, but in their capacity as business owners." (*Id.* at p. 840.) The fee in *Apartment Association* was imposed based on a property owner's choice to use the property as a business venture. If

the business operation ceased, the fee was no longer imposed. Furthermore, the court found that the fee did not have a " 'direct relationship to property ownership' " because it was subject to the requirement that the landowner engage in the business of being a landlord. (*Id.* at p. 843.)

In another case the Supreme Court held that a capacity charge imposed as a condition of a new water hookup was not a charge "on real property as such," but was a charge against the individual for hooking up to water service. (*Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 420 (*Richmond*).) It was therefore not a special assessment, which is a levy "upon real property." (Art. XIII D, § 2, subd. (b).) The court distinguished this from a fee or charge, which could be imposed either on the property itself or upon the owner " 'as an incident of property ownership.' " (*Richmond, supra,* 32 Cal.4th at p. 420, fn. 2.) The court also addressed a fire suppression charge, which it found was not a fee imposed "as an incident of property ownership" because it was "not imposed simply by virtue of property ownership, but instead it is imposed as an incident of the voluntary act of the property owner in applying for a service connection." (*Id.* at p. 426.) The court explained that if the same fee were imposed as part of ongoing water service, it would be "an incident of property ownership" because it would require "nothing other than normal ownership and use of property." (*Id.* at p. 427.)

The parties before us rely upon, and distinguish, *Apartment Association* and *Richmond*. Appellant contends that the court's discussion in *Richmond* supports the contention that the fee in this case, which was imposed on all users of well water and not simply on those people who chose to apply for new hookups, was imposed "as an incident of property ownership." Appellant distinguishes *Apartment Association* on the basis that renting apartments for profit is a business, whereas using water on your own property is not a choice and requires nothing other than normal use of the property. Respondent, on the other hand, argues that the holding in *Richmond* is a narrow one, limited to the question whether a fee imposed as a condition of a new water hookup was a

special assessment, subject to the procedures and restrictions set forth in article XIII D, section 4. The court's discussion of other types of fees and charges, respondent contends, was dicta and thus cannot be relied upon as precedential authority. Respondent contends that *Apartment Association* is controlling because the augmentation charge here is imposed only on those who choose to extract well water and "not imposed solely because a person owns property." (*Apartment Association, supra*, 24 Cal.4th at p. 838.)

I believe these arguments frame a close and important issue. It appears from the record that the vast majority of property owners in the Pajaro Valley obtain their water from wells. There are few practical alternatives. Thus a property owner who "chooses" not to use well water must resort to means such as hauling water, using sea water, purchasing bottled water, or catching rain water. Otherwise, the property will be essentially unusable since, as the Supreme Court observed in *Richmond*, "water is indispensable to most uses of real property." (*Richmond, supra*, 32 Cal.4th at p. 426.) On the other hand, the augmentation charge imposed by Ordinance No. 2003-01 is not a flat fee imposed on all property owners but is a charge imposed per acre-foot for "groundwater extractions" within the Agency's boundaries. (Ordinance No. 2003-01, p. 5.)

Ultimately, I conclude, as did the trial court and the majority, that the augmentation charge is not a fee imposed "as an incident of property ownership" and thus is not subject to the restrictions and requirements of article XIII D. The trial court found that the charge is imposed only upon those pumping groundwater and is not imposed on property where there is no well or where the well is not being used as a source of water, and that the amount of the charge is proportional to the amount of use. These factors, I believe, distinguish the charge at issue here from fees found to be unconstitutional, such as the storm drainage fee in *Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351 and the "in lieu" fees in *Howard Jarvis Taxpayers Assn. v. City of*

Fresno (2005) 127 Cal.App.4th 914 and *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637.

In sum, guided by Supreme Court precedent and the appropriate standards of review, and mindful of our role as an intermediate appellate court (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), I would affirm the judgment of the trial court.

_____

BAMATTRE-MANOUKIAN, J.

Trial Court:	Santa Cruz County Superior Court Superior Court No.: CV146754
Trial Judge:	The Honorable Samuel S. Stevens
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