No. A109510

In the Court of Appeal

Of the State of California

First Appellate District

Division 1

UNFAIR FIRE TAX COMMITTEE

Plaintiff and Appellant,

v.

CITY OF OAKLAND,

Defendant and Respondent.

APPELLANT S OPENING BRIEF

Appeal from Alameda County
Superior Court Case No. RG04146478
The Honorable Steven Brick

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STATEMENT OF APPEALABILITY

This appeal is taken from a final judgment that disposes of all issues between the parties and is appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a).

STATEMENT OF THE CASE

Plaintiff and appellant Unfair Fire Tax Committee (UFTC) filed an initial complaint on March 18, 2004, and a First Amended Complaint on August 4, 2004. (Appellant s Appendix (AA) 1, 10.) Defendants and respondents City of Oakland and Oakland Wildfire Prevention Assessment District (collectively City) filed a demurrer to the First Amended Complaint, which the trial court sustained with leave to amend on October 20, 2004. (AA 22.)

After UFTC filed its Second Amended Complaint and Petition for Writ of Mandate Re: Oakland Fire Suppression, Prevention and Preparedness District Ordinance (SAC) on November 15, 2004 (AA 23-35), the City again demurred. (AA 36-103.) On January 24, 2005 the trial court again sustained the demurrer, this time

without leave to amend (AA 142), and this appeal followed. (AA 144, 149.)

STATEMENT OF FACTS

The City is a chartered city in the State of California which is authorized to act through its City Council. (Ordinance, Request for Judicial Notice In Support of Defendant City of Oakland and its Oakland Wildfire Prevention Districts Demurrer to Plaintiff s Second Amended Complaint and Petition for Writ of Mandate (RJN), Exhibit A, AA 60[1].) In November 2003, the City Council adopted Ordinance No. 12556 C.M.S. (Ordinance), along with resolutions of intention to form a special fire suppression district within the City. (SAC ¶¶ 1, 4, 6, 19, AA 23-24, 26; Ordinance, AA 60-63.)

UFTC is an unincorporated association consisting of property owners within the City of Oakland who are affected by the Ordinance; UFTC was formed specifically to contest the Ordinance. (SAC ¶¶ 1-2, AA 23-24.)

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[1] The trial court granted the City s request to take judicial notice of documents pertaining to the City s actions. (AA 142.)

David E. Mix, the owner of a parcel of land affected by the Ordinance, is UFTC s principal and managing member. (SAC ¶ 2, AA 24.)

The Ordinance granted the City Council the power, after notice and public hearing, to create a special benefit fire suppression, prevention and preparedness district, and to levy annual assessments for that district, in designated areas of the City. (Ordinance, Section 3, AA 61-62.)

The City Council was required to follow notice, protest and hearing procedures complying with Government Code section 53753, and the Ordinance provided that any proposed assessee could make written protest against the proposed assessment, up until the close of the public hearing, by delivering the protest to the City Clerk. (Ordinance, Sections 8-10, AA 64-65.) The Ordinance also allowed any interested person to present written or oral testimony at the public hearing. (SAC ¶ 30, AA ; Ordinance, Section 10, AA 65.) The City Council could form the district only if there were no protests, or if the valid protests did not amount to a majority protest. (Ordinance, Sections 12-13, AA 66.)

The City notified some residents, though not all those required, that a public hearing would be held on January 6, 2004, and a public hearing was held on that date. (SAC ¶¶ 6, 15-16, 26, 36-37, AA 24-29; Notice, RJN, Exhibit C, AA 100-103.) Mr. Mix orally protested at the January 6, 2004 public hearing, and made written or oral protests against the proposed fire suppression district on November 4, 2003, November 18, 2003, January 5, 2004, January 6, 2004, and January 20, 2004. (SAC ¶¶ 30-33, 35, 37-38, 40, AA 28-29.) In addition, other interested parties orally protested at the January 6, 2004 public hearing, and presented written protests on December 8, 2003 and January 6, 2004. (SAC ¶¶ 30-31, 34, 36, 39-40, AA 28-29.) There are a number of alleged defects in the formation of the district that render it invalid. (SAC ¶¶ 7-29, AA 25-28.)

Following the public hearing, and pursuant to the Ordinance and to California Government Code sections 50078 *et seq.*, the City Council on January 20, 2004 passed Resolution No. 78305 C.M.S. (Resolution), establishing the Oakland Wildfire Prevention Assessment District. (SAC ¶¶ 6, 29, 39, AA 24, 28-29; Resolution,

RJN, Exhibit B, AA 72-98.)

Under Section 17 of the Ordinance, Code of Civil Procedure sections 860 *et seq.* govern any judicial action or proceedings to validate, attack, review, set aside, void or annul a resolution adopting a final report and levying an assessment, and UFTC filed suit in accordance with those sections. (SAC ¶ 29, AA 28; Ordinance, Section 17, AA 68.) Section 19, on the other hand, provides that no error, irregularity or neglect:

> in any procedure taken under this division (*sic*) shall avoid or invalidate such proceeding or any assessment. The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the City Council.

(Ordinance, Section 19, AA 68-69.)

The Ordinance does not specify any procedure to be followed in taking this appeal to the City Council. (Ordinance, Section 19, AA 68-69.)

ARGUMENT

A. STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

The court sustained the City s demurrer without leave to amend based on its determination that the SAC failed to allege either exhaustion of the administrative appeal procedures set out in Section 19, or a basis for excusing the failure to exhaust. (Order, AA 142.)

In determining whether the trial court erred in sustaining the demurrer, this court must assume the truth of all facts properly pled in the SAC (*Howard Jarvis Taxpayer Association v. City of La Habra* (2001) 25 Cal.4th 809, 814), and construe them liberally with a view to attaining substantial justice. (*Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 841-42.) In conducting its independent review of the decision below, the court must construe the SAC reasonably and reverse if the SAC contains facts entitling UFTC to relief under any legal theory (*Walker v. Allstate Indemnity Company* (2000) 77 Cal.App.4th 750, 754), or it there is a reasonable possibility the defect can be cured by amendment. (*Friedland*, 62 Cal.App.4th at 842.)

In this case, the trial court erred as a matter of law in sustaining the City s demurrer without leave to amend, because the SAC properly alleged that UFTC had exhausted all necessary administrative remedies. (SAC ¶¶ 30-40, AA 28-29.)

Under California constitutional and statutory law, a local agency must follow certain procedures in imposing assessments. The City identified those procedures in the Ordinance and properly provided for judicial review pursuant to Code of Civil Procedure sections 860 *et seq.* (Ordinance, Sections 8, 17, AA 64, 68.) The addition of Section 19, which purportedly requires an appeal to the City Council, does not allow the City to evade the mandated procedure for levying assessments and judicial oversight of those assessments.

Even if the City could ignore constitutional and statutory requirements, UFTC did not have to allege exhaustion of the appeal identified in Section 19. The City s failure to specify any procedure to be followed on the appeal renders it an ineffective administrative which need not be exhausted. Appealing the City Council s decision to itself would be an idle act, which

is also not required under California law. It has been settled for more than fifty years that where a statute provides both judicial and administrative remedies, as the City did here, exhaustion remedy has no application. Finally, since the appeal could not invalidate the ordinance, it does not afford an adequate remedy, and need not be exhausted.

The SAC properly alleged that UFTC had exhausted the constitutionally mandated administrative procedures, and the court should reverse the judgment in favor of the City.

B. FOLLOWING THE PASSAGE OF PROPOSITION 218, THE CALIFORNIA CONSTITUTION REQUIRES THAT SPECIFIC PROCEDURES BE FOLLOWED IN PROTESTING ASSESSMENTS, AND THE LAW DOES NOT ALLOW FOR AN APPEAL TO THE CITY COUNCIL

Since its adoption in 1981, Government Code sections 50078 has granted local agencies, including chartered cities, the authority to levy assessments for fire suppression services. (Gov. Code § 50078 *et seq.*)

In 1996 voters approved Proposition 218, adding two articles to the California Constitution that govern the procedures to be followed by local agencies in adopting

assessments. (*Ventura Group Ventures, Inc. v. Ventura Port District* (2001) 24 Cal.4th 1089, 1105.)

Proposition 218 was a response to the attempts of local agencies to avoid the limitations that Proposition 13 had imposed on their ability to tax. (*Silicon Valley Taxpayers Association, Inc. v. Santa Clara County Open Space Authority* (2005) 130 Cal.App.4th 1295, 1328-29.) Local agencies had begun to rely on special assessments, which could be levied without the two-thirds vote required by Proposition 13, and Proposition 218 was intended to protect[] taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent. *Silicon Valley Taxpayers Association,*130 Cal.App.4th at 1330, quoting the Ballot Pamphlet for Proposition 218.)

The procedures required by Proposition 218 are set out in Article XIII D, section 4 of the California Constitution, and in the Proposition 218 Omnibus Implementation Act, codified at Government Code section 53750 *et seq.* (*Silicon Valley Taxpayers Association*, 130 Cal.App.4th at 1330.) The provisions of those statutes expressly supersede any other statutory

provisions applicable to the levy of a new assessment. (*Silicon Valley Taxpayers Association*, 130 Cal.App.4th at 1330; Gov. Code § 53753, subd. (a).)

As a result, the protest and hearing procedures provided for fire suppression assessments by Government Code section 50078.8 and 50078.10 were repealed in 2000 (Senate Bill No. 1334 (2000 Regular Session).) Section 50078.6 was amended to specify that the local agency shall cause the notice, protest, and hearing procedures to comply with Section 53753. (Gov. Code § 50078.6.)

California Constitution Article XIII D, section 4, along with Government Code sections 53753, subdivisions (b), (c) and (d), require local agencies to mail written notice of a public hearing to the record owners of affected parcels, to include assessment ballots that can be submitted to protest the proposed assessment, and to hold the public hearing as noticed, at which the agency shall consider all objections or protests, and at which any interested person shall be permitted to present written or oral testimony. (Gov. Code § 53753, subd.(d).)

Proposition 218 did not change the procedure for

filing judicial challenges to fire suppression assessments, and section 50078.17 continued to require that any judicial action or proceeding to validate, attack, review, set aside, void, or annul an ordinance or resolution levying an assessment would be governed by Code of Civil Procedures section 860 *et seq.* In any legal action attacking an assessment, Proposition 218 did reverse the burden of proof, requiring the local agency the burden to establish a special benefit to each parcel. (Cal. Const., art. XIII D, § 4(f); see *Not About Water Committee v. Solano Board of Supervisors* (2002) 95 Cal.App.4th 982, 992-97.)

To some extent, the City attempted to follow the law in adopting the Ordinance, which specifically required compliance with Government Code section 53753 and Code of Civil Procedure section 860 *et seq.* (Ordinance, Sections 8 and 17, AA 64, 68.) The City began to go off course in Sections 9 and 10 of the Ordinance, which track almost verbatim repealed Government Code sections 50078.8 and 50078.10, (Ordinance, Sections 9-10, AA 65), but the trial court did not base its ruling on any claimed failure by the

UFTC to comply with those provisions. (Order, AA 142.)

As the above survey of California assessment law demonstrates, however, the City had absolutely no basis for placing an additional administrative hurdle in the path of any proposed assessees who wanted to attack the Ordinance. There is nothing in Article XIII D of the California Constitution, Government Code section 53753, or Code of Civil Procedure section 860 *et seq*., to suggest that the City could unilaterally require that anyone had to take an appeal to the City Council (Ordinance, Section 19, AA 68-69), before attacking the Ordinance in a legal proceeding.

The court sustained the City s demurrer without leave to amend solely because it determined that UFTC had neither complied with Section 19 of the Ordinance, nor provided any excuse for noncompliance. (Order, AA 143.) This was error as a matter of law, because the City was required to follow the procedures set forth in Government Code section 53753, which superseded any other provisions applicable to the levying of assessments. (*Silicon Valley Taxpayers Association*, 130 Cal.App.4th at 1330; Gov. Code § 53753, subd. (a).)

The voters passed Proposition 218 to make it more difficult for local agencies to use special assessments to avoid Proposition 13. (*Silicon Valley Taxpayers Association*, 130 Cal.App.4th at 1328-30.) The City of Oakland cannot avoid judicial scrutiny of its assessments by adopting an illegal, additional prerequisite to judicial review, and the court should reverse the demurrer.

C. EVEN IF THE CITY COULD LEGALLY IMPOSE AN ADDITIONAL ADMINISTRATIVE BURDEN, IT WAS ERROR FOR THE COURT TO SUSTAIN THE DEMURRER BECAUSE THE APPEAL WAS AN INSUFFICIENT AND UNNECESSARY ADMINISTRATIVE REMEDY

Assuming that, despite the California Constitution and applicable provisions of the Government Code and the Code of Civil Procedure, the City could legally require proposed assessees to overcome an additional administrative hurdle, the court erred in determining that the doctrine of exhaustion of administrative remedies required it to sustain the City s demurrer.

While a party generally must exhaust administrative remedies before resorting to the courts, (*Coachella Valley Mosquito and Vector Control District*

v. California Public Employment Relations Board (2005) 35 Cal.4th 1072, 1080), the exhaustion doctrine is subject to a number of exceptions (*Coachella Valley*, 35 Cal.4th at 1081), several of which apply in this case.

The doctrine does not apply, for example, where an effective administrative remedy is wholly lacking. *G¢ehring v. Chapman University* (2004) 121 Cal.App.4th 353, 380.) The statute or regulation providing for the remedy must establish *clearly defined machinery for the submission, evaluation and resolution of complaint by aggrieved parties.* (*Goehring*,121 Cal.App.4th at 380 (emphasis in original).) Relying on cases rejecting nebulous procedure[s] as inadequate,*Goehring* held that the exhaustion doctrine was inapplicable where the State Bar s rules did not define any procedure for the submission, evaluation and resolution of ... claims. (*Goehring*, 121 Cal.App.4th at 380-81.)

In this case, the City s claimed administrative procedure does not even rise to the level of nebulous. Section 19 of the Ordinance states that the exclusive remedy of any person affected or aggrieved thereby shall

be by appeal to the City Council (Ordinance, Section 19, AA 68-69), but the Ordinance gives no indication as to how the appeal could be taken, when it had to be taken, when it would be heard, what evidence could be submitted, or what standard would be applied. (Ordinance, Section 19, AA 68-69.)

In the absence of any machinery, much less clearly defined machinery, the City s attempt to require a wholly undefined appeal to the City Council must be rejected due to its complete failure to provide an adequate administrative remedy. (*Goehring*, 121 Cal.App.4th at 380-81; see also *City of Susanville v. Lee C. Hess Company* (1955) 45 Cal.2d 684, 689-90, discussed below.)

Even if the City had clearly delineated the appellate machinery, Section 19 s requirement that a proposed assessee appeal the City Council s decision to the City Council is an idle act that the California Supreme Court has specifically found was not required to satisfy the exhaustion doctrine. (*Sierra Club v. San Joaquin Local Agency Formation Commission* (1999) 21 Cal.4th 489, 501-03, 510.)

Noting that the likelihood that an administrative body will reverse itself when presented only with the same facts and repetitive legal arguments is small, (*Sierra Club*, 21 Cal.4th at 501), the Court overruled long-established precedent[2] and held that the right to petition for judicial review of a final decision of an administrative agency is not necessarily affected by the party s failure to file a request for reconsideration or rehearing before that agency. $*ierra Club*, 21 Cal.4th at 510.) Specifically, there was no such requirement where there would be no opportunity to bring new evidence or legal arguments before the administrative body. (*Sierra Club*, 21 Cal.4th at 510.)

The City has never suggested that UFTC could present new evidence or argument to the City Council under Section 19, and there is no reason to believe that the City Council would have reversed its unanimous Resolution (AA 75), if given another chance. Since

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[2] *Sierra Club*, 21 Cal.4th at 510, specifically overruled *Alexander v. State Personnel Board* (1943) 22 Cal.2d 198 and, by inference, overruled *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, cases upon which the City erroneously relied below. (Memorandum of Points and Authorities ... 7-8, AA .)

there is little reason to maintain an illogical extension of this general rule [of exhaustion of administrative remedies that] require[s] an idle act, (*Sierra Club*, 21 Cal.4th at 503), the trial court erred in sustaining the demurrer.

Even assuming the City could legally require proposed assessees to appeal the City Council s decision to itself:

> It is equally well settled that where a statute provides an administrative remedy and also provides an alternative judicial remedy the rule requiring exhaustion of the administrative remedy has no application if the person aggrieved and having both remedies afforded him by the same statute , elects to use the judicial one.

(*City of Susanville v. Lee C. Hess Company* (1955) 45 Cal.2d 684, 689.)

City of Susanville involved a public works contract, and the contractor argued that review could be sought by filing a judicial action to determine the validity of the proceedings under former Streets and Highways Code section 5268, while the City of Susanville claimed that Streets and Highways Code section 5003 controlled. (*City of Susanville*, 45 Cal.2d at 688-89.)

The judicial action provided by former section 5268

is very similar to the one afforded under Code of Civil Procedure sections 860 *et seq.*, which both Section 17 of the Ordinance and Government Code section 50078.17 require be used in validating or attacking a resolution. (Ordinance, Section 17, AA 68.) Section 19, on the other hand, is taken almost verbatim from Streets and Highways Code section 5003,[3] which the Court found inapplicable because it is substantive, not a procedural provision. It grants a right but provides for no machinery to enforce this right. *City of*

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[3] Section 19, provides that this chapter (*sic*) shall be liberally construed to effectuate its purposes. No error, irregularity, informality, and no neglect or omission of any officer, in any procedure taken under this division (*sic*) shall avoid or invalidate such proceeding or any assessment. The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the City Council.

Streets and Highways Code section 5003 provides that this division shall be liberally construed to effectuate its purposes. No error, irregularity, informality, and no neglect or omission of any officer, in any procedure taken under this division, which does not directly affect the jurisdiction of the legislative body to order the work or improvement, shall avoid or invalidate such proceeding or any assessment for the cost of the work done thereunder. The exclusive remedy of any person affected or aggrieved thereby shall be by appeal to the legislative body in accordance with the provisions of this division.

Susanville, 45 Cal.2d at 690.)

Recently the Court declined to follow *City of Susanville* in *Campbell v. Regents of the University of California* (2005) 35 Cal.4th 311, 331-32, because in *Campbell* no legislation corresponds to the detailed procedures for judicial remedy found in the former Streets and Highways Code. In this case, however, Code of Civil Procedure sections 860 *et seq.* have provided just such a detailed procedure for more than forty years, and *City of Susanville* controls this case.

Not only are proposed assessees not required to pursue a worthless appeal before seeking a judicial remedy but, in the absence of any indication regarding the timeframe for the appeal provided by Section 19, pursuing that remedy might make it impossible for an assessee to comply with Section 860's requirement that legal remedies be pursued within 60 days. (Code Civ. Proc. § 860.)

Finally, the exhaustion doctrine does not apply when the administrative agency cannot grant an adequate remedy. *Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830, 834.) Section 19 specifically states

that the appeal to the City Council will not result in the invalidation of the Ordinance or the Resolution. (Ordinance, Section 19, AA 68-69.) The exclusive procedure provided to test the validity of the proceedings is Code of Civil Procedure sections 860 *et seq.* (Code Civ. Proc. § 869.)

D. UFTC HAS ADEQUATELY ALLEGED EXHAUSTION OF ALL REQUIRED ADMINISTRATIVE REMEDIES, OR COULD EASILY AMEND THE SAC TO DO SO

While the trial court s focus on the Section 19 appeal made it unnecessary to consider the City s other objections, if this court considers those objections it should reject them as well. Liberally construing the facts as pled in the SAC, (*Friedland v. City of Long Beach* (62 Cal.App.4th 835, 841-42), UFTC has adequately alleged the exhaustion of all necessary administrative remedies.

Contrary to the City s claim, for example, all plaintiffs need not personally exhaust the administrative remedies as long as the local agency has had an opportunity to act on the objections so that the policies of the exhaustion doctrine have been

fulfilled. (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 267-68.) Even if that were the law, the SAC clearly alleges that UFTC s managing member, Mr. Mix, submitted written and oral objections prior to and at the public hearing, along with other interested persons. (SAC ¶¶ 2, 30-40, AA 24, 28-29.)

While the SAC could have described in more detail the relationship of those other people with UFTC, or the specific nature of the objections raised orally and in writing, UFTC could easily amend the SAC to remedy those problems, and it was therefore error to sustain the demurrer without leave to amend. (*Friedland,* 62 Cal.App.4th at 842.)[4]

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[4] At the hearing on the demurrer, UFTC s trial counsel offered to amend the SAC by alleging the relationship more fully and by attaching the written objections. (AA 137-38.)
The Original Notice of Appeal requested the preparation of the reporter s transcript (AA 144-146), though an Amended Notice indicated an intention to proceed without a reporter s transcript. (AA 149-150.) The reporter s transcript was prepared, and is included in the Appellant s Appendix at 135-41.)

CONCLUSION

The City of Oakland had no authority to undermine constitutional and statutory requirements by raising a nebulous, unnecessary and ineffective administrative hurdle for those who wish to challenge these assessments, particularly where the City had specified an alternative, well-established method of judicial review.

This court should reverse the order sustaining the demurrer and dismissing the case against the City.

DATED: March 22, 2007 LAW OFFICES OF PAUL KLEVEN

By:_____
PAUL KLEVEN

CERTIFICATE OF COUNSEL

I certify that this Appellant s Opening Brief contains 3803 words, as calculated by my WordPerfect 11 word processing program.

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