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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY, Plaintiff/Petitioner, vs. METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA, et al. Defendants/Respondents.	Case No. CFP-10-510830 Case No. CFP-12-512466 PRE TRIAL RULINGS

On November 4, 2013, I heard argument on a series of pretrial issues. The parties had previously filed First Pretrial Briefs and then Replies to those. This order treats (i) motions *in limine*, (ii) San Diego's request to augment the administrative record, and (iii) standards of review, burdens of prof and nature of the admissible record for the various claims.

1. Motions In Limine

A. Introduction

The central cases on *in limine* motions are *Amtower v. Photon Dynamics, Inc.*, 158 Cal.App.4th 1582 (2008); *Kelly v. New West Federal Savings,* 49 Cal.App.4th 659 (1996); and *R*

& B Auto Center, Inc. v. Farmers Group, Inc., 140 Cal.App.4th 327 (2006) (Rylaarsdam, Acting P.J., concurring).

The key function of these motions is to ensure juries do not hear inadmissible evidence, and in particular inadmissible evidence which may prejudice the jury. "The advantage of such motions is to avoid the obviously futile attempt to unring the bell in the event a motion to strike is granted in the proceedings before the jury." *Amtower*, 158 Cal.App.4th at 1593, quoting *Hyatt v. Sierra Boat Co.,* 79 Cal.App.3d 325, 337 (1978). Secondly, *in limine* motions can help speed the trial and allow for a more considered decision on difficult evidentiary issues. *Kelly*, 49 Cal.App.4th at 669-70. They are not a good device for resolving what are in effect dispositive motions such as motions for judgment on the pleadings or for summary adjudication. *Id.*; David N. Finley, CIVIL PRACTICE GUIDE: CALIFORNIA MOTIONS IN LIMINE § 1:4.[1]

It is, therefore, not useful—indeed, it is pointless—to file *in limine* motions in a bench trial when the central asserted problem is prejudice under Evid. C. § 352, because judges usually can be relied on avoid the bias, and, more practically, because the same judge will be viewing the evidence to evaluate it in the § 352 analysis anyway.[2] Too, when the main issue is undue consumption of time under § 352, *in limine* motions are pointless when either little time is at stake, or when about the same amount of time would be expended on e.g. a § 402 hearing (or reading voluminous depositions extracts or reviewing the documents) as at trial; and where the court has imposed time limits, the 'undue consumption of time' criterion under § 352 is in any

[1] More—more than any reader would want—is found at e.g., George P. Schiavelli, "Effective Use of Motions In Limine," http://ceb.com/reporter/freeAccess/articles/cvart805.pdf; C. Karnow, "Trial and Tribulations," http://works.bepress.com/curtis_karnow/10/

[2] For similar reasons § 352 objections should never be made in connection with motions for summary judgment. *People ex rel. City of Dana Point v. Holistic Health*, 213 Cal.App.4th 1016, 1029 (2013).

event of less concern since the advocates can, by and large, be relied on to spend time on what matters most to their case.[3]

It is generally not useful to ask for the exclusion of 'irrelevant' evidence, or immaterial evidence, or evidence which does not support the theories advanced in pleadings, unless *specifically* identified evidence is called out by the motion. These sorts of motions *in limine* are not much more than a request that the trial judge implement the law. We hope he will.

Finally, there are generally serious problems with motions which seek to exclude evidence just because it was not produced during discovery. The failure to produce discovery is not a sufficient basis; for example, there might have not have been a discovery demand for the item. Usually there are four requirements for this sort of preclusion order (and I mean aside from other grounds such as spoliation): (i) there was a discovery demand for the item; (ii) the party either (a) unqualifiedly responded that it would produce it, or that it had no objection to doing so, or (b) a court ordered its production; (iii) the item was extant (or the party knew the facts, if the demand was an interrogatory or deposition question) at the time the party was to produce it, and (iv) the party did not produce it.

B. Rulings

Metropolitan MIL No. 1 – Seeking to exclude all evidence outside the administrative record.

Denied. No specified evidence is cited. In any event for certain issues in the case, certain evidence outside the record may be admissible, including for (as the parties agree) the RSI and

[3] Thus some judges believe these sorts of motions are just out of place in a bench trial. E.g., http://judgebonniesudderth.wordpress.com/tag/motion-in-limine/; John N. Sharifi, "Techniques for Defense Counsel in Criminal Bench Trials," 28 AM. J. TRIAL ADVOC. 687, t.a.n. 12, http://www.scribd.com/doc/31439427/Bench-Trial-How-To; Randy Wilson, "The Bench Trial: It Really Is Different," ADVOCATE (2009), http://www.justex.net/JustexDocuments/12/Articles/Bench%20Trial.pdf

the preferential rights claims, and probably for the Wheeling statute claim. To assist the court in distinguishing the evidence which is within from that without the administrative record, future briefs should indicate the latter with, for example, an asterisk (*) or other agreed-on convention.

Metropolitan MIL No. 2 – Seeking to exclude all evidence of unpled theories or claims.

Denied. No specified evidence is cited.

Metropolitan MIL No. 3 – Seeking to exclude evidence of working groups of certain Metropolitan agencies and the motives and mental processes of Metropolitan's Board of Directors.

Denied. No specified evidence is cited. However, the parties may be able to use a lengthier discussion here.

This motion has two parts; there is no dispute as to the first part, that is, that evidence of the 'working group' including the 'secret society' and 'cabal' are not admissible. The second part of the motion has to do with the motives, mental processes and biases of Metropolitan's board of directors. I agree with San Diego that the deliberative process privilege is not directly applicable here, because it is a bar to discovery and inquiry, not necessarily to the admissibility of the evidence. I might bar questions of the board members concerning their mental processes,[4] but if they had for example penned a memo revealing those mental processes, a memo already in the hands of San Diego, the privilege probably would not bar its admission. The question is whether the mental processes and biases are *relevant*. It is not good enough to suggest, as San Diego does, that evidence outside the record might be relevant.[5] I assume it might, but that tells me little about what *sort* of extra-record evidence is admissible. The cases cited by San Diego do

[4] *Regents of University of California v. Superior Court*, 20 Cal.4th 509, 540 (1999).
[5] As San Diego notes, under the Wheeling statutes I am to consider "all relevant evidence."

not tell us that mental processes, bias, and the like, are admissible.[6] They do suggest that the proffered or *stated* reasons of the agency might matter in some cases so as to compare the means it used to accomplish the purpose, but those will be objectively determinable statements presumably in the administrative record, not evidence of people's mental impressions, and not admitted to impeach the stated purpose.[7]

Metropolitan MIL No. 4 – Seeking to exclude any evidence that was requested by Metropolitan during discovery but was not produced or disclosed in the course of discovery, excepting documents produced in response to public records requests.

Denied. See introductory discussion.

Metropolitan MIL No. 5 – Seeking to exclude all evidence or argument from San Diego and IID in both the 2010 and 2012 action that the Wheeling statute applies to the 2003 Exchange Agreement between Metropolitan and San Diego.

Denied. The motion does not seek to exclude specified evidence but rather preclude San Diego from taking a certain position, because, Metropolitan says, San Diego is precluded by the doctrine of judicial estoppel. It is generally inappropriate to preclude an entire claim in the context of an *in limine* motion.

2. San Diego's Motion to Augment the Administrative Record

San Diego moves to augment the administrative record with 54 additional exhibits. As to the first set of 46 exhibits, San Diego argues that each conveys information that was, or should

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[6] E.g., *City and County of San Francisco v. Western Air Lines Inc.*, 204 Cal.App.2d 105 (1962)(circumstances were contracts , rates, and *stated* justifications); *Brydon v. East May Mun. Utility Dist.*, 24 Cal.App.4th 178 (1994)(no motive or bias relied on); *Wilson v. Hidden Valley Mun. Water Dist.*, 256 Cal.App.2d 271 (1967) (court looked at "proceeding before the board" and indeed, "Any claim of prejudgment, bias or prejudice in favor of this policy on the part of the four directors in acting upon the petitions is beside the point." *Id.* at 286); *San Luis Coastal Unified School Dist. v. City of Morro Bay*, 81 Cal.App.4th 1044 (2000) (examination of *proffered* justifications).

[7] San Diego is incorrect in its suggestion that Metropolitan agrees in its Pretrial Brief (at 69) to the admissibility of this sort of evidence; Metropolitan only agrees that extra-record evidence might be admissible for the RSI claim.

have been, in Metropolitan's possession when it made the decisions at issue in this case. Motion, 2. San Diego tells us that these consists of earlier studies, reviews, and reports made in response to the agency's mandate. *Id.* at 2-3 (citing Exhibits 25 and 36 as examples) If *Western States*[8] applies, San Diego argues that this evidence should be included in the administrative record because it could not be produced at the administrative level in the exercise of reasonable diligence because Metropolitan had the evidence in its possession at the time but hid it from San Diego. *Id.* (citing Exhibit 32 as an example). And to the extent these arguments don't work, San Diego argues that the exhibits should be considered as 'background information'.

San Diego also argues that 8 exhibits consisting of discovery should be included in the administrative record or considered as extra-record evidence under *Western States.* San Diego asserts that the exhibits contain admissions by Metropolitan about the true basis for its rates, its lack of analysis or data supporting its rate decisions, and admissions contradicting Metropolitan's representations made when it adopted the rates. San Diego argues that the exhibits are admissible because they were in Metropolitan's possession at the time it enacted the rates and San Diego could not have presented them at the rate hearing. San Diego also contends that the exhibits are admissible because they establish Metropolitan's failure to consider the costs of its services, the source of its costs, and Metropolitan's inadequate explanation of the bases for its rate decisions.

In general, the administrative record consists of documents considered by the agency in making its decision. *Evans v. City of San Jose*, 128 Cal.App.4th 1123, 1144 (2006). Under *Western States*, a court may augment the administrative record if evidence is relevant and it was improperly excluded during the administrative process or it could not, in the exercise of

[8] *Western States Petroleum Ass'n v. Superior Court*, 9 Cal.4th 559, 565, 576 (1995).

reasonable diligence, have been presented before the administrative decision was made. *Id.*, citing *Western States*, 9 Cal.4th at 573.[9]

A. First Set of Proposed Additions

San Diego provides no evidence that any of the exhibits were actually considered by the Metropolitan Board in setting the rates in this case. San Diego argues, relying on *Santa Cruz*, that some of the exhibits are studies, reviews, and reports whose contents should be imputed to the Metropolitan Board. San Diego points to only two examples of studies, a 1969 study and a 1999 study, and one memorandum from 1997. San Diego Motion, 3; Exs. 25, 32, 36; *see also* San Diego Brief, 28-30 (citing Ex. 74 at 35:14-36:17 for the proposition that the 1999 study formed the core of the financial planning model Metropolitan uses to set its rates). San Diego does not make any specific argument as to the remainder of the exhibits in the first set.[10]

It is not clear from the face of the 1969 study (which provided background about Metropolitan and projected water and revenue requirements through June 1990) why Metropolitan would have considered it in ratemaking forty years later. San Diego argues only

[9] *Western States* in dicta says there may be other exceptions, noting a federal exception for background information and for ascertaining whether the agency considered all relevant factors or fully explicated its course of conduct or grounds for decision. *Western States*, 9 Cal.4th at 578-79.

[10] At argument San Diego told me that these were the specific items they wished added to the administrative record: Ex. 25 (June 1969 Metropolitan Board authorized water policy price study providing background on Metropolitan and its water supply and requirements, financial data and revenue requirements, water pricing practices and studies, and proposing rates); Ex. 26 (June 1992 revenue designed study prepared by the Metropolitan Board pursuant, in part, to legislation requiring Metropolitan to conduct a study to investigate water supply and demand management strategies that will result in reliable water supplies at reasonable cost. Evaluating existing and potential revenue sources); Ex. 28 (November 1995 Planning & Resources Division memo containing suggested workplan for initiating internal discussion of strategies for wheeling, contracts, rate refinements, and finalizing IRP); Ex. 29 (March 1996 Planning & Resources Division memo, attached to which is a report prepared for the LA and Orange County water districts (and for the benefit of their representatives on the Metropolitan Board) that discusses wheeling policies, legal aspects, and alternatives); Ex. 31 (July 1996 Planning & Resources Division memo containing background material (unclear who generated the background material) to prepare recipients to discuss meeting on wheeling and pricing strategies); Ex. 36 (June 1999 cost of service report prepared for Metropolitan by Raftelis. At the hearing, San Diego argued that this report is referenced and its meaning is disputed in the administrative record); Ex. 57 (March 2010 email exchange under the subject "language for RFC report); Ex. 59 (April 2010 email exchange under the subject "NARUC chart of accounts").

that Metropolitan presumptively considered it because it was a past study conducted by Metropolitan. I discuss that argument below. As to the 1999 study, there is no evidence that it was ever circulated to the Board, intended to be circulated to the Board, or hidden from any party. There is no basis to conclude that it was considered by the Board or that San Diego was unable to discover it with reasonable diligence before the ratemaking process was complete. San Diego does attempt to provide evidence that the board considered the 1999 study found in Exhibit 36. Ex. 74, 35:14-36:17. But the testimony is ambiguous and never references the 1999 study. So San Diego has not established that Metropolitan considered the 1999 study in the ratemaking in these cases.

As to the rest of the items, San Diego asks me to infer just from their existence that the Metropolitan Board considered them in setting the 2010-2014 water rates.

San Diego invokes *City of Santa Cruz v. Local Agency Formation Com.*, 76 Cal.App.3d 381 (1978). The agency had certified a record with a number of studies, reviews, and reports made by and for the agency. Santa Cruz objected because many of these had not actually been presented to the commissioners. The Court rejected the objection: there was no indication that the documents were not available for inspection and consideration as required by the governing statute, and so presumed the agency had considered the materials which after all had been made in response to legal requirements.

Santa Cruz does not support San Diego's argument, an argument for a loophole which threatens to swallow the usual rules on the scope of an administrative record. *Santa Cruz* tells us that an objector cannot remove items from administrative record just because they were not literally discussed or presented at a board meeting; it is not authority to *add anything* not literally discussed or presented at a board meeting. San Diego has not established that (1) the Board

considered the reports; (2) San Diego could not have presented the reports with reasonable diligence;[11] or (3) that the exhibits are relevant.

B. Second Set of Proposed Additions (Discovery Responses)

Deposition transcripts are not part of the administrative record. *Compare Carrancho v. Cal. Air Resources Bd.*, 111 Cal.App.4th 1255, 1264, 1269-71 (2003) (deposition testimony inadmissible pursuant to general bar on extra-record evidence) *with Nasha L.L.C. v. City of Los Angeles*, 125 Cal.App.4th 470, 485 (2005) (deposition testimony admissible because evidence of bias admissible under C.C.P. § 1094.5). And none of the discovery responses proffered now existed when the administrative decision was made, so they could not have been presented to the agency and cannot be admitted under the *Western States* exception. *Western States*, 9 Cal.4th at 578-79. The apparent purpose of this discovery is to contradict Metropolitan's asserted basis for setting the rates. San Diego Motion, 5. This is probably not a proper use. *Western States*, 9 Cal.4th at 579 (prohibition against admitting extra-record evidence merely to contradict the evidence on which the administrative agency relied).

The motion is denied.

3. Request for Judicial Notice

The request for judicial notice is not opposed and is granted.

4. Standards of Review, Burdens of Proof, and Evidence that Should be Considered

The determinations in this section are expressly subject to revision by the time of the court's statement of decision. There are a number of reasons for this. First, the parties' first pretrial briefs and the replies have not actually addressed, in the case of every claim, the

[11] San Diego avers that Metropolitan hid the reports, but cites no evidence for that assertion.

standards of review, burdens, and extent of the applicable record. Secondly, there may be specific issues within a claim which are subject to a different standard than the claim generally. For example, it is possible that while the standard of review for a claim is generally deferential such as 'arbitrary and capricious,' one of the subsumed issues requires me to construe a statute or constitutional provision in which case the standard is likely to be less deferential. Or vice-versa, where a legal issue is subject to *de novo* review but I am also called on to review the agency's factual determinations. Third, the evidence adduced may meet a variety of standards and it so it may not matter which one I adopt.[12] Fourth, and related to the previous reason, because many of the claims pose essentially the same question (which is, to put it most simply, whether the rates charged were commensurate with the services provided), it may not matter much which of varying standards is deemed to apply to a given claim. Fifth, the parties occasionally dispute whether a question posed by one of San Diego's claims is factual or legal; they each rephrase the issue to lead ineluctably to their preferred standard of review. I may have to determine at trial how best to conceive those issues.

A. **Default rules**

The general principles governing review of a quasi-legislative action on a writ of mandate under C.C.P. § 1085 are discussed in *American Coatings Assn., Inc. v. South Coast Air Quality Dist.*, 54 Cal.4th 446, 460 (2012). The rules are: (1) the standard of review is arbitrary

[12] Some of the standards discussed by the cases cited by the parties may make distinctions without much of a difference. For example, as I note below, on some statutory issues such as the MWD Act I probably have to give 'great weight' to the agency's reading but yet make the final call. It is not obvious how that differs from the usual *de novo* work courts usually undertake in statutory interpretation. More examples: is the 'arbitrary and capricious' standard more deferential to the agency than the 'substantial evidence' standard? Do these both amount to the same thing, i.e. whether the agency had a 'reasonable basis' for its decision? Might I need to decide between being deferential and *highly* deferential? E.g. Metropolitan Reply at 14. Some fine distinctions may be "beyond judges' cognitive capacity. The multiplication of unusable distinctions is a familiar judicial pathology." R. Posner, REFLECTIONS ON JUDGING 251 (Harvard 2013).

and capricious, (2) petitioner usually bears the burden of proof,[13] and (3) the court considers only the administrative record before the agency at the time of its decision. An administrative agency's rate-making is that sort of quasi-legislative action. *20th Century Ins. Co. v. Garamendi*, 8 Cal.4th 216, 277 (1994); *Brydon v. East Bay Mun. Util. Dist.*, 24 Cal.App.4th 178, 196 (1994) (water rate structure is quasi-legislative). Rates are presumed reasonable, fair, and lawful. *Hansen v. City of San Buenaventura*, 42 Cal.3d 1172, 1180 (1986) and petitioners have the burden of showing otherwise. *Id; San Diego Cnty. Water Auth. v. Metro. Water Dist. of S. California,* 117 Cal.App.4th 13, 23 n.4 (2004).

At argument, San Diego emphasized its position that the usual rules have to some extent been trumped by *20th Century Inc. Co. v Garamendi*, 8 Cal.4th 216 (1994) "especially after" *Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority*, 44 Cal.4th 431 (2008).

But *Garamendi* was not a harbinger of revolution. There, the court distinguished (1) legal issues subject to *de novo* or "independent[]" review, such as whether the Proposition authorized the Insurance Commissioner to adopt rate regulations, and whether the regulations actually adopted were consistent with the Proposition, 8 Cal. 4th 216, 271-73, from (2) issues as to which the court was to defer under the "arbitrary-or-capricious standard of review" such as whether the regulations were "necessary and proper for the implementation of a statute," *id.* at 273. And in *Silicon Valley*, the Court's ruling was limited to the sorts of assessments there discussed, because of the constitutional cast the voters determined to place on those assessments. So the Court held, "courts should exercise their independent judgment in reviewing whether assessments that local agencies impose violate article XIIID." *Silicon Valley,* 44 Cal. 4th at 450.

[13] Evid. C. § 500. The burden of producing evidence is usually, but not always, on the party which has the burden of proof. Evid. C. § 550 (b).

Below, I implement *Silicon Valley* that way, as addressed to putative assessments the subject of constitutional scrutiny; but not further.

Evidence outside the administrative record is not usually admissible. *Western States Petroleum Ass'n v. Superior Court*, 9 Cal.4th 559, 565, 576 (1995). *Western States* did recognize a narrow exception: Extra-record evidence is admissible in traditional mandamus proceedings if it existed before the agency made its decision and it was not possible in the exercise of reasonable diligence to present it to the agency before the decision was made. *Id.* at 578. Other exceptions might exist, but extra-record evidence cannot be used to contradict the administrative record. *Id.* at 578-79.

Those are the default rules. As we see below, they do not always apply.

B. The Claims

Proposition 26 (California Constitution Article XIIIC)

1. Standard of Review

California Constitution Article XIIIC § 1(e) provides,

> The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a pay or bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

This is similar to that enacted by Proposition 218 and found in article XIIID § 4(f), which states

> In any legal action contesting the validity of any assessment, the burden shall be on the agency to demonstrate that the property or properties in question receive a special benefit over and above the benefits conferred on the public at large and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property or properties in question.

Proposition 218 probably requires independent review. *Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority*, 44 Cal.4th 431 (2008).[14] Proposition 26 specifies the "burden of proving by a preponderance of the evidence" that the charge is not a tax, whereas Proposition 218 uses only the general term "burden." By clarifying the burden, Proposition 26 may more strongly suggest that independent or *de novo* review is required. After Proposition 218, "an assessment's validity, including the substantive requirements, is now a constitutional question," and agencies may not exercise discretion to violate the constitution. *Silicon Valley*, 44 Cal.4th at 448. This too suggests *de novo* review. *See also Griffith v. City of Santa Cruz*, 207 Cal.App.4th 982, 990 (2012) (reviewing trial court's denial of petition for writ of mandate pursuant to Propositions 218 and 26 *de novo* because it involved a facial constitutional challenge to an ordinance as written); *Greene v. Marin Cnty. Flood Control & Water Conservation Dist.*, 49 Cal.4th 277, 298 (2010) (reciting *Silicon Valley*).

2. Burden of Proof

As San Diego's counsel suggests, it is peculiar to consider burdens of proof when it comes to purely legal issues such as constitutional interpretation.[15] The parties' briefs do not do much to discuss the burden on issues such as whether for example Metropolitan's rates are taxes, or whether approval by 2/3 of the Metropolitan Board satisfies Proposition 26 (Metropolitan's Reply brief does say San Diego has the burden).

Here's the statutory language: "the local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax." This suggests

[14] *Silicon Valley* held the Proposition did not specify the burden, and so considered extrinsic evidence of voter intent. *Id.* at 445. The Court found that Proposition 218 was intended to overturn cases that held a deferential view of local government assessments was required. *Id.* at 445-46. And the Court concluded that the primary basis for deferential review, judicial deference to legislative acts, did not apply under Proposition 218, a constitutional amendment designed to limit local power, because Proposition 218 makes an assessment's validity a constitutional question. *Id.* at 447-48. Neither party here discusses the extrinsic evidence of voter intent as to Proposition 26.

[15] The notion of a 'burden' in this sense probably is limited to the proof of *facts*. Cf., M. Simons, CALIFORNIA EVIDENCE MANUAL § 9:1 at 607 (2013 edition).

that Metropolitan bears the burden of proving that its charge is not a tax under *any* of the seven exceptions. Metropolitan has not provided authority for its alternative reading.

3. Evidence

Following the usual pattern in the briefs, Metropolitan tells me I must limit my review to the administrative record and San Diego says the opposite. Neither side has clear authority. San Diego cites *Town of Tiburon* as if it authorized consideration of extra-record evidence whenever a court's independent judgment is exercised (Reply, 10), but that isn't so. The case just invokes *Western States*:

> Ordinarily, when we review the decision of a public agency under the substantial evidence standard, we confine our review to the administrative record of the agency's action. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573, 38 Cal.Rptr.2d 139, 888 P.2d 1268.) However, we are not so constrained when we exercise independent judgment in reviewing the action of a public agency. As set forth in Code of Civil Procedure section 1094.5, subdivision (e), a court authorized to exercise independent judgment may admit and consider extra-record evidence in administrative mandate proceedings if the evidence was improperly excluded by the public agency or could not have been produced through the exercise of reasonable diligence at the time of the hearing. Although the Town acknowledges this rule, it contends that appellants have made no showing as to why the Original District administrative record was not presented to the Town's council or was improperly excluded from consideration.
>
> *Town of Tiburon v. Bonander,* 180 Cal. App. 4th 1057, 1076 (2009).

Given the default rule that the scope of review is limited to the administrative record (with certain exceptions) and the failure of Proposition 26 to clearly modify this standard, I will here follow *Western States* and look only to the administrative record.

Proposition 13 and Government Code § 50075-50077

1. Standard of Review

San Diego states that the standard of review under Proposition 13 is the same as that for Proposition 26 because Proposition 13 creates constitutional requirements. San Diego Brief, 38.

Metropolitan argues that the arbitrary and capricious standard applies. Metropolitan Brief, 58. As San Diego correctly asserts in reply, whether a statute imposes a tax or a fee for the purposes of Proposition 13 is a question of law to be decided on an independent review of the facts. *See Cal. Farm Bureau Federation v. State Wat. Resources Control Bd.*, 51 Cal.4th 421, 436 (2011).[16]

2. Burden of Proof

San Diego states that the burden of proof under Proposition 13 is the same as that for Proposition 26. San Diego Brief, 38. Metropolitan argues that the following burden-shifting framework applies: (1) San Diego bears the burden of establishing a prima facie case showing that the fee is invalid; and (2) if San Diego's evidence is sufficient, Metropolitan then bears the burden of production to show that the challenged components of its rates bear a fair or reasonable relationship to the costs of the service Metropolitan provides. Metropolitan Brief, 59. However, Metropolitan asserts that San Diego bears the burden of proof, and Metropolitan's burden is one of production only. *Id.* San Diego appears to agree. San Diego Reply, 24. I should use the burden-shifting framework offered by Metropolitan. *See Cal. Farm Bureau*, 51 Cal.4th at 436-37.

3. Evidence

The parties make the same arguments here as with Proposition 26. For the same reasons I will look solely to the administrative record.

Wheeling Statutes

The wheeling statutes provide that no "public agency may deny a bona fide transferor of water the use of a water conveyance facility which has unused capacity, for the period of time for

[16] San Diego relies on *California Farm Bureau* for its propositions concerning the standard of review, Metropolitan relies on the same case for its propositions concerning the burden of proof.

which that capacity is available, if fair compensation is paid for that use, subject to [enumerated exceptions]." Wat. Code § 1810. "'Fair compensation' means the reasonable charges incurred by the owner of the conveyance system, including capital, operation, maintenance, and replacement costs, increased costs from any necessitated purchase of supplemental power, and including reasonable credit for any offsetting benefits for the use of the conveyance system." Wat. Code § 1811(c).

1. Standard of Review

Section 1813 provides,

> In making the determinations required by this article, the respective public agency shall act in a reasonable manner consistent with the requirements of the law to facilitate the voluntary sale, lease, or exchange of water and shall support its determinations by written findings. In any judicial action challenging any determination made under this article the court shall consider all relevant evidence, and the court shall give due consideration to the purposes and policies of this article. In any such case the court shall sustain the determination of the public agency if it finds that the determination is supported by substantial evidence.

Metropolitan argues that it is entitled to determine what constitutes "fair compensation," and its determination is subject to substantial evidence review. Metropolitan Brief, 49-50. San Diego writes that the statute only requires me to review Metropolitan's factual determination made in written findings under the substantial evidence standard, San Diego Brief at 42, and frames the issue as a legal one: Did Metropolitan include improper components in the rate such that San Diego was forced to pay more than fair compensation? San Diego Brief, 42-43. Metropolitan replies that the legal question proffered by San Diego has already been answered in its favor, but Metropolitan does not address the standard of review. Metropolitan Reply, 11.

In *Metropolitan Water Dist. of Southern Cal. v. Imperial Irr. Dist.*, 80 Cal.App.4th 1403, 1423, 1426-33 (2000), the Court of Appeal found the wheeling statutes do not always preclude the consideration of system-wide costs in a wheeling rate calculation, and in so doing the Court

afforded no deference to Metropolitan's position. Accordingly, I should review *de novo* whether the statute applies or bars the inclusion of any component in a rate. But to the extent I must to review Metropolitan's factual "fair compensation" determination, the statute requires me to do so under the substantial evidence standard.

2. Burden of Proof

The statutory language does not address the burden of proof, nor is there authority on point. Metropolitan argues that San Diego bears the burden of proof, as under the common law. Metropolitan Brief, 51. San Diego argues that *Beaumont Investors v. Beaumont-Cherry Valley Water District*, 165 Cal.App.3d 227 (1985) places the burden of proof on the water district to prove that its charges are fairly allocated and do not exceed the reasonable cost of service. San Diego Motion, 47-48. Metropolitan replies that, if anything, *Beaumont* shifts only the burden of production. Metropolitan Reply, 17, 26. This is correct. *Homebuilders Ass'n of Tulare/Kings Cntys., Inc. v. City of Lemoore*, 185 Cal.App.4th 554, 563 (2010) (*Beaumont* conflated the burden of production and the burden of proof, the agency in *Beaumont* failed to meet its burden of production). In an argument made throughout the pretrial briefing, San Diego also suggests that Metropolitan should bear the burden of proof because there is a disparity in the available information regarding the claim.[17] San Diego Brief, 47-48. But Metropolitan's evidence is the administrative record: everyone has it. San Diego's argument proves too much: it would be enough to switch the burden in all administrative review cases.

3. Evidence

The statute requires me to consider all relevant evidence. *See* Wat. Code § 1813. Metropolitan, without addressing the statutory language, argues that I must only consider the

[17] Assigning the burden contrary to the usual rule (found in Evid. C. § 500) generally requires attention to four different factors, only one of which is the unique availability of the evidence. *See generally*, M. Simons, CALIFORNIA EVIDENCE MANUAL § 9:2 (2013 edition).

administrative record because (i) the substantial evidence review standard applies or (ii) extra-record evidence is irrelevant. Metropolitan Brief, 51-53. But the statute tells me to consider *all* relevant evidence. At argument, Metropolitan agreed that were a wheeling claim to be made against a person or entity (aside from an administrative agency) evidence outside an administrative record *would* be admissible; there is no reason that should not be so just because there *also* happens to be an administrative record.

Government Code §§ 54999.7(a) and 66013

Metropolitan disputes whether these statute apply, as a matter of law, and whether the § 66013 claim was within the scope of the pleadings. Metropolitan Brief, 43-44 (arguing § 54999.7 does not apply); Metropolitan Reply, 7-8 (arguing that § 66013 does not apply and was not properly alleged).

1. Standard of Review

San Diego argues that the Court should apply the de novo standard of review because this case is about legal questions, not Metropolitan's factual findings. San Diego Brief, 53. Metropolitan argues that, if the statutes apply, I should apply the 'arbitrary and capricious' standard because San Diego is challenging Metropolitan's quasi-legislative act of rate making. Metropolitan Brief, 45-46.

The applicability of the statutes is a legal matter, and no deference is afforded to Metropolitan. To the extent San Diego alleges Metropolitan acted unreasonably by including certain components in its water rates, this may raise factual questions, challenging Metropolitan's quasi-legislative actions. As to such issues, I afford deference to Metropolitan.

2. Burden of Proof

Metropolitan asserts that the default rule that San Diego must carry the burden of proof should apply here. Metropolitan Brief, 46. San Diego argues that Metropolitan must bear the burden because Metropolitan was in a better position to know what its costs were and how to defend its charges as reasonable. San Diego Brief, 53. As noted above, this argument is unpersuasive. I apply the default rule that San Diego bears the burden of proof.

3. Evidence

There is no reason not to follow the default rule that I am confined to the administrative record.

The MWD Act

San Diego argues that Metropolitan violated its enabling statute, the MWD Act, by including in its wheeling rate costs that are unrelated to wheeling. San Diego Brief, 53-54. At issue is Water Code § 134, which requires Metropolitan to set rates that are "uniform for like classes of service throughout the district."

1. Standard of Review

San Diego argues that the *de novo* standard applies because I am confronted with the legal question of whether Metropolitan's rates are consistent with the statutory requirement. San Diego Brief, 54. Metropolitan contends that the arbitrary and capricious standard applies to the determination of whether its rates comply with the law. Metropolitan Brief, 25. To the extent that the parties dispute the meaning of Metropolitan's enabling statute, Metropolitan argues that its interpretation of the statute is entitled to deference. *Id.*

In construing § 135 in a declaratory relief action, the Court of Appeal noted that "the judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the administrative construction." *San Diego Cnty. Wat. Authority v. Metropolitan Wat. Dist. of Southern Cal.*, 117 Cal.App.4th 13, 22-23 (2004). The Court further noted that substantial deference must be given to Metropolitan's determination of its rate design and that rates established by a lawful rate-fixing body are presumed reasonable, fair, and lawful. *Id.* at 23 n.4. Accordingly, here I should give substantial deference to Metropolitan's rate design, presume that Metropolitan's rates are reasonable, and accord great weight to Metropolitan's statutory construction while independently taking ultimate responsibility for construction of the statute. *Yamaha Corp. of America v. State Bd. of Education*, 19 Cal.4th 1, 11 n.4 (1998) (court has final responsibility for the interpretation of the law).

2. Burden of Proof

To the extent a burden of proof applies, San Diego asserts that it should be Metropolitan's. Metropolitan argues for a burden-shifting scheme: (1) the plaintiff has the initial burden to establish that rates are different for different classes of like entities; (2) upon that showing, the defendant must make a showing that the rates were fixed by a lawful rate-fixing body, giving rise to an assumption of fact is required to be made that the rates fixes are reasonable, fair, and lawful; and (3) the plaintiff has the ultimate burden to show that the rates fixed are unreasonable. Metropolitan Brief, 25 (citing *Elliott v. City of Pacific Grove*, 54 Cal.App.3d 53, 60 (1975)).

In *Elliott*, the Court stated in dicta that the burden-shifting scheme proposed by defendants should apply in a rate-setting case. San Diego does not address this in its reply papers. In light of the presumption that Metropolitan's rates are reasonable, the burden-shifting

scheme proposed by Metropolitan should apply here. *See also Hansen*, 42 Cal.3d at 1180 (citing *Elliott* for the propositions that rates established by a lawful rate-fixing body are presumed reasonable and that, thus, plaintiffs bear the burden of showing that the rates fixed are unreasonable).[18]

3. Evidence

Absent a showing that evidence is admissible pursuant to an exception under *Western States*, I should consider only the administrative record.

Common Law

1. Standard of Review

Metropolitan contends that the arbitrary and capricious standard of review applies because San Diego is challenging its presumptively reasonable water rates. Metropolitan Brief, 41. San Diego never identifies an applicable standard of review, but asserts that Metropolitan abused whatever discretion it had such that its rates are invalid under any standard of review. San Diego Reply, 34. At the hearing, San Diego argued that *Silicon Valley,* 44 Cal.4th 431, spelled the end of the deferential standard of review. For reasons noted above, I disagree with respect to the non-constitutional issues posed by the common law claims. I conclude I should give Metropolitan deference. Even when appellate opinions have not applied the writ of mandate standard to rates, they follow the "substantial deference" standard and presume rates' reasonableness. *See San Diego*, 117 Cal.App.4th at 23 n.4.

[18] However I do not here decide that the sole means to establish a MWD Act violation is to prove different classes of entities; that is matter of statutory interpretation, left to a decision on the merits.

2. Burden of Proof

Metropolitan argues that the same burden-shifting scheme described above pertaining to the MWD Act applies to the common law claim. Metropolitan Brief, 42. San Diego agrees that, as a general rule, the plaintiff must ultimately show that the discrimination is unreasonable. San Diego Brief, 55. Nevertheless, San Diego argues that the ultimate burden should be shifted here. *Id.* The burden-shifting procedure described above should apply to the common law theory for the same reasons it should apply under the MWD Act.

3. Evidence

San Diego does not address the scope of evidence for the common law claims. San Diego Brief, 55-5; San Diego Reply, 33. As with the MWD Act claim, I should confine myself to the administrative record, absent San Diego's showing that an exception to *Western States* applies.

The RSI Clause

The RSI clause denies subsidies funded by the Water Stewardship Rate to parties that challenge Metropolitan's rates by judicial review. San Diego argues that the RSI clause (1) is an unconstitutional condition on public benefits; and (2) violates C.C. § 1668.

The parties agree that I am to evaluate the RSI clause claim in the first instance; this is not an agency review. *See* San Diego Brief, 56; Metropolitan Brief, 68. The parties also agree that the RSI clause claims are subject to the default rules under the Evidence Code. San Diego Brief, 56; Metropolitan Brief, 68. Thus I will consider all admissible evidence. SWDCA Brief, 56; Metropolitan Brief, 69.

The parties frame the burden of proof differently. First, on the constitutional claim, Metropolitan argues that the following burden-shifting analysis applies: (1) San Diego must show (a) that it is a potential recipient of a public benefit to which the unconstitutional conditions doctrine applies; (b) the RSI clause implicates a constitutional right enjoyed by San Diego; and (c) the RSI provision impinges on that constitutional right; and (2) if San Diego carries its initial burden, Metropolitan must demonstrate by a preponderance of the evidence the practical necessity for the limitations: (a) the condition reasonably relates to the purpose of the legislation that confers the benefit; (b) the value accruing to the public from imposition of the condition manifestly outweighs any resulting impairment of the constitutional right; and (c) there are no available alternative means that could maintain the integrity of the benefit programs without severely restricting a constitutional right. Metropolitan Brief, 68-69. San Diego discusses only the second portion of the test as formulated by Metropolitan in its brief, and does not address the issue in its reply. San Diego Brief, 57; San Diego Reply, 34 (postponing its response to future briefing). The burden shifting framework set forth by Metropolitan appears correct. *Sanchez v. County of San Diego*, 464 F.3d 916, 930-31 (9th Cir. 2006) (citing *Parrish v. Civil Serv. Comm'n of the Cnty. of Alameda*, 66 Cal.2d 260 (1967)); *Robbins v. Superior Court*, 38 Cal.3d 199, 213 (1985) (when receipt of a public benefit is conditioned on the waiver of a constitutional right, the government bears the heavy burden of demonstrating the practical necessity of the limitation).

On the § 1668 claim Metropolitan argues that San Diego bears the burden of establishing Metropolitan's violation by a preponderance of the evidence, as with any other civil claim. Metropolitan Brief, 68-69. San Diego does not address the burden of proof in its briefing. *See* San Diego Brief, 57, San Diego Reply, 34. Because the default rules of evidence apply, Metropolitan is correct.

Preferential Rights

San Diego writes that the default rules under the Evidence Code apply. San Diego Brief, 58. Metropolitan agrees that (1) San Diego must prove a violation by the preponderance of the evidence; and (2) I may consider all relevant evidence admissible. Metropolitan Brief, 84. But Metropolitan argues that its statutory construction is entitled to deference because it is the agency tasked with implementing the statute. *Id.* at 83. San Diego does not address this argument, reserving responsive argument to future briefing. San Diego Reply, 34.

As discussed above, I should afford great weight to Metropolitan's interpretation of its implementing statute but am ultimately responsible for the statutory interpretation. *See San Diego*, 117 Cal.App.4th at 22-23.

Dated: November 5, 2013

Curtis E.A. Karnow
Judge Of The Superior Court