Citizens For Fair REU Rates, et al., Plaintiffs and Appellants vs. City of Redding, et al., Defendants and Respondents.

C071906

COURT OF APPEAL OF CALIFORNIA, 3RD DISTRICT

2013 CA App. Ct. Briefs 71906; 2013 CA App. Ct. Briefs LEXIS 819

April 18, 2013

[Superior Court Case Nos. 171377; 172960].

Appeal from the Superior Court of the State of California for the County of Shasta.

Honorable William D.Gallagher, Judge Presiding.

Initial Brief: Appellee-Respondent

COUNSEL: [*1] MICHAEL G. COLANTUONO (143551), AMY C. SPARROW (191597), MICHAEL R. COBDEN (262087), COLANTUONO & LEVIN, PC, Penn Valley, California, Attorneys for Respondent City of Redding.

INTERESTS: CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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

None.

DATED: April 17, 2013

Respectfully submitted,

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TITLE: Respondents' Brief

TEXT: INTRODUCTION

This case asks this Court to decide whether a component of the City of Redding's electric rates, in place for 25 years, was invalidated by a new definition of "tax" adopted by Proposition 26 in 2010. On demurrer, the trial court reviewed ample briefing and heard argument on the factual and legal issues. The court then reviewed another full round of briefing and argument in a half-day bench trial in the first of these two consolidated cases, and re-examined that briefing and conducted an additional half-day bench trial in the second case. Judge Gallagher rendered two detailed and thoughtful statements of decision concluding that voters did not intend Proposition 26 to apply retroactively to invalidate local government legislation such as Redding's payment in lieu of taxes ("PILOT"). The PILOT is a transfer from the City's electric utility to its general fund to support vital City services of benefit to the utility, such as police, fire, and street services. [*2]

As do most municipal utilities in California, the City of Redding established its PILOT to approximate the 1 percent property tax its utility assets would bear if owned by an investor-owned utility like Pacific Gas & Electric. The PILOT compensates the City's general fund for numerous benefits and services provided by the City so the general fund is not impoverished by the decision to municipalize electric service. Redding's PILOT was established 25 years ago, was amended on several occasions to better approximate the property tax, and has been unchanged since 2005.

Appellants argue Proposition 26, article XIII C, section 1, subd. (e) of the California Constitution, n1 now requires voter approval of the long-standing PILOT because the existence of the PILOT necessarily means the City's electricity rates necessarily exceed the cost of service limitation stated in article XIII C, section 1, subd. (e)(1) and (2). However, the text of Proposition 26 is plain that it requires limited retroactivity as to State government and no retroactivity as to local government.

n1 All further references to articles and sections of articles in this Brief are to the California Constitution.

[*3]

Furthermore, applying Proposition 26 retroactively to invalidate local rate-making legislation that predates it would eliminate low-income and senior rate subsidies, environmental protections and other public goods legislated prior to the adoption of the measure - the very consumer and environmental protections the ballot arguments promised Proposition 26 would preserve.

Finally, even if Proposition 26 did apply to the PILOT, it is not a tax because Redding's rates do not exceed its cost to provide electricity service, as the PILOT is funded from non-rate revenues.

For these reasons, the City respectfully asks this Court to affirm Judge Gallagher's well-reasoned decisions.

STATEMENT OF THE CASE

On February 4, 2011, Citizens for Fair REU Rates filed a petition for writ of mandate and complaint for declaratory and injunctive relief (Case No. 171377, "Rate Case") against Respondents City and City Council of Redding (collectively, "Respondents" or "City"), alleging Redding Electric Utility ("REU") rate increases adopted December 7, 2010 by Resolution No. 2010-179 are rendered illegal taxes by the continuing existence of the PILOT. (1 CT 2.) On March 9, 2011, the City demurred, [*4] arguing that none of the constitutional provisions cited by Appellants n2 applied to the pre-existing PILOT. (1 CT 29.) On June 6, 2011 the court denied the demurrer. (2 CT 474.) The City answered June 16, 2011, denying all claims and contentions. (2 CT 486.) On August 5, 2011, the City lodged its 12-volume Administrative Record ("AR") containing the information considered by its City Council when legislating the PILOT and REU rates. n3 (2 CT 496.)

n2 This brief uses "Appellants" to refer collectively to Citizens for Fair REU Rates, Fee Fighter, LLC and the individual plaintiffs and petitioners in both cases consolidated here.
n3 Appellants designated the AR as part of the record on appeal and it was transmitted to this Court pursuant to California Rules of Court, rule 8.224.

On August 29, 2011, Feefighter, LLC, a for-profit entity owned by counsel for Appellants, filed a second lawsuit against the City (Case No. 172960, "Budget Case") seeking declaratory and injunctive relief [*5] and damages, alleging that Resolution No. 2011-111, which adopted the City's budget for fiscal years 2011-2012 and 2012-2013, illegally included revenues from the pre-existing PILOT. (2 CT 498.) The City answered by general denial on September 27, 2011, and lodged an additional two volumes as an addendum to the Administrative Record. (2 CT 557 [Answer]; 3 CT 732 [Notice of Lodgment].)

After a November 8, 2011 bench trial on the Rate Case, the trial court ruled for the City. (3 CT 709.) The court concluded the PILOT was neither created nor altered by the December 2010 rate increase, Proposition 26 does not apply to the PILOT, and it does not invalidate the December 2010 rate increase. (3 CT 711.)

The court consolidated the two cases for all purposes on February 2, 2012. (3 CT 719.) As agreed by the parties, no additional briefing was prepared for the Budget Case, but the Court heard additional argument on April 30, 2012.

On July 13, 2012, the Court issued judgment for the City in both cases. (3 CT 750.) In a second detailed and considered Memorandum of Decision, the trial court concluded that Proposition 26 does not apply retroactively [*6] to the PILOT, which the City Council adopted in 1988. (3 CT 736, 739.) The trial court also concluded the PILOT is a cost of service for the Redding Electric Utility ("REU") that was not displaced by Proposition 26. (3 CT 734-737.) n4

n4 For the convenience of the court, a copy of the trial court's June 22, 2012 Memorandum of Decision is attached to this brief pursuant to California Rules of Court, rule 8.204, subd. (d).

Appellants filed a Notice of Appeal as to both cases on August 20, 2012. (3 CT 760.)

STATEMENT OF FACTS

From 1971 to 1988, the City implemented an operating transfer from Redding Electric Utility to the City's general fund - i.e., a transfer in a fixed amount established by the City budget, as distinguished from a PILOT, which is calculated like a property tax as a percentage of the value of utility assets. (II AR Tab 37, p. 358; II AR Tab 42, pp. 379-380; III AR Tab 111, p. 640.) The transfer was intended to compensate the City's general fund for numerous benefits [*7] and services the City provides the utility, and for which a private utility would have to pay property taxes and a franchise fee (a fee in the nature of rent for use of public rights of way), in addition to services that would not ordinarily be provided to a private utility at general fund expense, such as billing, finance, and fleet maintenance. (II AR Tab 37, p. 358; I AR Tab 5, p.133.) Its effect was to leave the General Fund on the footing it would have if the community had not elected to municipalize electric service. In 1987, the City's Finance Department determined that operating transfers undervalued City benefits to REU. (I AR Tab 4, pp. 119-124.) Finance Department staff examined similar programs in 34 cities which operated municipal utilities (i.e., essentially all of them in California) and requested a legal opinion of respected outside counsel. (I AR Tab 4, p. 119; I AR Tab 5, p. 135.) Martin McDonough of McDonough, Holland & Allen opined that PILOTs were lawful, and that REU power rates including a PILOT would almost certainly be considered reasonable because REU's rates were (and are) lower than comparable private utility rates. n5 (I AR Tab 5, p. 133.)

n5 REU's rates continue to be among the lowest in the state. (IV AR Tab 166, pp. 1074, 1080-1085.)

[*8]

The City Council adopted PILOTs benefitting its general fund from water, sewer, solid waste, and electric utilities in the fiscal year 1988-1989 budget. n6 (II AR Tab 28, p. 319; III AR Tab 111, p. 640.) Initially, the PILOT was calculated by assessing the value of REU's property and equipment, subtracting estimated depreciation, and multiplying the

result by the 1 percent property tax rate permitted by Proposition 13. (II AR Tab 42, p. 380.) In 1991, the Finance Department re-evaluated the calculation, and upon adoption of the 1991-1992 budget, the City Council adopted its recommendation to amend the PILOT to include the value of construction in progress. (II AR Tab 70 pp. 446-447; II AR Tab 72, p. 450.)

n6 The City's fiscal year, like that of most local governments, runs from July 1 to June 30. All "years" referenced in this brief and in the record are fiscal years unless otherwise specified.

Following adoption of Proposition 218 in November 1996, the City compared the PILOT to the cost of services for [*9] which it was charged. (III AR, Tab 119, pp. 663-665.) The study concluded the PILOT fairly compensated the City for services to the utility, such as billing, finance, and fleet maintenance, and for use of public rights-of-way. (III AR Tab 119, p. 663.) The report noted the PILOT represented approximately 5 percent of REU revenues, a figure that was "well within the range of similar transfers in California." (III AR Tab 119, p. 663.) In fact, the report noted the State Board of Equalization's method for assessing multi-county utility property for purposes of the property tax uses original, rather than the depreciated, asset values as did Redding's PILOT. (III AR Tab 119, p. 664.) Upon adoption of its 2001-2003 budget, the City Council adjusted the PILOT to comply with the State Board of Equalization's methodology, including a maximum 2 percent annual growth in assessed valuation (the ceiling imposed by Proposition 13, art. XIII A, section 2, subd. (b)). (III AR Tab 126, pp. 693-694; III Tab 134, p. 738.)

The PILOT was amended for the final time in 2005, to include REU's share of assets held by joint powers agencies ("JPAs"). n7 (2 CT 530; see also MJN Exh. D.) The City increased [*10] REU rates in 2008 to compensate for fluctuations in the natural gas market and a dry year for hydroelectric power production, which produces the cheapest power available to REU. (III AR Tab 140, pp. 797-798; IV AR Tab 142, p. 816; IV AR Tab 166, pp. 1067-1068.) At the time, the City was concerned with raising rates too quickly (which can cause significant economic dislocations that rate-making academics refer to as "rate shock" n8), and decided to raise rates to recover the full cost of service incrementally over several years, using cash reserves in the interim. n9 (III AR Tab 140, pp. 797-800; IV AR Tab 159, p. 1031.) Although REU staff had hoped that several "wet" years would allow an eventual rate decrease, it did not rain as hoped. (See IV AR Tab 142, p. 816.) Instead, the utility's cash reserves declined significantly and staff warned the City Council in December 2010 that a failure to raise raises would harm the utility's credit rating and raise its borrowing costs. (IV AR Tab 165, p. 1060; IV Tab 166, p. 1077-1078.) Staff also recommended rate increases to reflect escalating costs to purchase power and the City's covenants with bondholders obligating it to maintain rates and [*11] cash reserves sufficient to ensure repayment of debt. (IV AR Tab 158, p. 1028; IV AR Tab 159, pp. 1031-1033.)

n7 As detailed below, Appellants' claim the City first included JPA assets in the PILOT calculation in 2011 (AOB at pp. 26-27) misreads the record.
n8 E.g., Edison Electric Institute, Rate Shock Mitigation (June 2007) available at http://www.eei.org/whatwedo/PublicPolicyAdvocacy/StateRegulation/Documents/rate shock mitigation.pdf (as of Apr. 6, 2012).
n9 It is for this reason that rate-stabilization reserves are a common feature of utility cost-of-service analyses.

Accordingly, on December 7, 2010, the City Council adopted Resolution No. 2010-179 to increase electric rates by 7.84 percent effective January 1, 2011 and by another 7.84 percent effective December 2011. (IV AR Tab 163, p. 1041.)

Those increases did not change the PILOT or affect it in any way. (IV AR Tab 163, p. 1041.) Nor were those rate increases necessary to fund the PILOT, which was included - as had been the [*12] City's consistent practice since first adopting the PILOT in 1988 - in the 2009-2011 budget in precisely the amount charged to REU for both years of that biennium. The December 2010 electric rate increases were instead driven by other costs noted above. Furthermore, REU receives revenue from wholesale customers (and other sources of revenue) in three to four times the amount of the PILOT. (IV AR Tab 145, p. 831; n10 IV AR Tab 149, p. 873.) Thus, the PILOT can be funded twice over from unrestricted revenues n11 without drawing upon the proceeds of retail rates. (IV AR Tab 145, p. 831; IV AR Tab 149, p.

873; XIII AR Tab 205, p. 2975.) The December 2010 rate increase is therefore unrelated to the PILOT and the premise of Appellants' Rate Case fails.

> n10 Duplication of the AR has obscured information on page 831. A legible copy is attached to this brief for the Court's convenience pursuant to California Rules of Court, rule 8.204, subd. (d). The calculation of non-rate revenue is elaborated in Part III.A below in footnote 26 and accompanying text.
> n11 The prices applied to wholesale transactions are not "fees or charges" governed by either Proposition 218 (art. XIII D, § 6) or Proposition 26 (art. XIII C, § 1, subd. (e)) because they are not "imposed", rather they are freely negotiated between voluntary market participants of comparable market power. (Cf. *Ponderosa Homes, Inc. v. City of San Ramon (1994) 23 Cal.App.4th 1761, 1770* [defining "impose" as used in Mitigation Fee Act as "to establish or apply by authority or force, as in "to impose a tax"].) This point is elaborated in Part IV below.

[*13]

City staff calculates the PILOT with each budget according to the formula adopted by the City Council. (E.g. III AR Tab 126, pp. 693-694 [2001-2003 budget summary]; XIII AR Tab 205, p. 2896 [2011-2013 budget].) Because the formula relies on estimates, the PILOT is "trued up" with the adoption of budgets in odd-numbered years to correct estimates for the previous biennium. (e.g., XIII AR Tab 205, p. 2972.)

STANDARDS OF REVIEW

The Court of Appeal reviews the trial court's ruling "de novo to the extent that the [trial] court decided questions of law concerning the construction of constitutional provisions and not turning on any disputed facts. [The Appellate Court] review[s] the [trial] court's factual findings under the substantial evidence standard." (*Schmeer v. County of Los Angeles, (2013) 213 Cal.App.4th 1310, 1316* [construing Proposition 26] pet'n rev. pending; internal citations omitted.] n12 *Here,* the record is not in dispute; the parties do, however, dispute the inferences to be drawn from it. While the City asserts some deference to the trial court's reading of the record is appropriate, even if this Court reviews the administrative [*14] record de novo, the trial court's well-reasoned conclusions survive review.

> In reviewing the trial court's ruling on a writ of mandate (Code Civ. Proc., § 1085), the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. However, the appellate court may make its own determination when the case involves resolution of questions of law where the facts are undisputed.

(*Saathoff v. City of San Diego (1995) 35 Cal.App.4th 697, 700* [internal citations omitted].)

> n12 Even if a heightened standard of review on disputed factual issues applied, this Court can ignore Appellants' unsupported factual assertions. (*See* Cal. Rules of Court, rule 8.204, subd. (a)(1)(C); *City of Lincoln v. Barringer (2002) 102 Cal.App.4th 1211, 1239* [reviewing court may disregard evidentiary contentions unsupported by proper record citations].)

"'[T]he court's decision to grant or deny [*15] [declaratory] relief will not be disturbed on appeal unless it be clearly shown ... that the discretion was abused.'" (*Pellegrini v. Weiss (2008) 165 Cal.App.4th 515, 529; Osseous Technologies of America, Inc. v. DiscoveryOrtho Partners LLC (2010) 191 Cal.App.4th 357, 364.)*

As for the burden of proof, the trial court determined that, as a threshold matter, Proposition 26 did not apply to the PILOT, and therefore the Memorandum of Decision did not reach the issue of burdens of proof under that measure. Appellants cite the final unnumbered paragraph of art. XIII C, section 1, subd. (e) to contend the City bears the burden to prove by a preponderance of the evidence that REU's rates are not a tax. n13 To the extent Appellant would assign the City the burden to produce an administrative record containing evidence to sustain its legislative acts to adopt the

December 2010 power rates and its 2011-2013 budget, and to prove any disputed facts by a preponderance of the record evidence, the City accepts the burden. However, to the extent Appellant would assigns the City some burden as to questions of law, the City demurs.

n13 Appellants' citation of *California Farm Bureau Federation v. State Water Resources Control Bd. (2011) 51 Cal.4th 421* is curious, as that case does not address Proposition 26.

[*16]

Proposition 26 states as to burdens of proof:

> 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 payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

(Art. XIII C, § 1, subd. (e) [final unnumbered paragraph].)

What can it mean to bear the burden to prove that a charge is not a tax? A burden of proof is assigned with respect to disputed facts and assists a court in deciding issues as to which the evidence is in equipoise. (Evid. Code § 110 [defining "burden of producing evidence"]; Evid. Code § 115 [defining "burden of proof"].) The Court, however, needs no tie-breaking device for questions of law; it determines those independently. (See generally, *Crocker National Bank v. City and County of San Francisco (1989) 49 Cal.3d 881, 888* [Mosk, J., discussing appellate standards of review of questions of fact, law and mixed questions [*17] of fact and law].) Accordingly, Appellants and the City are on equal footing in this Court as to the meaning of Proposition 26 and other legal issues.

In any event, the City contends it bore the burden to produce a record adequate to support its December 2010 power rates and its 2011-2013 budget, that a preponderance of the evidence in that record supports the City's legislative acts, and that the trial court correctly found the law in this case. This Court should affirm.

ARGUMENT

I. PROPOSITION 26 DOES NOT APPLY RETROACTIVELY TO REDDING'S PILOT

Appellants claim the trial court ruled that Proposition 26 does not apply to electric rates. (AOB at p. 18.) Not so. Although the City contended, as an additional basis for decision, that its electric rates are not "imposed" within the meaning of Proposition 26 because residents have alternative power sources (3 CT 628-629), the trial court did not rest on that ground. Instead, the court concluded rates adopted after Proposition 26's effective date may fund utility costs to comply with legislation that predates the measure, including state and local laws requiring discounts for seniors and low-income households, "green" [*18] power programs, and the PILOT. (3 CT 737, 742.) Thus, the trial court rejected Appellants' factual assertion that electric rates set in December 2010 fund the PILOT and their legal assertion that, if that fact were proven, it would necessarily make the rates "taxes" under Proposition 26. (3 CT 741.)

The trial court correctly concluded that Proposition 26 does not apply to the PILOT, adopted in 1988 and last amended in 2005. (3 CT 738-739.) Proposition 26 does not vitiate pre-existing local legislation like the PILOT. Moreover, the court found that the challenged Resolution 2010-179, adopted in December 2010 to increase REU's rates, made no change to the PILOT formula or to the amount of the PILOT transfer. (3 CT 737.) Nor did the adoption of the 2011-2013 budget change the PILOT in any way. (3 CT 742.) Accordingly, Proposition 26 does not apply to the PILOT unless and until the PILOT is amended to increase revenue to the City's general fund.

A. Proposition 26 Does Not Apply to Pre-Existing Legislation

1. Proposition 26 terms make clear it has no retroactive application to local legislative acts

There is a strong presumption that statutes [*19] operate prospectively. (*Myers v. Philip Morris Co. (2002) 28 Cal.4th 828, 840.)* "[A] statute may be applied retroactively only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application." (*Id., at p. 844.)* Initiative constitutional amendments are interpreted under these same standards. (*Schmeer, supra, 213 Cal. App. 4th at p. 1316* ["We construe provisions added to the state Constitution by a voter initiative by applying the same principles governing the construction of a statute."] pet'n rev. pending.) Thus, unless Proposition 26's text or legislative history clearly indicates retroactive application was intended, the contrary presumption governs.

Proposition 26 was adopted November 2, 2010 to amend the California Constitution to provide the first legislative definition of the "taxes" for which voter approval is required by Propositions 13 (art. XIII A, § 4) and 218 (art. XIII C, § 2). Proposition 26's provisions addressing **state** taxes contain a limited retroactivity clause:

> Any [state] tax adopted after [*20] January 1, 2010, but prior to the effective date of this act that was not adopted in compliance with the requirements of this section is void 12 months after the effective date of this act unless the tax is reenacted by the Legislature and signed into law by the Governor in compliance with the requirements of this section.

(Art. XIII A, § 3, subd. (c).) But the provisions of Proposition 26 addressing **local** taxes contain no such clause, despite the essentially identical language of the state and local provisions in all other respects. (Compare art. XIII A, § 3, subd. (b) with art. XIII C, § 1, subd. (e).)

Simply put the measure's text makes clear its intent to apply retroactively to the State (to a limited extent), but makes no such express declaration with respect to local governments. Thus, it lacks the necessary "express language of retroactivity" to overcome the presumption of prospective applicability. (*Myers, supra, 28 Cal.4th at p. 844.)* Moreover, an express statement of retroactivity as to the State, combined with silence on its retroactivity as to local governments, demonstrates intent to provide no retroactivity for local governments. (E. [*21] g., *Gikas v. Zolin (1993) 6 Cal.4th 841, 852* ["*Expressio unius est exclusio alterius.* The expression of some things in a statute necessarily means the exclusion of other things not expressed."].) Accordingly, Proposition 26 applies only to local legislative actions affecting fees, charges and taxes taken on or after November 3, 2010. n14

> n14 Amendments to the California Constitution take effect the day after voter approval. (Art. XVIII, § 4.)

Proposition 26's prospective application to local government is confirmed by comparing its language with that of Proposition 218, which Proposition 26 amends. Proposition 218's article XIII D, section 6, subd. (d) provides: "Beginning July 1, 1997, all fees and charges shall comply with this section" (*i.e.*, the property related fee provisions of Proposition 218), regardless of whether those fees were imposed under legislation that predated Proposition 218. The definition of "tax" that Proposition 26 adds to article XIII C contains no similar [*22] language. In addition, Proposition 218 also provided for limited retroactivity in art. XIII C, section 2, subd. (c) (tax provisions of art. XIII C applicable to taxes adopted from January *1*, 1995 to November 6, 1995) - a provision of art. XIII C that Proposition 26 leaves unchanged. Again, had the framers of Proposition 26 intended retroactive effect, they knew how to say so. They did not.

Proposition 26 must be interpreted in light of the other provisions of the constitutional articles it amends. The rule is ancient but remains vital. (*In re Wright's Estate (1929) 98 Cal.App. 633, 635* ["[I] it is a settled rule that all statutes which relate to the same general subject matter - briefly called statutes in pari materia - must be read and construed together, as one act, each referring to and supplementing the other, though they were passed at different times."].) "It is a basic canon of statutory construction that statutes in pari materia should be construed together so that all parts of the statutory scheme are given effect. (*Lexin v. Superior Court (2010) 47 Cal.4th 1050, 1090-91.)* Construing Proposition 26 in the context of article XIII [*23] *C*, which it amends, indicates that when retroactive applicability was intended, it was clearly expressed. As it was not expressed in Proposition 26, the measure has no retroactive application to local legislation.

2. Legislative history also confirms Proposition 26 was not intended to apply retroactively

The Court need not look beyond the text of Proposition 26 to determine that it applies to the City only prospectively.

> In analyzing the [statutory] exception's scope, we will, as in every case of statutory interpretation, begin with its language. (*Microsoft Corp. v. Franchise Tax Bd. (2006) 39 Cal.4th 750, 758, 47 Cal.Rptr.3d 216* [].) If the language is clear, our search for meaning is at an end; if it is ambiguous, we may then turn to other tools to divine the Legislature's intent. (*Ibid.*)

(*Lexin, supra, 47 Cal.4th at p. 1079.)* However, should this Court determine to resort to legislative history as the trial court did, that history supports the conclusion the measure has no retroactive application to local government revenues. As the trial court found, Proposition 26 was intended to apply only to "new or increased" [*24] charges, not to an existing levy. n15 (3 CT 738-739.)

> n15 Respondents agree with Appellants that the PILOT is not itself a "fee or charge" (AOB at p. 21), but instead a cost funded by utility resources, which include (but are not limited to) rate proceeds. This distinction does not help Appellants' cause, however, because Proposition 26 does not displace **any** preexisting local legislative act, whether an act to adopt a fee or charge or an act to impose costs to be recovered by future fees or charges. All are grandfathered, and Proposition 26 applies only if the legislative body amends prior legislation to increase government revenues or creates new policy which imposes non-service-related costs on a utility or other service.

A "[d]eparture from the presumption of prospectivity is warranted only by clear legislative intent." (*City of San Jose v. Internal. Assn. of Firefighters, Local 230 (2009) 178 Cal.App.4th 408, 420.)* "[I]n the absence of an express retroactivity provision, [*25] a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters **must** have intended a retroactive application." (*Evangelatos v. Superior Court (1988) 44 Cal.3d 1188, 1209,* emphasis added.) Both Proposition 26's text and its legislative history confirm its lack of retroactive effect. For example, the Legislative Analyst's Impartial Analysis told voters the measure would apply only prospectively:

> "[M]ost other fees or charges in existence at the time of the November 2, 2010 election would not be affected unless ... [t]he ... local government later increases or extends the fees or charges." (1 CT 277 [City's RJN, Exh. J].)

Ballot arguments in favor of Proposition 26 also disclaim any retroactive effect:

> PROPOSITION 26 PROTECTS ENVIRONMENTAL AND CONSUMER REGULATIONS AND FEES
>
> Don't be misled by opponents of Proposition 26. California has some of the strongest environmental and consumer protection laws in the country. **Proposition 26 preserves those laws** and PROTECTS LEGITIMATE FEES SUCH AS THOSE TO CLEAN UP ENVIRONMENTAL OR OCEAN DAMAGE, FUND NECESSARY CONSUMER REGULATIONS, [*26] OR PUNISH WRONGDOING, and for licenses for professional certification or driving.

(1 CT 279, boldface added.) The proponents' rebuttal to the "no" argument was to the same effect:

> Prop. 26 protects legitimate fees and WON'T ELIMINATE OR PHASE OUT ANY OF CALIFORNIA'S ENVIRONMENTAL OR CONSUMER PROTECTION LAWS, including:

-Oil Spill Prevention and Response Act

-Hazardous Substance Control Laws

-California Clean Air Act

-California Water Quality Control Act

-Laws regulating licensing and oversight of Contractors, Attorneys and Doctors

"Proposition 26 doesn't change or undermine a single law protecting our air, ocean, waterways or forests - it simply stops the runaway fees politicians pass to fund ineffective programs."- Ryan Broddrick, former Director, Department of Fish and Game

(1 CT 280, original emphasis.) Thus, both the text and the legislative history of Proposition 26 demonstrate it was not intended to apply retroactively.

B. The PILOT is Pre-existing Legislation

The trial court found that the PILOT had been a component of REU's budget for over 20 years when Proposition 26 was adopted in November

2010. ([*27] 3 CT 736, 739). The trial court also found the December 2010 rate increase did not affect the PILOT, which was adequately funded by then-existing rates. (3 CT 736-737.) The record supports these findings. The City Council adopted the PILOT in 1988, refined it in 1992, 2002 and 2005, and has implemented it without change ever since. (2 CT 530.)

The City Council's 1988 adoption of the PILOT by a budget resolution was a legislative act. Accordingly, REU's compliance with the PILOT is a lawful cost of its service, just as is its compliance with 2006's AB 32, the State's landmark greenhouse gas law. As the Court of Appeal explained:

> [T]here is a limited role for the judiciary to play in determining whether a legislative enactment, including a budgetary enactment, is within the authority of the legislative body and whether it violates any constitutional provisions.

(*Scott v. Common Council (1996) 44 Cal.App.4th 684, 698,* emphasis added [mandating council fund city attorney positions required by city charter].) Thus, it is plain that the Redding city Council's budgetary actions to establish and amend the PILOT are legislative acts. n16 [*28]

> n16 Appellants' claim that these legislative acts should have taken the form of an ordinance or resolution or have been established by procedures nowhere required by law is ahistorical. Until the 2010 adoption of Proposition 26 (which is not retroactive), there was no legal requirement to specify the cost- and non-cost-based portions of an electric rate. Those rates need only have been "reasonable" under such cases as *Durant v. City of Beverly Hills (1940) 39 Cal.App.2d 133.* If Proposition 26 is not retroactive, as shown above, then it cannot become implicitly so by treating historical legislative acts differently based on their compliance with a post hoc requirement as to form.

The trial court concluded the PILOT is a legislatively-established cost which REU must bear that pre-dates Proposition 26, and therefore survives it. (See 3 CT 737.) Appellants denigrate the PILOT as a "bad habit" rather than legislation (RT 137), and fail to accord the City's power to legislate via budget resolution [*29] an appropriate degree of re-

spect. n17 Nonetheless, the PILOT was enacted by budget resolution 25 years ago, and has continued in existence with only minor adjustments, most recently in 2005. (2 CT 530; 3 CT 737 [memorandum of decision].)

n17 As discussed below, Appellants' claim the PILOT should have been established by a separate resolution is unsupported. The PILOT is not a "rate," but a mandated transfer of funds, and the law does not require that each and every cost funded by rate revenue be approved by a separate resolution. Indeed, the law does not require local governments to adopt budgets at all, much less specify their form. (Gov. Code § 53901 ["If a local agency or special purpose assessing or taxing district does not have a formal budget, it shall file a listing of its anticipated revenues, together with its expenditures and expenses for the fiscal year in progress. The county auditor shall hold on file such statement for public inspection at all reasonable hours."].)

Because Redding's [*30] local legislation authorized the PILOT before Proposition 26, and that local legislation has not been amended since the effective date of that State measure, Proposition 26 does not invalidate the PILOT. Nor does it invalidate rates that Appellants claim fund the PILOT. n18

n18 Given the undisputed fact that non-rate revenue sources exceed the amount of the PILOT several times over (IV AR Tab 145, p. 831; XIII AR Tab 205, p. 2975), the trial court found that "there is no evidence that the PILOT is paid out of customers' rates." (3 CT 741.)

C. Appellants' Claim the City Amended the PILOT in 2010 Need Not Be Entertained for the First Time on Appeal and Is Mistaken in Any Event

Appellants argue that the City changed the formula to calculate the PILOT in 2010 to include REU's share of assets held by joint power agencies, citing an attachment to the City Council resolution adopting the 2011-2013 budget, the subject of Appellant's Budget Case. (AOB at p. 26.) However, Appellants did not make this factual [*31] argument below. (See RT 71-73, 198-199.) Instead, Appellants specifically acknowledged at trial that the calculation was last amended in either "2005 or 2007," and in any event, has not changed "in the recent years." (RT 198-199.) Appellants discussed the change in calculation several times at trial, including accounting for REU's interest in jointly-held assets, but never disputed that the change preceded the effective date of Proposition 26. (RT 71-73.) They cannot now, for the first time on appeal, change course and present a factual argument never raised before the trial court. (*McDonald's Corp. v. Board of Sup'rs (1998) 63 Cal.App.4th 612, 618* ["The existence of this factual question prevents the County from raising this theory for the first time on appeal."].)

Even if the Court were to reach the claim, n19 however, the budget document that Appellants cite, Attachment A to the budget resolution (XI AR Tab 203, p. 2469), shows only that which counsel acknowledged at trial: that the PILOT necessarily increases if the utility's assets increase. n20 That is how the PILOT has worked for 25 years. Furthermore, that Attachment A does not support Appellants' new contention [*32] that "according to the City's accounting sheet, these asset values were not added into the calculation of the PILOT until Fiscal Year 2010" (AOB at p. 26), because Attachment A to the budget does not show how the PILOT was calculated for any year other than fiscal year 2010-2011. In fact, examination of that Attachment A, as compared to similar spreadsheets prepared for previous budgets, demonstrates that the REU has maintained a consistent methodology:

. Line 1 of Attachment A reflects the value of appreciating assets first acquired in the year listed and still in service when any particular rendition of Attachment A was created. That number is then multiplied by the factor shown on line 11, to calculate 2 percent annual appreciation from acquisition through 2011, and the result of this calculation appears on line 14. One-percent of the number appearing on line 14 is then shown on line 17 as the amount of the PILOT. n21

. The numbers on line 14 for all prior years (i.e., pre-2000 through the fiscal year ending in 2010) are then totaled in the far left column of line 14, representing the values of all appreciating assets still in ser-

vice for fiscal year 2010-2011. The [*33] fact they appear there does not mean these values were first calculated in that year.

. Line 14 is then added to line 12 (depreciated vehicle value taken from line 5), line 13 (the utility's proportionate share of joint power agency assets, which are not appreciated, and therefore not identified by year of acquisition), and line 15 (accounts payable), to determine the total asset base for fiscal year 2010-2011, which is shown on line 16.

. One-percent of the figure shown on line 16 is stated in the far left column on line 17 as the PILOT for fiscal year 2010-2011, which is then compared to the charge previously determined for that year on line 18, and adjusted accordingly on line 19. (This is a biennial "true-up" to correct estimates of increments to asset value during a biennium to reflect the utility's actual experience in the prior biennium.)

. Budget attachments for prior years reflect this consistent methodology, with joint power agency assets accounted for every year in the manner described above. (MJN Exhibits D, E.)

n19 Should the Court wish to reach the claim, the City requests judicial notice of documents that refute it (MJN Exhs. D and E) by a motion filed concurrently with this brief.
[*34]

n20 As discussed below, this does not amount to an "increase" for purposes of Proposition 218, which does not apply to electric rates in any event. (Art. XIII D, § 3 ["For purposes of this article, fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership."].)
n21 A comparison between line 17 of Attachment A and historical budget documents establishes that the numbers listed on line 17 for years other than fiscal year 2010-2011 do not represent the PILOT for those prior years. (2 CT 374 - 375 [showing REU PILOT ranging from $ 3.9m in fiscal year 2005-2006 to $ 4.8 million in fiscal year 2008-2009].)

Therefore, because Attachment A to the 2011-2013 budget resolution does not show the inclusion of joint powers agency assets post-dates the effective date of Proposition 26, but instead reflects that the values of these assets are not identified by year of acquisition (because they are not depreciated by REU which relies on current book values provided by the joint powers agencies which directly own [*35] the assets), Appellants' inference that the PILOT did not include the value of joint power agency assets prior to 2010 is just wrong. In any event, it is unsupported by the record and should be disregarded, even should this Court be inclined to entertain this arcane factual inquiry for the first time on appeal.

D. Applying Proposition 26 Retroactively to Invalidate the PILOT Would Undermine Many Vital State and Local Mandates

Were there any doubt as to Proposition 26's retroactive application to local government, public policy requires that doubt be resolved in favor of prospective application of the measure. If Proposition 26 were to retroactively invalidate the PILOT, then other pre-existing components of REU's rates that reflect legislative concern for issues other than cost of service would fall, too. The ballot materials cited above assured voters Proposition 26 would not disturb these policies. (2 CT 279-280.)

To identify but a few of the many policies Appellants' interpretation would prevent REU and all other municipal utilities in California from using rate proceeds to fund:

. programs to reduce greenhouse gases under 2006's A.B. 32 (Health & Saf. Code [*36] §§ 38550-38551);

. "green" power development (Pub. Util. Code § 387.5);

. the solar energy mandates of 2006's SB 1 (Pub. Resources Code §§ 25780 et seq.);

. increased reliance on renewable sources of energy (Pub. Util. Code § 399.11); and,

. the REU's discounted rate programs for seniors and low-income households.

(IV AR Tab 142, p. 817; IV AR Tab 145, p. 830; IV AR Tab 148, pp. 869-870.) Each of these policies predates Proposition 26 and requires REU customers to pay more than the cost of providing power to accomplish other objectives deemed worthy by the Legislature or the City Council. Nothing in the legislative history of Proposition 26 warned voters it would undermine such policies. Indeed, as discussed above, the Legislative Analyst informed voters the measure would apply only prospectively and its proponents assured them it would preserve environmental and consumer-protection legislation. (1 CT 279-280.)

Moreover, on the same November 2, 2010 ballot by which they approved Proposition 26, voters rejected a proposal to suspend funding of greenhouse gas mitigation measures though utility rates. n22 That rejection is significant, because rejection [*37] of a ballot measure can shed light on the meaning of a companion measure voters approved. (*California Redevelopment Assn. v. Matasantos (2013) 212 Cal.App.4th 1457, 1491-1492* [Interpreting Proposition 1A in light of rejection of Proposition 65].) The voters who rejected Proposition 23's direct suspension of 2000's A.B. 32 cannot be understood to have intended Proposition 26 to eliminate funding to implement that greenhouse gas law.

n22 This Court may take judicial notice, as did the trial court, of the failure at the November 2010 election of Proposition 23 - a proposal to suspend 2000's A.B. 32 greenhouse gas program. (1 CT 257.)

Applying Proposition 26 retroactively as Appellants urge would invalidate many REU rate components and defund important programs, including A.B. 32, which the voters plainly intended to preserve. By contrast, interpreting Proposition 26 as prospective only in its application to local government - as both its text and its legislative history require - avoids [*38] these consequences. Current laws affecting public utility rates should be unaffected by Proposition 26 until those laws change, a particular rate component is "increased" within the meaning of Government Code section 53750 (which defines "increase" for purposes of arts. XIII C and XIII D), or voters use their initiative power under art. XIII C, section 3 to require otherwise.

E. If Proposition 26 Were Retroactive, It Would Be an Unconstitutional Revision

Proposition 26 would be an improper revision of our Constitution if it were construed to invalidate prior legislation like the PILOT, and might constitute such a revision in any event. Although the Constitution may be **amended** by initiative, *"a* 'revision' of the Constitution may be accomplished only by convening a constitutional convention and obtaining popular ratification, or by legislative submission of the measure to the voters." (*Raven v. Deukmejian (1990) 52 Cal.3d 336, 349* [citations omitted].) A "revision" is a substantial change to our constitutional scheme either quantitatively or qualitatively. (*Ibid.*) "[E]ven a relatively simple enactment may accomplish such far reaching changes [*39] in the nature of our basic governmental plan as to amount to a revision ... ." (*Ibid.*, quoting *Amador Valley Joint Union High School District v. State Bd. of Equalization (1978) 22 Cal.3d 208, 223.)*

If retroactive, Proposition 26 would fundamentally alter the power of local government to fund services and regulatory programs and thus could not be enacted by initiative. (Compare art. XVIII, § 2 [amendment or revision by Legislature or Convention] with art. XVIII, § 3 [amendment by initiative]; see also *Raven, supra, 52 Cal.3d at pp. 352, 355* [Prop. 115 was an unconstitutional revision because it purported to fundamentally alter judicial power].) This Court should avoid adopting an interpretation that results in constitutional infirmity of a voter approved initiative, and instead harmonize the measure with other constitutional requirements. (*San Francisco Unified School Dist. v. Johnson (1971) 3 Cal.3d 937, 942* [statute reasonably susceptible of two constructions should be interpreted so as to render it constitutional].)

II. THE 2011 BUDGET RESOLUTION DID NOT REENACT THE PILOT

The City Council's adoption of the [*40] 2011-2013 budget by Resolution No. 2011-111 reflected general fund income from the PILOT, as it had been most recently amended in 2005, but did not create the PILOT anew. The trial court squarely rejected Appellants' arguments that the City reenacted the PILOT by either the 2010 rate increase or the 2011 budget resolution:

> Proposition 26 was not intended to require an election every time a local government adopts a budget that includes pre-existing components so long as that budget does not impose new or increased fees or charges or change the manner in which those fees are calculated. ... The adoption of Resolution 2011-111 adopting the City of Redding's budget, that included the budget of REU and the PILOT, does not impose, extend, or increase a tax, and Proposition 26 does not apply.

(3 CT 739.)

This conclusion is consistent with Government Code section 9605, which provides in relevant part that:

> Where a section or part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form. The portions which are not altered are to be considered as having been the law from the time when they were enacted.

Thus, [*41] neither the 2010 rate resolution nor the 2011 budget resolution "reenacted" the PILOT.

What Appellants call "the re-enactment rule," as described in *Barratt American Inc. v. City of Rancho Cucamonga (2005) 37 Cal.4th 685,* has been applied in only one reported case, and only in the specific context of statutes of limitations in the context of land use and development. (See *Arcadia Development Co. v. City of Morgan Hill (2008) 169 Cal.App.4th 253, 261-262.)* The trial court refused to stretch *Barratt American* so far beyond its intended reach, stating that the case applied to its specific statutory context. (3 CT 739.)

In *Barratt American,* the Rancho Cucamonga City Council adopted an ordinance stating a comprehensive schedule of fees on development, which the California Supreme Court held triggered a fresh limitations period to invalidate any fee on that schedule, including those unchanged from prior schedules. (*Barratt American, 37 Cal.4th at 703.)* The Court based its holding on two crucial factors not present here: the statutory scheme applicable to the development fees and charges at issue there, and the clear intention [*42] of the Rancho Cucamonga City Council to adopt a comprehensive "new" fee structure. (*Barratt American, supra, 37 Cal.4th at p. 703;* see also *Arcadia, 169 Cal.App.4th at pp. 263-265* [extension of "temporary" land use ordinance triggered fresh statute of limitations].)

First, the Court's holding in *Barratt American* cannot be separated from its statutory context: the 120-day statute of limitations of Government Code section 66022 of the Mitigation Fee Act (Gov. Code §§ 66000 *et seq.*), which does not apply here. Under that statute, revenue raised from development fees that exceeds the estimated reasonable cost of mitigation the fee is imposed to fund, if not approved by the electorate, must be used to reduce future fees. (*Barratt American, supra, 37 Cal.4th at pp. 691, 693;* Gov. Code §§ 66013, 66016.) To comply with the statutory mandate to reduce future fees, the schedule required periodic accounting to reconcile estimates to actual costs. (*Barratt American, supra, 37 Cal.4th at p. 703.)* Under these circumstances, the Court concluded that, unless the short limitations period of Government Code section 66022 [*43] were renewed whenever a fee schedule is adjusted, even as to fees that remained unchanged, there would be no effective means to ensure local agencies reduce fees when revenues exceed actual costs. Moreover, the Court agreed with *Barratt American* that a contrary view would immunize development impact fees from judicial review by allowing local agencies to overestimate mitigation costs and readopt those inflated fees with impunity. (*Ibid.*) No similar concerns are in issue here, and *Barratt American* has little reach beyond the Mitigation Fee Act.

Second, *Barratt American's* result reflected the Rancho Cucamonga City Council's stated intent to adopt a '"new comprehensive fee schedule,' stating it 'resolve[d] that the following fees are *established.'" (Ibid.,* italics in original.) Similarly, *Arcadia* applied *Barratt American* because the City of Morgan Hill clearly indicated that a land use ordinance - as to which any challenge was time-barred - was temporary, and the extension of its duration therefore constituted a "reenactment." (*Arcadia, supra, 169 Cal.App.4th at p. 263.)*

In stark contrast, the Redding City Council has never indicated an [*44] intent that the PILOT be temporary or to establish it anew in 2011. To the contrary, the Council made express its intent to continue the PILOT as it has existed for over 20 years:

> [I]n light of the adoption of Proposition 26 on November 2, 2010, which precludes certain new fees, levies or charges but is not retroactive as to local governments, the City Council desires to maintain the existing PILOT utilizing the current accounting formula and methodology as last modified in 2005.

(2 CT 531.) Accordingly, in Resolution No. 2011-111, the City Council expressly stated that it was **not** legislating anew with respect to the PILOT, and its intent to maintain the pre-Proposition 26 status quo is express and unmistakable. To apply *Barratt American* to these facts is to rewrite the Redding City Council's language rather than to implement it.

Accordingly, neither the legal nor factual context here allows application of *Barratt American.* Like the trial court, this Court should decline Appellants' invitation to do so.

III. NEITHER THE PILOT NOR THE 2010 RATES WOULD BE TAXES EVEN IF PROPOSITION 26 APPLIED RETROACTIVELY

Proposition 26 amended section 1 [*45] of article XIII C of the California Constitution to provide a comprehensive definition of "tax". It includes any levy, charge, or exaction of any kind "imposed" by a local government with seven exceptions, including an exception for:

> A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

(Art. XIII C, § 1, subd. (e)(2).) n23

> n23 The Second District recently concluded this definition has another, implicit requirement: to be a tax under Proposition 26, an imposition must fund government. (*Schmeer, supra, 213 Cal.App.4th at p. 1327* [County ordinance requiring retailers to charge, and retain, $ 0.10 per paper bag provided customers was not "tax" under Proposition 26 because revenue did not directly or indirectly fund government] pet'n rev. pending.)

Appellants' contention that the very existence [*46] of the PILOT demonstrates that REU's rates exceed the cost of service should be rejected for two reasons. First, REU's revenues from wholesale power sales (and other sources not challenged by Appellants) exceed the amount of the PILOT. Thus, Appellants cannot prove that the PILOT is funded by retail rates. Second, even if this Court could find that rates fund the PILOT, the PILOT is a lawful cost to the utility that predates Proposition 26 and can therefore be recovered from rates.

Although the trial court found it unnecessary to reach the issue (3 CT 739, 742), its judgment can nonetheless be affirmed on the basis of the record, which supports the conclusion that REU rates do not exceed the cost of service. This Court, of course, may affirm on any ground supported by the record and reviews the trial court's judgment, not its reasoning.

> "It is axiomatic that we review the trial court's rulings and not its reasoning." (See, e.g., *D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 18-19; Davey v. Southern Pacific Co. (1897) 116 Cal. 325, 329.)*

(*People v. Mason (1991) 52 Cal.3d 909, 944.)*

A. The Existence [*47] **of the PILOT Does Not Prove REU's Rates Exceed its Cost of Service**

Appellants claim that the existence of the PILOT necessarily means REU's retail electric rates exceed the cost of service and therefore constitute taxes under art. XIII C, section 1, subd. (e)(2). (AOB at 27-28.) Not so. REU has multiple sources of income, including:

. the retail rates Appellants challenge;

. the proceeds of wholesale transactions the prices of which Appellants do not challenge and which are not limited to cost; n24

. interest on investments; and

. grants and donations.

n24 See footnote 11 above and Part IV below.

(IV AR Tab 145, p. 831; XIII AR Tab 205, p. 2975.) Moreover, it is undisputed that REU's non-rate sources of revenue exceed the PILOT. (XIII AR Tab 205, p. 2975.) Therefore, as the trial court found, "there is no evidence that that the PILOT is paid out of customers' rates." (3 CT 741.) n25

n25 As noted above, this Court reviews construction of constitutional questions turning on undisputed facts de novo, but reviews any factual determinations made by the trial court under the substantial evidence standard. (*Schmeer, supra, 213 Cal.App.4th at p. 1316.)* Further, even under a preponderance of the evidence standard pursuant to art. XIII C, section 1, subd. (e) [final unnumbered paragraph], the administrative record's inclusion of budget documents indicating that non-rate revenue sources exceed the amount of the PILOT was the only evidence on this issue in this record on appeal. Appellants offer nothing more than the mere existence of the PILOT to support their claim that rates exceed the cost of service. (AOB at pp. 27-28.)

[*48]

REU's non-retail revenue is more than three times the amount of the PILOT. In 2011 for example, REU's total non-rate revenue was budgeted at $ 24.4 million, n26 while the PILOT was approximately $ 6.1 million in that year. (XIII AR Tab 205, p. 2975.) Therefore, even if this Court were to find that REU's compliance with the City Council's PILOT legislation is not a cost of service that can be funded through rates, the challenged REU rates nevertheless survive Appellants' constitutional challenge because the PILOT can be accounted for entirely by non-rate revenue. n27 Thus, even were the law as Appellants wish, their arguments fail in light of the undisputed evidence before this Court.

n26 Non-rate revenue estimated by the 2011-2013 budget for the fiscal year ended June 30, 2011 represents the sum of "wholesale electric sales" ($ 18.7 million) and "miscellaneous income" ($ 5.7 million), but does not include "retail electric sales" ($ 102.1 million). $ 18.7 million plus *$ 5.7* million equals $ 24.4 million.
n27 Appellants' contention that **"after collection in the REU rates** the PILOT amount is an interdepartmental charge that transfers the money from the electric utility to the City of Redding General Fund" (AOB at p. 30 [emphasis added]) is unsupported by citation to the record, and this Court can ignore such unsupported factual statements. (Cal. Rules of Court, rule 8.204, subd. (a)(1)(C); *City of Lincoln v. Barringer (2002) 102 Cal.App.4th 1211, 1239* [reviewing court may disregard evidentiary contentions unsupported by record cita-

tions].) Moreover, Appellants' counsel acknowledged at trial that the PILOT does not appear as a line-item on customers' bills. (RT 173, 186.)

[*49]

B. The PILOT is a Pre-existing Legal Obligation of REU and Could Therefore Be Funded from Rates

The trial court correctly concluded that the PILOT was a legally authorized cost of REU's service when the challenged rates were adopted December 7, 2010. (3 CT 737.) Because Proposition 26 did not retroactively invalidate those acts (as it did certain state fees) n28 or terminate them (as Proposition 218 did certain property related fees), n29 REU must comply with the legislation requiring it to pay the PILOT and doing so is a cost of operation it may recover from its rates, just as it recovers the cost of complying with the greenhouse gas mandate of 2000's A.B. 32, the safety requirements of the federal Occupational Safety and Health Administration (OSHA) and the Redding City Council policy requiring preferential rates for low-income and senior households.

n28 Art XIII A, § 3, subd. (c).
n29 Art. XIII D, § 6, subd. (d).

The PILOT is also appropriate public policy. As the trial court found, [*50] the PILOT was originally intended to defray the costs to the City for the use of rights of way, street maintenance, administration, and the other benefits the City provides REU and to hold the general fund harmless from the City's decision to municipalize electric service. (See 3 CT 736; II AR Tab 37, p. 358.) Such transfers were common among municipal utilities and both legal and appropriate when the Redding City Council first adopted the PILOT in 1988. (See I AR Tab 4, pp. 119-124; I AR Tab 5, pp. 133-135.) Appellants note that the City has not provided a detailed accounting of the costs the PILOT was intended to recover. True. Again, however, this is a post hoc demand for practices not required when the City Council established the PILOT in 1988. To impose such a requirement post hoc is to give Proposition 26 a retroactive effect the voters plainly did not intend.

Finally, as the trial court found, the 2010 rate increase was not related to the PILOT, and had no effect on it. (3 CT 736-737, 741.) The rate increase was not necessary to fund the PILOT, but to address other costs. n30 The loss of a significant hydropower contract, relatively dry weather, low retail sales, [*51] dwindling reserves and debt service coverage ratios required the December 2010 rate increase. (IV AR Tab 159, pp. 1030-1034 [Dec. 19, 2010 staff report]; IV AR Tab 166, pp. 1065-1098 [slide presentation].) Appellants offered nothing at trial to counter this evidence, and the trial court's findings on the basis for the rate increase are clearly supported by the record.

n30 Appellants misstate the record by asserting the City did not challenge their argument below that the "increase in rates incorporated the [PILOT] ... ." (AOB p. 2.) In fact, the City challenged both Appellants' claims that the increase and overall rates included the PILOT. (See, e.g., 2 CT 632-634 [City Trial Brief].) The trial court agreed that the record supports the City's position (3 CT 741 [Memorandum of Decision]), and Appellants identify nothing in the record on appeal to warrant a reversal of this finding.

IV. PROPOSITION 26 DOES NOT YET REQUIRE VOTER APPROVAL OF REDDING'S PILOT

Proposition 26 defines [*52] the term "tax" (art. XIII C, § 1, subd. (e)), but relies on Proposition 218 to give effect to that definition. Under Proposition 218, a "tax" cannot be "impose[d], extend[ed] or increase[d]" without voter approval. (Art. XIII C, § 2.) Because neither Resolution No. 2010-179 nor Resolution No. 2011-111 "impose, extend or increase" the PILOT, Proposition 218's election requirement does not apply.

A. REU Rates are Not "Imposed" Within the Meaning of Article XIII C

Although the trial court rejected this claim, it is a question of law this Court may view otherwise: article XIII C (adopted by Proposition 218 and amended by Proposition 26) requires voter approval when a "tax" is "imposed." However, REU's rates are not "imposed" within any reasonable interpretation of that term, because the term "impose" re-

flects the exercise of force or authority. As the Court of Appeal explained in construing the Mitigation Fee Act, which governs fees imposed on developers to fund local government facilities and services, "impose" means "to establish or apply by authority or force." (*Ponderosa Homes, supra,* Cal.App.4th at p. 1770.)

Even if the PILOT were funded by rates, [*53] no force or authority is involved here - those who wish to buy energy from REU pay the PILOT (and other costs argued to be funded by REU's service rates) only to the extent they use its service. Those who obtain energy in other ways do not. Not only are there alternatives to electric utility service (such as solar, water, wind and geothermal power), the Court of Appeal quite recently observed that municipal utilities such as REU have no monopoly:

> Nothing in section 9 of article XI of the Constitution conveys an intention to grant a municipal corporation a right to sell all power consumed within its borders. The plain meaning of the words is limited to the right of a municipal corporation to control the use of its property for utility service.

(*City of Los Angeles v. Tesoro Ref. & Mktg. Co. (2010) 188 Cal.App.4th 840, 847* [refinery could purchase power for use in Los Angeles from So. Cal. Edison rather from LA Department of Water & Power].) No force or authority is involved in economic relationships between government and those who voluntarily agree to pay for a service or product they could forego or obtain elsewhere. Thus, the PILOT is not "imposed, [*54] " because no force or authority compels its payment.

Moreover, a tax is "imposed" under Article XIII C only upon its initial legislative adoption. (*Citizens Ass'n of Sunset Beach v. Orange County Local Agency Formation Com'n (2012) 209 Cal.App.4th 1182, 1194-1195* [Proposition 218 did not require tax election on annexation to City because taxes had been "imposed" in compliance with applicable law years earlier].) As the Court of Appeal explained in a challenge to a utility tax under Propositions 62 (Gov. Code §§ 53020 et seq.) and 218 (art. XIII C, § 2), if continued collection of a pre-existing tax were considered an "imposition" or "extension" of the tax requiring an election under Proposition 218, this interpretation would:

> require a local government to annually resubmit taxes previously approved by the voters, even in the absence of any change in the amount or duration of those taxes. Such an absurd result was clearly not intended by the voters.

(*McBrearty v. City of Brawley (1997) 59 Cal.App.4th 1441, 1450,* disapproved on another ground in *Howard Jarvis Taxpayers Ass'n v. City of La Habra (2001) 25 Cal.4th 809, 816.)* [*55] Here, the PILOT was first adopted in 1988, and has existed in its present form since 2005. (3 CT 530.) Mere continued implementation of the PILOT is not an "imposition" for purposes of article XIII C; were it otherwise, we would have election season without end. n31 Thus, resolutions adopted in December 2010 and June 2011 did not "impose" the PILOT within the meaning of article XIII C.

> n31 The trial court came to a similar conclusion in rejecting Appellants' argument from the "re-enactment" rule. (3 CT 739.)

B. The PILOT was Neither "Extended" Nor "Increased" Under Article XIII C

Similarly, the Proposition 218 Omnibus Implementation Act of 1997, Government Code sections 53750 *et seq.* (the "Omnibus Act") defines "[f]or purposes of Article XIII C and Article XIII D of the California Constitution", "extended" as follows:

> "Extended" when applied to an existing tax or fee or charge means a decision by an agency to extend the stated effective period for the tax or fee or charge, [*56] including, but not limited to, amendment or removal of a sunset provision or expiration date.

(Gov. Code, § 53750, subd. (e).) As the trial court concluded, in the case at bar "there is no 'extension of a revenue measure's effective period, as by the repeal of a sunset clause.'" (3 CT 737, citing Gov. Code, § 53750, subd. (e).) The trial court also noted that "the PILOT does not constitute an 'increase' in a tax, in that there has been no change in the method of calculation." (3 CT 737, citing Gov. Code. § 53750, subd. (h)(2)(B) [an exception to the Omnibus Act's definition of "increase"].) As discussed below, both conclusions are sound.

The California Supreme Court recently recognized the value of the Omnibus Act as an interpretive tool for Proposition 218:

> In cases of ambiguity we also may consult any contemporaneous constructions of the constitutional provision made by the Legislature or by administrative agencies. Our past cases establish that the presumption of constitutionality accorded to legislative acts is particularly appropriate when the Legislature has enacted a statute with the relevant constitutional prescriptions clearly in mind. In [*57] such a case, the statute represents a considered legislative judgment as to the appropriate reach of the constitutional provision. Although the ultimate constitutional interpretation must rest, of course, with the judiciary, **a focused legislative judgment on the question enjoys significant weight and deference by the courts.**

(*Greene v. Marin County Flood Control & Water Conservation Dist. (2010) 49 Cal.4th 277, 290-91* [applying Omnibus Act to construe art. XIII D, § 6], internal quotations and citations omitted; emphasis added.)

Accordingly, the Omnibus Act guides interpretation of article XIII C here and clarifies the requirement for voter approval before a local government may "impose, extend or increase" a tax. The Omnibus Act provides a definition of the "increase" in a tax which triggers article XIII C, section 2's election requirements as follows:

> (h)(1) "Increased," when applied to a tax, assessment, or property-related fee or charge, means a decision by an agency that does either of the following:
>
> (A) Increases any applicable rate used to calculate the tax, assessment, fee or charge.
>
> (B) Revises the methodology by which the [*58] tax, assessment, fee or charge is calculated, if that revision results in an increased amount being levied on any person or parcel.

(Gov. Code, § 53750, subd. (h)(1), emphasis added.) This definition is not triggered by the continued implementation of a PILOT last amended in 2005 by the December 2010 rate increase (to the extent that increase could be found to have any relation to the PILOT) or by the City's accounting for its proceeds in its FY 2011-2013 budget.

This point is confirmed by the balance of the Omnibus Act's definition of "increase," which further narrows the term:

> (2) A tax, fee, or charge is not deemed to be "increased" by an agency action that does either or both of the following:
>
> (A) Adjusts the amount of a tax or fee or charge in accordance with a schedule of adjustments, including a clearly defined formula for inflation adjustment that was adopted by the agency prior to November 6, 1996.
>
> (B) **Implements or collects a previously approved tax, or fee or charge,** so long as the rate is not increased beyond the level previously approved by the agency, and the methodology previously approved by the agency is not revised so as to result [*59] in an increase in the amount being levied on any person or parcel.

(Gov. Code, § 53750(h)(2), emphasis added.) Thus, article XIII C, as authoritatively and contemporaneously interpreted by the Legislature, allows continued implementation of a tax or fee without voter approval, provided "the rate is not increased beyond the level previously approved by the agency" and "the methodology previously approved by the agency is not revised." (See *AB Cellular LA, LLC v. City of Los Angeles (2007) 150 Cal.App.4th 747, 760* [Los Angeles increased tax without voter approval by revising methodology of cellphone tax to reach volumetric call charges in addition to fixed monthly charges].) Therefore, because the methodology used to calculate the PILOT has not changed since 2005, it has not been "increased" for purposes of Proposition 218. As Proposition 218 exempts electric charges (art. XIII D, § 3) and Proposition 26 is not retroactive, Redding may continue to implement the PILOT as last amended in 2005.

Therefore, voter approval of Redding's PILOT is not required until the City increases its rate or changes its "methodology" for calculating the PILOT in a way that increases [*60] revenues to the general fund. Thus, the PILOT - and all other legislation that imposes costs on REU that predate Proposition 26 - are "grandfathered" by that measure until "increased" within the meaning of Government Code section 53750, subd. (h).

V. THE PILOT COMPLIES WITH THE REDDING MUNICIPAL CODE

Appellants' citation of Redding Municipal Code (RMC) section 14.22.170, followed by eight lines of cryptic argument presents an ambiguous grievance. (AOB at pp. 24-26.) Either Appellants argue (for the first time on appeal) that RMC section 14.22.170 n32 prescribes an exclusive list of costs that may be funded by rate revenue, or Appellants argue (as they did at trial) that the PILOT was not adopted by resolution. As discussed below, neither argument has merit.

> n32 Although Appellants' quote RMC section 14.22.070, they do not provide a record citation or otherwise seek judicial notice of the ordinance. To assist the Court, the City requests judicial notice of the ordinance, attached to the concurrently filed Motion as Exhibit A.

[*61]

A. The Redding Municipal Code Authorizes Rates Sufficient to Fund the PILOT

To the extent that Appellants argue that RMC section 14.22.170 does not permit the PILOT to be funded by rate revenue, that argument was not raised below and cannot be raised for the first time on appeal. (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc. (2005) 126 Cal.App.4th 668, 685* ["Contentions or theories raised for the first time on appeal are not entitled to consideration."].) In any event, this argument does not withstand scrutiny. First as demonstrated above, Appellants do not provide any support for their contention that the PILOT is funded by rates, and REU's non-rate revenue is sufficient to do so.

Second, RMC section 14.22.170 expressly permits the recovery of legislatively imposed costs like the PILOT:

> "Electrical utility rates shall be sufficient to discharge and pay **all the costs of operation and maintenance** of the electrical utility department and the electrical utility system, including reasonable provision for general administrative services ... ."

(MJN, Exh. A [§ 14.22.170(B)], emphasis added.) As discussed above, the PILOT [*62] is a cost imposed on REU by local legislation that predates Proposition 26, and the Municipal Code permits rates to fund "all the costs of operation and maintenance" of the utility. Other costs of operation that can be recovered by rate revenue include:

> . municipal subsidies for senior and low-income residents (See TV AR Tab 142, p. 817; IV AR Tab 145, p. 830; IV AR Tab 148, pp. 869-870);
>
> . programs to reduce greenhouse gases under 2006's A.B. 32 (Health & Saf. Code §§ 38550-38551);

. "green" power development (Pub. Util. Code § 387.5);

. the solar energy mandates of 2006's SB 1 (Pub. Resources Code §§ 25780 et seq.); and

. increased reliance on renewable sources of energy (Pub. Util. Code § 399.11).

These programs, which also predate Proposition 26, are logically indistinguishable from the PILOT, and Appellants do not argue that they are invalid under the Redding Municipal Code - or Proposition 26, for that matter. As courts give legislation a construction which serves apparent legislative intent and avoid a construction which would invalidate the legislation (*People v. Amor (1974) 12 Cal.3d 20, 30)*, this is the appropriate construction [*63] of RMC section 14.22.170 - an inclusive interpretation of "all costs of operation and maintenance" to allow REU to comply with all applicable federal, state, and local laws.

RMC section 14.22.170, though renumbered 1999, was adopted in 1965. (MJN, Exhs. B, C.) The Redding City Council has clearly and consistently understood section 14.22.170 to permit the PILOT, as that provision was in place when the PILOT was first adopted in 1988 n33 and upon each amendment of the PILOT up to 2005. Yet the City Council maintained both section 14.22.170 and the PILOT as local legislation, apparently never intending one to defeat the other. The City's interpretation of its own ordinances ought to be given considerable deference. (*Los Altos El Granada Investors v. City of Capitola (2006) 139 Cal.App.4th 629, 648* [construing mobile home rent control ordinance].) This is especially so when that interpretation has been consistently maintained for over a long period of time. (*Van Wagner Communications, Inc. v. City of Los Angeles (2000) 84 Cal.App.4th 499, 509-510* [construing billboard ordinance].)

n33 Section 14.22.170's terms authorizing electric utility rates have been unchanged since at least 1965: "Electrical utility rates shall be sufficient to discharge and pay all the costs of operation and maintenance of the electrical utility department ...." (MJN, Exh. C.)

[*64]

In short the City Council has never deviated from the position that the REU rates can cover all costs of operating the utility, including the PILOT and other costs which derive from federal, state, and local law rather than from the practical necessities of electric generation, transmission, storage and distribution. The City's long-standing interpretation of its own ordinance is entitled to deference and, therefore, there can be no question that the 2010 REU rate adjustments are consistent with the rate-setting requirements of RMC section 14.22.170.

B. The PILOT Was Properly Adopted

To the extent Appellants argue that RMC section 14.22.170 required the PILOT to be enacted by separate resolution, they are mistaken.

Section 14.22.170 means what says: the City Council adopts retail electric rates by resolution, observing other requirements the Council has ordained. The City Council provided nothing in that section to indicate that every cost recovered by rates n34 must be adopted by separate resolution. For example, if REU hires a new line inspector, the funding for that position is appropriated by the budget. Although the additional expenditure would ultimately be recovered [*65] by electric rates established by a resolution of the City Council, no separate resolution is needed to authorize that hire. If the PILOT is a cost of service, as the trial court found, it can also be set by budget resolution, and need not be separately adopted as a stand-alone rate resolution. Appellants' position, though convenient to their goal, has no logical limit. Must every purchase of office supplies be the subject of a Council resolution? The point proves too much and cannot have been the Council's intent in adopting RMC section 14.22.170.

n34 Again, Appellants cannot establish on this record that the PILOT is funded by retail rates.

Furthermore, the PILOT was established by budget resolution in 1988 and amended by subsequent budget resolutions, most recently in 2005. (2 CT 530.) Although Appellants argued at trial that there was no independent enactment of the PILOT, they have not refuted - below or here - the City's evidence to the contrary. (See RT 140-141, 175-176.) The trial court properly [*66] determined that the City's position on the creation and history of the PILOT was correct, and included that factual finding in its second Memorandum of Decision. (3 CT 736-737.) In short, the City Council properly legislated the PILOT by budget resolution, and Appellants' refusal to recognize that fact need not distract this Court.

VI. EVEN IF THE PILOT VIOLATED PROPOSITION 26, PROPOSITION 62'S STATUTORY REMEDY WOULD NOT APPLY

Appellants argue that, if the PILOT violates Proposition 26; the appropriate remedy is that provided by Proposition 62, a 1986 statutory initiative. (Gov. Code, §§ 53720 - 53730.) (AOB at pp. 31-33.) Government Code section 53728 requires a county auditor-controller to withhold from a city a dollar of property tax for each dollar of a tax collected by the city in violation of Proposition 62's requirement that taxes imposed after August 1, 1985 be subjected to voter approval. (Gov. Code, § 53727 [limited retroactivity of Proposition 62 adopted in 1986].) However, this remedy is unavailable even were Appellants correct on the merits of their claims, which they are not.

A. The PILOT is not a "Tax" within the Meaning of Proposition 62

Proposition [*67] 62, largely supplanted by Proposition 218, required voter approval of local "taxes" without altering the pre-existing common law definition of the term, which did not encompass utility charges. (*Hansen v. City of San Buenaventura (1986) 42 Cal.3d 1172, 1182* [Ventura's water rates were not taxes even though non-city customers charged more than service cost].) Because Proposition 62 did define the "taxes" for which voter approval is required, prior definitions of the term apply. REU's rates are plainly not taxes under that earlier law. Thus, Proposition 62's remedy cannot apply to a dispute regarding REU's rates even if it could be shown that those rates fund the PILOT and exceed the cost of services. n35

n35 As noted above, the trial court resolved in the City's favor on both points and the record supports those conclusions.

When voters approved Proposition 62 in 1986, utility rates exceeding the cost of service were lawful and common. (E.g., *Hansen, supra, 42 Cal.3d at p. 1182.)* [*68] Moreover, utility rates had long been understood not to involve the levy of a tax in 1986. (*Arcade County Water Dist. v. Arcade Fire Dist. (1970) 6 Cal.App.3d 232, 240* ["A charge for services rendered is in no sense a tax."].) Nor was a fee in lieu of property tax, such as the PILOT, a "tax" under article XIII C prior to Proposition 26. (*Howard Jarvis Taxpayers Ass'n v. City of Fresno (2005) 127 Cal.App.4th 914, 927* ["An exaction imposed on any particular ratepayer in an amount established in the discretion of the utility department is not an exercise of the city's taxing power"].)

The intent of the voters who approved Proposition 62 existed in

1986. It could not have been informed by a measure that was approved more than two decades later by a different electorate; the intent of those earlier voters must be found in the text and context of Proposition 62. That context, of course, includes law Proposition 62 left undisturbed, such as the rule that a PILOT is a reasonable rate-making practice and not a tax. (E.g., *Hansen, supra, 42 Cal.3d at p. 1172* [Ventura was entitled to reasonable rate of return on water service provided [*69] to non-city residents].)

Similarly, Proposition 26's definition of "tax" is not the intent the electorate that adopted a remedy in 1986. How can the remedy adopted by a different generation of voters apply to a rate that may become a tax only by virtue of a definition adopted 24 years later?

Thus, the PILOT is not a "tax" as Proposition 62 uses the term.

B. Proposition 62's Remedy is Unavailable Here

Proposition 26 was adopted more than two decades after Proposition 62, and neither the text of Proposition 26 nor the ballot materials pertaining to it make any reference to the penalty provision of Proposition 62. Furthermore, the

meaning of a statutory initiative such as Proposition 62 turns on the intent of those who voted for it, and as discussed above, utility rates were not characterized as taxes at the time Proposition 62 was approved.

In addition, the remedy required by Proposition 62 is ill defined. It does not require a county auditor-controller to reduce the 1 percent property tax authorized by Proposition 13 (art. XIII A, § 1); nor does it indicate how property taxes withheld from an offending city should be reallocated. No other law specifies what becomes of property [*70] taxes withheld from a city under Government Code section 53728. n36 Does it become a windfall to the county? Escheat to the state? Become a windfall to all taxing agencies other than the offending city? If the County were to simply keep the property taxes and use them to fund its services, it would violate Proposition 13's directive that "[t]he one percent (1%) tax [is] to be collected by the counties and **apportioned according to law** to the districts within the counties." (Art. XIII A, § 1, emphasis added.)

n36 Perhaps for this reason, the remedy Appellants seek has never been awarded by any court - a fact they concede. (AOB at p. 33.)

Notably, there is no mechanism for the transfer of such withheld funds to the state as Appellants argued to the trial court. (RT 88-90.) Shasta County collects property tax, and its Auditor-Controller apportions tax revenues pursuant to the dense and complicated instructions of Revenue and Tax Code sections 95 and 95.2. As property tax revenue never gets to the state [*71] to begin with, it cannot simply "remain" there, as Appellants urged below. Indeed, Proposition 13 requires property taxes to be "apportioned according to law to the districts within the counties." (Art. XIII A, § 1). Although the Legislature has often manipulated the property tax system to its own ends (e.g., *City of Alhambra v. County of Los Angeles (2012) 55 Cal.4th 707* [describing vehicle license fee swap and "Triple Flip" reallocation of sales and property taxes]), it has never simply appropriated them.

Fortunately, this Court need not be the first to chart these waters, because electric rates, even those that arguably fund a PILOT or other general fund transfers, are not taxes subject to Proposition 62. Moreover, the reach of Proposition 62 need not be determined here, because Proposition 26 should be given the solely prospective effect intended by the voters who approved it. For all of these reasons, the Proposition 62 remedy should not be invoked.

CONCLUSION

Because it is plain that voters did not intend Proposition 26 to be retroactive as to local government or to undermine earlier laws serving environmental and consumer protection policies, [*72] this Court should affirm the trial court's conclusion that Proposition 26 does not invalidate Redding's PILOT. To rule otherwise would give Proposition 26 a meaning expressly disclaimed by the Legislative Analyst and that does not comport with the electorate's rejection of a measure designed to limit the application of AB 32, the state's greenhouse gas law, on the same ballot by which they approved Proposition 26.

Even were it retroactive, Proposition 26 merely defines "tax." The balance of article XIII C (adopted by Proposition 218) gives effect to that definition, and the PILOT has not been "impose[d], extend[ed] or increase[d]" within the meaning of that article. Moreover, REU's non-rate revenue is far greater than the amount of the PILOT, and Appellants therefore cannot prove the challenged electricity rates fund the PILOT in any event.

Further, the adoption and implementation of the PILOT does not offend the City's long-standing interpretation of RMC section 14.22.170, which allows rates to recover all REU's costs of operation and maintenance and does not require a separate resolution for each such cost.

Finally, Proposition 62 was adopted in 1986, when utility rates [*73] were not taxes under applicable law, and its problematic remedy - never applied by any court-is therefore unavailable here, even could this Court conclude the PILOT is a tax within the meaning of Proposition 26.

For all these reasons, the City respectfully urges this Court to affirm the well-reasoned judgments of the trial court.

DATED: April 17, 2013

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CERTIFICATION OF COMPLIANCE WITH CAL. R. CT. 8.204, subd. (c)(1)

Pursuant to California Rules of Court, rule 8.204, subd. (c)(1), the foregoing Respondents' Brief by Respondents City of Redding and City Council of Redding contains 11,792 words (including footnotes, but excluding the tables and this Certificate) and is within the 14,000 word limit set by rule 8.204, subd. (c)(1). In preparing this certificate, I relied on the word count generated by Word version 14, included in Microsoft Office Professional Plus 2010.

Executed on April 17, 2013, at Penn Valley, California.

COLANTUONO & LEVIN, PC
MICHAEL G. COLANTUONO

/s/ [Signature] [*74]
Michael G. Colantuono

PROOF OF SERVICE

CITIZENS FOR FAIR REU RATES v. CITY OF REDDING

Third District Court of Appeal Case No. C071906

I, Ashley L. Lloyd, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 11364 Pleasant Valley Road, Penn Valley, CA 95946. On April 17, 2013 I served the document(s) described as **RESPONDENTS' BRIEF** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED LIST

BY MAIL: The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it "would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Penn Valley, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed' invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

I declare under penalty of perjury [*75] under the laws of the State of California that the above is true and correct.

Executed on April 17, 2013 at Penn Valley, California.

/s/ [Signature]
Ashley L. Lloyd

SERVICE LIST

CITIZENS FOR FAIR REU RATES v. CITY OF REDDING

Third District Court of Appeal Case No. C071906

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[SEE ATTACHMENT 1 IN ORIGINAL]

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