Supreme Court of California
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Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
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No. S262634

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ROBERT ZOLLY, RAY MCFADDEN, AND STEPHEN CLAYTON,

Plaintiffs-Appellants,

v.

CITY OF OAKLAND,

Defendant-Respondent.

After a Published Opinion From the Court of Appeal,
First Appellate District, Division One, Case No. A154986,
Alameda County Superior Court Case No. RG16821376

REQUEST FOR JUDICIAL NOTICE OF THE LEGISLATURE OF THE STATE OF CALIFORNIA IN SUPPORT OF PROPOSED AMICUS CURIAE BRIEF; DECLARATION OF ALEX M. HARRISON

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Legislature of the State of California

REQUEST FOR JUDICIAL NOTICE

Pursuant to California Rule of Court 8.252 and California Evidence Code section 452, proposed amicus curiae Legislature of the State of California requests that the Court take judicial notice of the following documents:

1. The Complaint for Declaratory and Injunctive Relief filed in Alameda County Superior Court on June 29, 2016 in *Zolly v. City of Oakland*, No. RG16821376, attached as **Exhibit A** to the Declaration of Alex M. Harrison.

2. Excerpts from Plaintiffs' Opposition to Demurrer, filed in Alameda County Superior Court on December 1, 2017 in *Zolly v. City of Oakland*, No. RG16821376, attached as **Exhibit B** to the Declaration of Alex M. Harrison.

3. Excerpts from Appellants' Opening Brief filed in the Court of Appeal of California, First Appellate District, Division One on March 8, 2019 in *Zolly v. City of Oakland*, No. A154986, attached as **Exhibit C** to the Declaration of Alex M. Harrison.

4. Excerpts from Appellants' Answer to Petition for Review filed in the Supreme Court of California on July 10, 2020 in *Zolly v. City of Oakland*, No. S262634, attached as **Exhibit D** to the Declaration of Alex M. Harrison.

5. Plaintiffs' First Amended Complaint for Declaratory Relief filed in San Francisco County Superior Court on October 18, 2018 in *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority*, No. CGC-18-567860, attached as **Exhibit E** to the Declaration of Alex M. Harrison.

6. Excerpts from Plaintiffs' Opposition to Motions for Judgement on the Pleadings filed in San Francisco County Superior Court on March 20, 2019 in *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority*, No. CGC-18-567860, attached as **Exhibit F** to the Declaration of Alex M. Harrison.

7. Excerpts from Order Granting Defendant California State Legislature's Motion for Judgement on the Pleadings filed in San Francisco County Superior Court on April 3, 2019 in *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority*, No. CGC-18-567860, attached as **Exhibit G** to the Declaration of Alex M. Harrison.

8. Excerpts from Appellants' Opening Brief filed in the Court of Appeal of California, First Appellate District on October 29, 2019 in *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority*, No. A157598, attached as **Exhibit H** to the Declaration of Alex M. Harrison.

9. Excerpts from Appellants' Consolidated Reply Brief filed in the Court of Appeal of California, First Appellate District on January 24, 2020 in *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority*, No. A157598, attached as **Exhibit I** to the Declaration of Alex M. Harrison.

10. Excerpts from Appellants' Petition for Rehearing filed in the Court of Appeal of California, First Appellate District on July 8, 2020 in *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority*, No. A157598, attached as **Exhibit J** to the Declaration of Alex M. Harrison.

11. Excerpts from Appellants' Petition for Review filed in the Supreme Court of California on August 10, 2020 in *Howard Jarvis*

Taxpayers Association v. Bay Area Toll Authority, No. S263835, attached as **Exhibit K** to the Declaration of Alex M. Harrison.

Exhibit A-K are court records of the State of California which are the proper subject of judicial notice under Evidence Code section 452(d), which provides that judicial notice may be taken of records of any court of the State. Exhibits A-K are relevant to demonstrate that the plaintiffs in this case, and in the related case currently pending in this Court, *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority*, No. S263835, have cumulatively changed their legal theories concerning the meaning of the plain language in article XIII A, section 3(b)(4) and article XIII C, section 1(e)(4) of the California Constitution six times.

The Legislature notes, pursuant to California Rule of Court 8.252(a)(2)(B)-(D), that none of these exhibits were presented to the trial or appellate courts below as matters to be judicially noticed. The Legislature did not seek to file an amicus curiae brief in either lower court in this case. Furthermore, the exhibits are relevant to facts that did not become fully apparent until the plaintiffs in the two cases once again changed positions in their filings before this Court.

Dated: March 22, 2021

Respectfully submitted,

OLSON REMCHO, LLP

By: /S/ Robin B. Johansen
Attorneys for Proposed Amicus Curiae
Legislature of the State of California

DECLARATION OF ALEX M. HARRISON

I, Alex M. Harrison, declare as follows:

1. I am a paralegal at the law firm Olson Remcho, LLP, attorneys for proposed amicus curiae the Legislature of the State of California. I submit this declaration in support of the Legislature's Proposed Amicus Curiae Brief in Support of Respondent City of Oakland.

2. Attached as **Exhibit A** is a true and correct copy of the Complaint for Declaratory and Injunctive Relief filed in Alameda County Superior Court on June 29, 2016 in *Zolly v. City of Oakland*, No. RG16821376. I obtained a copy of this document from <https://publicrecords.alameda.courts.ca.gov/>.

3. Attached as **Exhibit B** is a true and correct copy of excerpts from Plaintiff's Opposition to Demurrer, filed in Alameda County Superior Court on December 1, 2017 in *Zolly v. City of Oakland*, No. RG16821376. I obtained a copy of this document from <https://publicrecords.alameda.courts.ca.gov/>.

3. Attached as **Exhibit C** is a true and correct copy of excerpts from Appellants' Opening Brief filed in the Court of Appeal of California, First Appellate District on March 8, 2019 in *Zolly v. City of Oakland*, No. A154986. This document was obtained by counsel to the Legislature Margaret Prinzing from https://advance.lexis.com/ and maintained in our office files.

4. Attached as **Exhibit D** is a true and correct copy of excerpts from Appellants' Answer to Petition for Review filed in the Supreme Court of California on July 10, 2020 in *Zolly v. City of Oakland*, No. S262634. This document was obtained by counsel to the Legislature

Margaret Prinzing from https://advance.lexis.com/ and maintained in our office files.

5. Attached as Exhibit E is a true and correct copy of Plaintiffs' First Amended Complaint for Declaratory Relief filed in San Francisco County Superior Court on October 18, 2018 in *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority*, No. CGC-18-567860. This copy was served on this law firm in its capacity as counsel to the Legislature in the case and maintained in our office files.

6. Attached as Exhibit F is a true and correct copy of excerpts from Plaintiffs' Opposition to Motions for Judgement on the Pleadings filed in San Francisco County Superior Court on March 20, 2019 in *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority*, No. CGC-18-567860. This copy was served on this law firm in its capacity as counsel to the Legislature in the case and maintained in our office files.

7. Attached as Exhibit G is a true and correct copy of excerpts from Order Granting Defendant California State Legislature's Motion for Judgement on the Pleadings filed in San Francisco County Superior Court on April 3, 2019 in *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority*, No. CGC-18-567860. This copy was served on this law firm in its capacity as counsel to the Legislature in the case and maintained in our office files.

8. Attached as Exhibit H is a true and correct copy of excerpts from Appellants' Opening Brief filed in the Court of Appeal of California, First Appellate District on October 29, 2019 in *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority*, No. A157598. This copy was served on this law firm in its capacity as counsel to the Legislature in the case and maintained in our office files.

9. Attached as Exhibit I is a true and correct copy of excerpts from Appellants' Consolidated Reply Brief filed in the Court of Appeal of California, First Appellate District on January 24, 2020 in *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority*, No. A157598. This copy was served on this law firm in its capacity as counsel to the Legislature in the case and maintained in our office files.

10. Attached as Exhibit J is a true and correct copy of excerpts from Appellants' Petition for Rehearing filed in the Court of Appeal of California, First Appellate District on July 8, 2020 in *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority*, No. A157598. This copy was served on this law firm in its capacity as counsel to the Legislature in the case and maintained in our office files.

11. Attached as Exhibit K is a true and correct copy of excerpts from Appellants' Petition for Review filed in the Supreme Court of California on August 10, 2020 in *Howard Jarvis Taxpayers Association v. Bay Area Toll Authority*, No. S263835. This copy was served on this law firm in its capacity as counsel to the Legislature in the case and maintained in our office files.

I declare under penalty of perjury that the foregoing is true and correct. I have firsthand knowledge of the same, except as to those matters described on information and belief, and if called upon to do so, I could and would testify competently thereto. Executed this 22nd day of March, 2021, in Piedmont, California.

ALEX M. HARRISON

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is 1901 Harrison Street, Suite 1550, Oakland, CA 94612.

On March 22, 2021, I served a true copy of the following document(s):

Request For Judicial Notice
Of The Legislature Of The State
Of California In Support Of Proposed
Amicus Curiae Brief;
Declaration Of Alex M. Harrison

on the following party(ies) in said action:

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☐ **BY UNITED STATES MAIL:** By enclosing the document(s) in a sealed envelope or package addressed to the person(s) at the address above and

☐ depositing the sealed envelope with the United States Postal Service, with the postage fully prepaid.

☐ placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, located in Oakland, California, in a sealed envelope with postage fully prepaid.

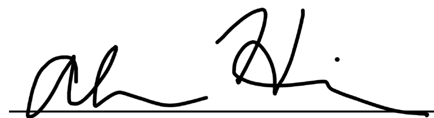
☐ **BY OVERNIGHT DELIVERY:** By enclosing the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☐ **BY MESSENGER SERVICE:** By placing the document(s) in an envelope or package addressed to the persons at the addresses listed and providing them to a professional messenger service for service.

☐ **BY FACSIMILE TRANSMISSION:** By faxing the document(s) to the persons at the fax numbers listed based on an agreement of the parties to accept service by fax transmission. No error was reported by the fax machine used. A copy of the fax transmission is maintained in our files.

☒ **BY EMAIL TRANSMISSION:** By emailing the document(s) to the persons at the email addresses listed based on a court order or an agreement of the parties to accept service by email. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

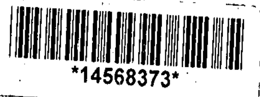
I declare, under penalty of perjury, that the foregoing is true and correct. Executed on March 22, 2021, in Oakland, California.



Alex M. Harrison

(00433487-4)

EXHIBIT A



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SUPERIOR COURT - STATE OF CALIFORNIA

COUNTY OF ALAMEDA – UNLIMITED CIVIL JURISDICTION

ROBERT ZOLLY, RAY MCFADDEN, and STEPHEN CLAYTON

Plaintiffs,

vs.

CITY OF OAKLAND; and DOES 1-50, inclusive,

Defendant.

CASE NO. RG16821376

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DEMAND FOR JURY TRIAL FOR VIOLATIONS OF ARTICLE D OF THE CALIFORNIA CONSTITUTION

By Fax

Plaintiffs Robert Zolly ("ZOLLY"), Ray McFadden ("MCFADDEN") and Stephen Clayton ("CLAYTON") (collectively, "Plaintiffs") hereby seek declaratory and injunctive relief from the excessive and disproportional refuse, recycling and disposal collection charges ("Zero Waste Rates") being imposed on Plaintiffs' multifamily dwelling ("MFD") properties (collectively, "Plaintiffs' Property") as a result of Defendant City of Oakland's ("Defendant") negotiation and passage of Ordinance Nos. 13253 C.M.S., 13254 C.M.S., 13255 C.M.S, 13258 C.M.S (amending 13253 C.M.S), 13259 C.M.S (amending 13255 C.M.S.), 13273 C.M.S.

(amending Ordinance No. 13258 C.M.S.) 13274 C.M.S. (amending Ordinance No. 13254 C.M.S.) and 13331 C.M.S (amending 13273 C.M.S.) between 2014 and 2015 (collectively referred to as the "Zero Waste Ordinances"). Plaintiffs request this Court, pursuant to California Code of Civil Procedure section 410.10 and article 6, section 10, of the California Constitution, to: (1) Declare that the Zero Waste Rates negotiated by the Oakland Public Works Department ("PWD"), and approved by the Oakland City Council ("City Council"), City Administrator of Oakland ("City Administrator") and Defendant, resulted in revenues that exceed the funds required to provide the property-related services for which they are meant; (2) declare that such revenues exceeding the funds required to provide the property-related services for which they are meant amount to an improperly imposed tax, subject to voter approval; (3) declare the Zero Waste Rates imposed on Plaintiffs' Property, negotiated by PWD, and approved by City Council, City Administrator, and Defendant, exceed the proportional cost of the property-related services attributed to Plaintiffs' Property; (4) declare that those excessive charges in the Zero Waste Rates being imposed on Plaintiffs' Property amount to an improperly imposed tax, subject to voter approval; (5) declare that Defendant has approved and imposed, through the passage of the Zero Waste Ordinances, charges on Plaintiffs' Property that has derived revenues not being used for the purpose for which the fee or charge was imposed; (6) declare that the property related charges being imposed on Plaintiffs' Property that has derived revenues not being used for the purpose for which the fee or charge was imposed amount to an improperly imposed tax, subject to voter-approval; (7) declare that a portion of franchise fee revenues derived through Defendant's negotiation and passage of the Zero Waste Ordinances are being used for purposes other than that for which the fee is imposed, including general government services; (8) declare that portion of the franchise fee being used for purposes unrelated to that

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for which the fee is imposed, including general governmental services, amounts to an improperly imposed tax, subject to voter approval; (9) grant injunctive relief to prevent that portion of the Zero Waste Rates determined to be an improper tax from further being imposed on Plaintiffs' Property without prior voter approval; (10) grant injunctive relief to reimburse Plaintiffs for all payments made in connection with those improperly imposed taxes under the Zero Waste Ordinances; and (11) order Defendant to show cause why injunctive relief should not be granted.

In support of Plaintiffs' complaint for declaratory and injunctive relief (the "Complaint"), Plaintiffs allege as follows:

INTRODUCTION

1. On or around February 1, 2012, City Council approved the procurement process for Defendant's Zero Waste Services contracts (collectively, the "Zero Waste Contracts"), which included a request for proposal (the "Zero Waste RFP") for three franchise contracts: (1) residential recycling (the "RR Contract"), for citywide collection and processing of recyclables; (2) mixed materials and organics (the "MMO Contract"), for citywide collection and processing of mixed materials and organic materials; and (3) disposal (the "Disposal Contract"), for landfill disposal of the City's refuse. The Zero Waste Contracts were to take effect July 1, 2015, immediately following the expiration of the then-existing contracts, to ensure that refuse, recyclables, and organics would be picked up on "day one."

2. The Zero Waste Contracts, which obligated Oakland ratepayers to the Zero Waste Rates approved by City Council and Defendant, are valued in excess of $1.5 billion, cumulatively constitute the largest contracts ever awarded by Defendant, and obligate Oakland ratepayers to the Zero Waste franchisees for the next twenty-plus years.

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3. In handling the selection process for these critical and highly valuable contracts, City Council, Defendant's legislative body, would proceed to deviate sharply, and impermissibly, from their own procurement process, resulting in not only the violation of the public's trust, but the approval and imposition of an improper tax on unwitting Oakland ratepayers through manipulation, and the flaunting of the very Zero Waste RFP guidelines City Council and Defendant originally instituted. The consequence of this misconduct was the complete curtailment of a good faith, competitive bidding process, and unconscionable delays in negotiations, leaving City Council and Defendant, in the end, with no choice but to approve proposed rates and terms of the only viable provider at the eleventh hour.

4. By undermining its own self-imposed Zero Waste RFP process, and acting in its own best interest rather than the people it serves, Defendant failed to meet the primary goal it originally sought to achieve: negotiating the best deal for the ratepayers of Oakland, while concurrently striving for zero waste. Plaintiffs, as MFD property owners and ratepayers in the City of Oakland, are among such people.

PARTIES

5. Plaintiff ZOLLY is the owner of the Bel Air Apartments, a 31-unit MFD property located at 306 Lee Street, Oakland, CA 94610. Plaintiff ZOLLY's MFD property is subject to the MFD Zero Waste Rates approved by Defendant through the Zero Waste Ordinances and implemented through the Zero Waste Contracts.

6. Plaintiff MCFADDEN is the owner of a 12-unit MFD property located at 3618 Telegraph Avenue, Oakland, CA 94609. Plaintiff MCFADDEN's MFD property is subject to the MFD Zero Waste Rates approved by Defendant through the Zero Waste Ordinances and implemented through the Zero Waste Contracts.

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7. Plaintiff CLAYTON is the owner of a 6-unit MFD property located at 2520-2530 38th Avenue, Oakland, CA 94601. This property includes section 8 housing. Plaintiff CLAYTON's MFD property is subject to the MFD Zero Waste Rates approved by Defendant through the Zero Waste Ordinances and implemented through the Zero Waste Contracts. Plaintiff CLAYTON also owns and resides in a single-family home in the Rockridge area of Oakland, CA.

8. Defendant is, and at all times mentioned in this Complaint was, a charter city organized and existing under the laws of the State of California. Defendant has, through its City Council, the authority and duty to approve and enter into contracts for the collection and disposal of municipal solid waste and recyclable materials.

FACTUAL ALLEGATIONS

9. City Council is, and at all times mentioned in this Complaint was, the elected legislative body of the City of Oakland with the authority and duty to approve and enter into contracts for the collection and disposal of municipal solid waste and recyclable materials.

10. The City Administrator is, and at all times mentioned in this Complaint was, a City of Oakland government official responsible for carrying out the Zero Waste RFP and contracting process for procuring the Defendant's services for collection and disposal of municipal solid waste and recyclable materials.

11. The PWD is, and at all times mentioned in this Complaint was, a City of Oakland government agency responsible for carrying out the Zero Waste RFP and contracting process for procuring the City of Oakland's services for collection and disposal of municipal solid waste and recyclable materials.

12. City Council, the City Administrator and PWD, and all City of Oakland

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employees within these various agencies, are all agents and representatives of Defendant.

13. On or around January 17, 2012, City Council adopted Resolution No. 83689, approving a Zero Waste System Design to be used in a carrying out the Zero Waste RFP process for the procurement of the Zero Waste Contracts.

14. On or around February 14, 2012, PWD issued an agenda report (the "February Agenda Report") recommending City Council to adopt a resolution implementing a process and schedule for the competitive procurement of the Zero Waste Contracts. The February Agenda Report provides a recommended Zero Waste RFP schedule, detailing "the steps and timing necessary to establish and implement new contracts before current service agreements end in June 2015." In the corresponding Table 1 – Request for Proposal Schedule, the proposed deadline to execute the Zero Waste Contracts was January 2014.

15. Citing Defendant's mission and goals for procurement being the "upholding [of] the highest ethical and professional standards," the February Agenda Report outlined a Protocol for Process Integrity (the "Integrity Protocol"). The Integrity Protocol "set[] a code of conduct for participants in the Zero Waste RFP process, and provide[d] mechanisms for ensuring that code [was] observed." The Integrity Protocol also included specific provisions for the proposal evaluation period to "protect the confidentiality of the evaluation process and of information in proposal responses."

16. On or around February 21, 2012, City Council adopted Resolution No. 83729, approving the Zero Waste RFP schedule and Integrity Protocol, as set forth in the February Agenda Report.

17. On or around April 3, 2012, City Council passed Resolution No. 83783, which included the adoption of certain proposal evaluation criteria and weighting for the Zero Waste

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RFP. Table One of Resolution No. 83783 allocated weighted percentages among the criteria to be considered under the RR Contract and MMO Contract. Among all of the evaluation criteria to be considered, the most heavily weighted was for the "comparison between proposals of rate cost to customers," at 35%. The second most heavily weighted evaluation criteria concerned diversion outcomes, receiving a criteria weight of just 25%.

18. On or around June 19, 2012, City Council approved a motion for an "opt-in" program for source-separated organics collection, under the MMO contract which required that the Zero Waste RFP solicit proposals that "include within the rate structure for MFD [properties] a third 'green' container at no additional charge whenever the property owner requests it," and "proposals that include a third 'green' container option for MFD at a clearly identified additional charge." Under neither of these solicited proposals was any mention made of a so-called "opt-out" program, nor was such a program ever considered, in the June 19, 2012 motion.

19. On or around August 3, 2012, PWD issued the Zero Waste RFP for the Disposal contract.

20. On or around September 2, 2012, PWD issued the Zero Waste RFP for collection services, which included the MMO Contract and RR Contract.

21. On or around January 9, 2013, PWD received one responsive proposal, on behalf of Waste Management of Alameda County ("WMAC"), for the Disposal Contract. PWD found this proposal to be in full conformance with City Council policies, which were incorporated into the Zero Waste RFP and draft contracts contained therein.

22. On or around January 9, 2013, PWD received responsive proposals from WMAC and California Waste Solutions ("CWS") for both the MMO Contract and RR Contract. PWD

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found the responsive proposals of both WMAC and CWS to be in full conformance with City Council policies at that time, which had been incorporated into the Zero Waste RFP and its draft contracts.

23. On or around May 16, 2013, PWD issued an agenda report recommending that City Council approve a resolution authorizing the City Administrator to enter into negotiations with the top-ranked proposers under the Zero Waste RFP.

24. On or around May 28, 2013, City Council passed a motion amending the proposed May 16, 2013 resolution, allowing PWD and the City Administrator to enter into concurrent negotiations with the proposers. Included in this motion was reference to a new exhibit, crafted by City Council, proposing the augmentation of certain policies under the Zero Waste RFP. The passage of this motion, and its incorporated exhibit, allowed City Council to direct PWD to apply these policy changes to the original, formerly issued Zero Waste RFP.

25. The May 28, 2013 motion further requested PWD to provide a supplemental report to City Council regarding several areas of concern raised by PWD, with topics including, but not limited to:

a. "Address Civicorps Schools concern with new franchise;"

b. "Clarify the opportunity in [the Zero Waste] RFP for apartment residents to access bin for source-separated organics;" and

c. "Describe new Franchise contract provisions for reduction and abatement of illegal dumping."

These areas of concern all related to City Council-directed policy changes to the Zero Waste RFP, despite responsive proposals already have been received from all bidding companies.

26. On or around June 5, 2013, PWD issued a supplemental report pursuant to its May 28, 2013 motion (the "June Supplemental Report") addressing the areas of additional concern identified in Paragraph 26 of this Complaint. With respect to Civicorps Schools ("Civicorps"), the June Supplemental Report states that the "Zero Waste System Design explicitly allows Civicorps and other independent recyclers to compete for commercial recycling clients in Oakland…" However, the inclusion of Civicorps in any aspect of the Zero Waste System Design, or the Zero Waste Contracts, was not mandatory under the Zero Waste RFP.

27. In describing new franchise contract provisions for the reduction and abatement of illegal dumping, the June Supplemental Report clarifies two new service proposals for the pickup of larger items from ratepayers' residences by the franchisee for disposal ("Bulky Pickup"):

a. On-call Bulky Item collection service: This provision **was added for MFD as a standard service embedded in the base rate,** and includes collection of the types of items typically found illegally dumped on Oakland Streets. (Emphasis added)

b. Pay as you go Bulky Item Service: This provision **gives SFD property owners and other residential customers direct access to** bulky item collection services. (Emphasis added)

June 18, 2013 Special Concurrent Meeting of the Oakland Redevelopment Successor Agency and City Council, and the December 2013 and February 2014 Letters From Councilmembers Kalb, McElhaney and Gallo

28. On or around June 18, 2013, a Special Concurrent Meeting of the Oakland Redevelopment Successor Agency and City Council was held (the "June Council Meeting") to address the status of the Zero Waste RFP process and to vote on a resolution that would allow the City Administrator to enter into concurrent negotiations with the top proposers for the Zero

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Waste Contracts.

29. At the June Council Meeting, City Council, PWD, the City Administrator, and the Mayor of Oakland engaged in a discussion, on the record, of the following topics: the feasibility of changing the Zero Waste RFP terms to allow for bids to be presented on 20-year terms for the RR Contract and MMO Contract in addition to the previously mandated 10-year term bids, and whether allowing bids on 20-year term bases at this juncture of negotiations would compromise the integrity of the Zero Waste RFP process; whether the terms under the Zero Waste RFP had resulted in a competitive bidding process; whether use of the East Bay Municipal Utility District's ("EBMUD") digester could be made part of the Zero Waste RFP; whether the Zero Waste RFP required Civicorps to perform services under the Zero Waste RFP; and the proposition of changing the Zero Waste RFP to allow for proposals to include options making mandatory the inclusion of a third "green" bin at all MFD.

30. On the topic of deviating from the rules of the Zero Waste RFP to re-open the bidding for revised RR Contract and MMO Contract proposals on 20-year terms, and whether such a change would compromise the integrity of the Zero Waste RFP process, the following statements were made at the June Council Meeting:

- Councilmember Rebecca Kaplan ("Councilmember Kaplan"): "We have been told that the limit to only ten years on the contract is why we didn't get more bids." Councilmember Kaplan then proposed that PWD amend the Zero Waste RFP to allow for bids on 20-year terms on the MMO Contract and RR Contract.

- Councilmember Libby Schaff ("Councilmember Schaff"): "My understanding is that Republic [Services] and Recology did not bid because of the 10-year term of the contract… It does feel a little odd that we might be entertaining a longer-term contract when that's the very reason that the two companies chose not to bid. So it does feel a little bit like changing the rules." Later, addressing Councilmember Kaplan's proposition to re-open the bidding process and allow for 20-year terms not originally allowed under the Zero Waste

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RFP: "Ms. Kaplan, I really do have a concern with you changing the terms, my whole thing has been fairness and the integrity of the process. I would be happy to move forward with the two bidders that we have before us tonight, but making such a material change to the terms that was before us from day one would really concern me."

- Councilmember Pat Kernighan ("Councilmember Kernighan"): "Now when I heard [PWD] say that they could entertain a 20-year term, I feel like… that wasn't fair to the other people who seriously considered bidding and who didn't. So I feel like if you do that, then you should also give the other companies the opportunity to submit a proposal based on the 20-year term."

- PWD Director Vitaly Troyan ("Director Troyan"): "It would make no sense for this Council to spend thirteen meetings, develop all these principles, and then for staff to turn around to any vendor, and say 'sure, you can come in and propose whatever you want. Let's talk about it.' That makes no sense." Later, in response to a question concerning what the harm would be in re-opening the bidding for 20-year terms: "We would end up losing X number of months in the process… now we're down to two years and a week []. I don't think it's possible for a vendor to put together a reasonable bid… it makes me very uncomfortable to change the process in midstream."

- City Administrator Deanna J. Santana ("City Administrator Santana"): "[Concerning] the issues around the [City] Council policy with [regard to] how the [Zero Waste RFP] process was conducted, to allow for potential new proposers, we need to also evaluate the proposers that did adhere to the process… it begins to erode the integrity of the process. Whether the proposers that did participate would be damaged is something I think we need to consider."

- Mayor Jean Quan ("Mayor Quan"): "If you reopen [the bidding process] and you want to change the rules in terms of us finding a new facility, that really is a massive change and we would have to go over all of it again, to totally reform all the bids, so you need to think about that."

31. On whether the terms under the Zero Waste RFP had resulted in a competitive bidding process, the following statements were made at the June Council Meeting:

- Councilmember Kernighan: "I think there was a very big mistake in setting the term of [the RR Contract and MMO Contract] at ten years instead of

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twenty. And it really continues to concern me because I think we would have had at least one more, if not two more, bidders. I reached out to both Republic [Services] and Recology and asked them point blank, 'why did you not bid,' and Republic's representative said to me 'because the term of the contract was too short.'"

- Director Troyan: "It's certainly a possibility we could get higher prices now that [WMAC and CWS] know there were only two bidders, so when I start playing the 'what if' game with myself...I am disappointed we just got two bidders. I was expecting three, maybe four."

- Recology General Manager Minna Tao ("Ms. Tao"): "The Zero Waste RFP issued is not conducive to allow for competition and makes it very hard for any interested party to participate, especially at the [10-year] term." Ms. Tao then addressed when Recology had originally voiced its concerns with the 10-year term limit: "To change the term now to twenty years, [] I think it's really not fair at all, to come in at the very end. And I also want to make very clear, at the end of October [2012] as soon as we found out, a letter was sent to Zero Waste Management, [and] we expressed our concern that this [10-year] term is not good enough."

- Zero Waste Services RFP Project Manager Susan Katchee ("RFP Manager Katchee"): In responding to whether PWD was, in fact, made aware from Recology's letter in October 2012 letter that the 10-year term was a deterrent to bidding, RFP Manager Katchee replied, "It was one of the many things that was in that letter."

32. On whether use of the EBMUD digester could be made part of the Zero Waste RFP, the following statements were made at the June Council Meeting:

- Councilmember Dan Kalb ("Councilmember Kalb"): "I'd like to know if there is still an opportunity for EBMUD to be involved in whatever the final decision is, or if that opportunity is no longer there for them?"

- Director Troyan: In response to the preceding question from Councilmember Kalb, Director Troyan clarified that PWD could, "arrange for EBMUD to talk to the proposers and see if they can come to some sort of solution."

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- Councilmember Kaplan: "I like the idea of posing the question to the bidders about the EBMUD digester. **I'm tempted to say a requirement** but maybe just if it's something we tell them we want and see what [WMAC and CWS] say back." (Emphasis added)

33. On whether the Zero Waste RFP required Civicorps to perform services under the Zero Waste RFP, the following statements were made at the June Council Meeting:

- Director Troyan: "This particular Zero Waste RFP has no impact on Civicorps."

- RFP Manager Katchee: "Civicorps provides their own commercial recycling. This contract won't impact that."

34. On the proposition of changing the Zero Waste RFP to allow for proposals to include options making mandatory the inclusion of a third "green" bin at all MFD properties, the following statements were made at the June Council Meeting:

- Councilmember Kalb: "I would love to see a required 'green' bin at multi-family buildings." Councilmember Kalb then acknowledged that he, "realize[d] there were some discussions last year and [he was] coming in a little bit late, but [he] thinks there could be a way to do an 'opt-out' for MFD."

- Councilmember Schaff: "Just to make perfectly clear, the Zero Waste Contracts we are putting forward would have organic recycling for all [residents] in Oakland." After Director Troyan confirmed that Councilmember Schaff's assertion was accurate, Councilmember Schaff continued, "The issue is whether the separation happens in the bin at the home by the resident, or we now have the technology to pick up the garbage, take it away, and then separate out the organics from the garbage from a single bin..." The Sierra Club has confirmed that you end up with a greater diversion by having it separated [by the single-bin method and not with the use of an additional 'green' bin]."

35. At the conclusion of the June Council Meeting, City Council passed Resolution No. 84461, authorizing the City Administrator to enter into concurrent negotiations with WMAC and CWS for the award of the Zero Waste Contracts. City Council further directed

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PWD, by motion, to report back to City Council on items including, but not limited to: cost impacts for 10- and 20-year terms for the Zero Waste Contracts; the results of discussions with EBMUD concerning its digester; that assurances would be made for direct tenant-access to Bulky Pickup service; cost proposals for MFD source-separated organics collection, through the use of a third "green" bin, at no additional cost; and proposals for a further expansion of the illegal dumping strategy.

36. On or around December 2, 2013, Councilmembers Noel Gallo ("Councilmember Gallo"), Kalb, and Kaplan delivered a letter to Mayor Quan and City Administrator Santana concerning, in part, the proposed addition of a third "green" bin for organic materials at MFD properties. With respect to the basis for these councilmembers' expressed desire to add a third "green" bin at MFD properties, the letter cites to "important issues of equity and fairness at stake, because the occupants of [MFD properties] are generally lower-income and more likely to be people of color than homeowners. Denying these residents the same environmental services as homeowners is therefore unfair, unjust, and unequitable." No mention or consideration is given to the cost implications of adding a third "green" bin at MFD properties, despite these rate impacts potentially being passed through to the very same "lower-income" residents.

37. In response to Councilmember Gallo's, Kalb's, and Kaplan's December 2, 2013 letter, Interim PWD Director Brooke A. Levin issued a memorandum of clarification concerning the issue of adding a third "green" bin for organic materials at MFD properties. This memorandum stated that "the proposers are required to present cost proposals for three variations of MFD ['green' bin] service for source-separated organics, which would be provided **in addition to** recovery of organic materials from mixed materials." (Emphasis

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added) According to this memorandum, the requirement for three variations of "green" bin services was pursuant to Resolution Nos. 83689 and 84461, as well as the June 19, 2012 motion passed by City Council.

38. Resolution No. 83689 and 8446, as well as the June 19, 2012 motion by City Council make no mention of a requirement for a third "green" bin service variation, and at no time make reference to an "opt-out" program. The first formal mention of an "opt-out" option for adding a third "green" bin at MFD properties was made by Councilmember Kalb during the June Council Meeting. Furthermore, this request for a third, additional pricing option for the inclusion of "green" bins at MFD properties was outside of the parameters of the original Zero Waste RFP, as it came more than one year after the Zero Waste RFP and its criteria were approved.

39. On or around February 28, 2014, Councilmembers Kalb, McElhaney, and Gallo submitted, for consideration by PWD, a resolution setting forth a "City of Oakland policy for future waste/garbage collection, disposal, or recycling franchise agreements, or the renewal or extension of any such existing agreement," to do, among others, the following things:

- "Provide that source-separated third ["green"] bin service for organics/compostable materials be provided, as the minimum default outcome, to all Oakland residents, **including those in multi-family buildings**, with the council receiving a costed-out option for mandatory organics bin service (emphasis added);
- Provide curbside bulky waste pick-up for all Oakland residents, **including tenants residing in multi-family buildings** (emphasis added); and
- Provide City Council a costed-out option to be included in the scope of services for handling source-separated organics at a local waste-to-energy facility."

40. These would-be mandates on MFD properties, as described in the

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councilmembers' proposed resolution, and as detailed in paragraph 40, were not included in the original Zero Waste RFP, and constituted material changes to the Zero Waste RFP's original terms. Additionally, there was no provision in the original Zero Waste RFP which called for the costing-out of services for handling source-separated organics at a local waste-to-energy facility.

41. On or around March 18, 2014, Resolution No. 84898 was adopted by City Council, thereby imposing on the in-progress Zero Waste RFP negotiations, nearly verbatim, those mandates described in the councilmembers' February 28, 2014 letter. The final language of Resolution No. 84898 provided for:

- An organic third ["green"] bin for source-separated organics... for all Oakland residents, including those in [MFD properties], as the preferred default outcome, and that any proposed franchise agreement presented to [City] Council include in the scope of services to be provided by the franchisee a mandatory third ["green"] bin for all such [MFD properties] as a costed-out option; and

- Convenient access to [Bulky Pickup service] for all residents, including renters and unit owners in [MFD properties], and that any proposed franchise agreement presented to [City] Council provide multiple options for implementation of [Bulky Pickup] at [MFD properties]; and

- Consideration of a local, non-combustible bio-waste-to-energy facility for handling of source-separated organics as an alternate service to be included as an option in the scope of services/operation of the franchise agreement presented to [City] Council.

May 29, 2014 Special Concurrent Meeting of the Oakland Redevelopment Successor Agency and City Council

42. On or around May 29, 2014, a Special Concurrent Meeting of the Oakland Redevelopment Successor Agency and City Council was held, at which time PWD presented its analysis of the rate impacts for the two scenarios under which the Zero Waste Contracts could be awarded (the "May Council Meeting").

43. A May 16, 2014 agenda report was prepared by PWD and presented to City Council, the City Administrator, and Mayor Quan, in advance of the May Council Meeting (the "May Agenda Report"). The May Agenda Report outlined the pricing and service proposals from CWS and WMAC for the RR Contract and MMO Contract, and WMAC's proposal for the Disposal Contract.

44. In addition to providing rate analysis of the base services identified in the original Zero Waste RFP, the May Agenda Report also included pricing impacts and service summaries for those additional service options added to the Zero Waste RFP at Councilmember Kalb's, Councilmember McElhaney's, and Councilmember Gallo's behest (and through the eventual passage of Resolution No. 84898), approximately two years after City Council approved the original Zero Waste RFP process. These City Council-directed "alternatives" included, among other things: new MFD "green" cart service options; additional Bulky Pickup options, including direct tenant-access to Bulky Pickup service at MFD properties; and allowing EBMUD to provide organics processing services under the MMO Contract.

45. The May Agenda Report vetted two viable options for City Council to consider: Option #1, award the Zero Waste Contracts to WMAC; and Option #2, award the MMO Contract and Disposal Contract to WMAC, and award the RR Contract to CWS.

46. Per the May Agenda Report, the rate impacts under Option #1, in comparison to then-existing rates, were as follows:

- SFD rates (for a 32-gallong cart) would increase to $43.93/mo., or 49.93%;

- MFD rates (for a 20-unit building) would increase to $583.89/mo., or $25.25%;

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- COM rates (for a 1-cu. yd. bin) would increase to $167.66/mo., or $21.90%.

47. Per the May Agenda Report, the rate impacts under Option #2, in comparison to then-existing rates, were as follows:

- SFD rates (for a 32-gallong cart) would increase to $48.72/mo., or 66.28%;

- MFD rates (for a 20-unit building) would increase to $665.15/mo., or $42.68%;

- COM rates (for a 1-cu. yd. bin) would increase to $175.65/mo., or $27.71%.

48. Two additional service alternatives for "green" cart service at MFD properties were added to the May Agenda Report's analysis to comply with City Council's adoption of Resolution No. 84898 in February 2014. The May Agenda Report included rate impacts for both the Zero Waste RFP default option and the Zero Waste RFP "opt-in" option, as well as the City Council-directed "opt-out" and "no opt-out" alternatives. Per the May Agenda Report, the rate impacts for these additional services, in comparison to then-existing rates for a 20-unit MFD property (using a 64-gallon cart), were as follows:

- Zero Waste RFP Default: Under both Option #1 and Option #2, no rate increase;

- Zero Waste RFP "Opt-In" Alternative: Under Option #1, the rate would increase an additional $43.79, or 7.5% above the default rate; under Option #2, the rate would increase an additional $46.54, or 7.0% above the default rate;

- City Council-Directed "Opt-Out" Alternative: Under Option #1, the rate would increase an additional $57.41, or 9.83% above the default rate; under Option #2, the rate would increase an additional $57.40, or 8.63% above the default rate;

- City Council-Directed "No Opt-Out" Alternative: Under Option #1, the rate would increase an additional $60.21, or 10.31% above the default rate; under

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Option #2, the rate would increase an additional $60.20, or 9.05% above the default rate.

49. With respect to Bulky Pickup service at MFD properties, the base option under the Zero Waste RFP called for the same service as provided under the then-existing contracts, which provided for MFD property managers to act as the exclusive point of contact for scheduling Bulky Pickup service at no additional charge. The City Council-directed alternatives addressed in the May Agenda Report called for three additional Bulky Pickup service options to be priced: Option #1, each household in MFD properties would schedule Bulky Pickup service independently; Option #2, each household in MFD properties would with less than 30-units would schedule Bulky Pickup service independently, while MFD properties with 30-units and above would have a one time debris box scheduled by the MFD property manager; and Option #3, which would allow for a coupon system to be available to each household in MFD properties for Bulky Pickup disposal at the Davis Street Transfer Station.

50. Per the May Agenda Report, the rate impacts to MFD properties for these three options would include the following rate increases over the base rate:

- Option #1: an additional $132.80/mo. for a 20-unit MFD property;
- Option #2: an additional $177.80/mo. for a 20-unit MFD property;
- Option #3: an additional $41.80/mo. for a 20-unit MFD property.

51. **These Bulky Pickup rate impacts, as described in paragraph 51 of this Complaint, would result despite the same volume of bulky items being picked up under the base rate.** When asked why the proposers would charge so much more for picking up the same volume of bulky items, RFP Manager Katchee stated at the May Council Meeting: "Because you're keeping track of the total number [of pickups], which is different. **We don't**

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have that information in the system right now..." (Emphasis added)

52. Finally, regarding the City Council-directed alternative of having source-separated organics processed at an EBMUD bio-waste-to-energy facility (which was a service not included in the original Zero Waste RFP), WMAC's proposal represented a rate impact of $23.48/mo. for COM ratepayers, or a 14.9% increase over the $157.81 COM ratepayers' base rate. Conversely, CWS's proposal imposed no additional rate increase to COM ratepayers for use of an EBMUD bio-waste-to-energy facility.

53. When asked why WMAC would be charging COM ratepayers an additional $23.48/mo. for WMAC's use of an EBMUD bio-waste-to-energy facility, RFP Manager Katchee stated at the May Council Meeting: "Part of the reason there's a cost implication is **because WMAC made investment into their own equipment and processing capability for this material as well, and so it's duplicative of their current systems to handle this material in this way.**" (emphasis added)

54. No data was ever presented by PWD or the City Administrator that WMAC's proposed $23.48/mo. rate increase related in any way to the actual cost of such service, nor did City Council ever demand such evidence.

55. After realizing that amending the Zero Waste RFP with the untimely City Council-directed alternatives had resulted in proposed rate increases far higher than expected, and in light of an impending deadline to select franchisees to award the Zero Waste Contracts to, the following statements were made on the record by RFP Manager Katchee and City Councilmembers at the May Council Meeting:

- RFP Manager Katchee: In explaining why SFD rates had risen more sharply than MFD and COM rates, RFP Manager Katchee stated, "**[SFD] rates experience a higher percentage increase, the [SFD] sectors compared to the**

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[MFD] or [COM] sectors, where routes serve a greater density of large-volume customers making them the most fuel-efficient and labor-efficient customer per sector and that's part of the reason why there's some differential there." (Emphasis added)

- Councilmember Desly Brooks ("Councilmember Brooks"): "I've gotten many emails from residents saying they simply cannot afford a 50% increase in their garbage bill. Throughout this process I have been saying the [City] Council was putting too many things as requirements in the contract that the ratepayer was going to have to pay for, and here we are."

- Councilmember Kalb: In addressing the very Bulky Pickup service alternative and MFD "green" bins requirements that he helped force into the Zero Waste RFP long after it was issued, Councilmember Kalb stated, 'For some of these add-ons or alternatives, some of the prices seem inflated, and I'd like to see those go down."

56. PWD recommended at the May Council Meeting that City Council authorize the City Administrator to accept the terms under Option #1 for the Zero Waste Contracts, prepare the corresponding rate tables with any City Council-directed alternatives, and bring the ordinances to City Council for consideration and approval to replace the existing contracts.

57. Rather than following the recommendation of PWD, City Council, by motion, directed PWD to "allow bidders to submit new [best and final] bids to include all components, including: EBMUD, mixed materials, organics, recycling and landfill comparable in scope to the WMAC proposal.

<u>July 30, 2014 Special Concurrent Meeting of the Oakland Redevelopment Successor Agency and City Council</u>

58. Both WMAC and CWS submitted new "best and final" offers to PWD on June 13, 2014.

59. CWS's revised bid was made only after being allowed to review WMAC's

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proposed pricing for the Zero Waste Contracts at the May Council Meeting, which was supposed to have been kept confidential throughout the negotiating process.

60. After receiving the June 13, 2014 "best and final" offers from WMAC and CWS, Mayor Quan and Administrator Gardner, on July 15, 2014, asked WMAC and CWS for yet another final offer.

61. This subsequent request by Mayor Quan and Administrator Gardner was made just two weeks before City Council was scheduled to award the Zero Waste Contracts, leaving insufficient time to verify potentially new pricing representations from the proposers.

62. In response to this new request, WMAC did not provide new pricing, while CWS provided a further rate reduction in its proposed RR Contract.

63. After receiving CWS's revised pricing for the RR Contract, an Agenda Report was prepared by PWD, which evaluated the "best and final" offers submitted by WMAC and CWS (the "July Agenda Report"). The July Agenda Report was then circulated to City Council and Mayor Quan in advance of the upcoming City Council meeting to award the Zero Waste Contracts.

64. On or around July 24, 2014, less than one week before the all-important City Council meeting that would decide the fate of the Zero Waste Contracts, Councilmember Kalb, Councilmember McElhaney and Councilmember Kaplan submitted a letter to Administrator Gardner complaining that critical information was missing from the July Agenda Report, and requesting that several new, substantive provisions to the Zero Waste Contracts be "costed-out and included in all proposed options." That same day, Councilmember Kalb, Councilmember McElhaney and Councilmember Kaplan submitted a separate letter to City Council urging them to vote and approve these additional provisions at the upcoming City Council meeting.

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65. On July 30, 2014, a Special Concurrent Meeting of the Oakland Redevelopment Successor Agency and the City Council was held to consider the final proposals from WMAC and CWS (the "July Council Meeting").

66. The July Agenda Report's executive summary asserted that, "since the proposals were received on January 9, 2013, the initial rate increase for the July 2015 rates have decreased from over 75% to 50% from negotiations, and again by City Council action to a range of 24% to 46% increase."

67. The July Agenda Report vetted three possible proposal combinations for City Council's consideration. These combinations included:

- Option #1: Award the Zero Waste Contacts to WMAC;
- Option #2: Award the RR Contract to CWS, and the MMO Contract and Disposal Contract to WMAC;
- Option #3: Award the Zero Waste Contacts to CWS.

68. CWS's Option #3, comprising over 300 pages of terms, was an entirely new service proposal, with the majority of its components having been vetted by PWD only weeks, if not days, before the July Council Meeting.

69. In the July Agenda Report, PWD cited the following risks in the event Option #3 was selected:

- Tentative agreements with and between multiple third parties would not be subject to City Control;
- Permits from multiple agencies would be needed;
- There was a moderate to high risk that the interim transfer facility would not be operating on July 1, 2015;
- There was a moderate to high risk that trucks & containers would not be available for a July 1, 2015 start;
- Material processing would be outsourced to Napa, Yolo and Contra Costa County;
- The Zero Waste Goals would not be met.

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70. Under Option #3, the Disposal Contract called for use of the Vasco Road Landfill in Alameda County as the primary facility, and the Keller Landfill in Contra-Costa County as a backup. Both facilities are owned by Republic Services Group, and entity that at no time submitted a timely proposal for the Disposal Contract, and was discussed as a possible third-party contractor only because City Council improperly reopened bidding for the Zero Waste Contracts.

71. Option #3 furthermore encompassed services for which CWS had never before performed, had no existing facilities from which to perform certain services, and required third party contracts that had yet to be formally negotiated, much less executed.

72. PWD recommended City Council to select Option #1 and its corresponding ordinances, which would have granted the Zero Waste Contracts to WMAC. PWD recommended Option #2 as a suitable alternative to Option #1, but did not recommend Option #3 under any circumstances due to its inherent risks.

73. A total of four proposed rate tables (A-D), all with varying service packages and associated rates, were applied to the three proposal options as described in paragraph 67.

74. City Council would eventually select and approve Rate Table C at the July Council Meeting, which included lower rates in year one, with increases for years two through five that included increases under the Refuse Recycling Index ("RRI") plus an additional 1.5% per annum.

75. PWD projected Rate Table C would result in the following monthly rates, and rate impacts, for SFD, MFD, and COM ratepayers, in relation to the then-existing contracts:

Rate Table C- Option #1

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- SFD rates (for a 32-gallon cart) would increase to $38.71/mo., or 29.88%;
- MFD rates (for a 20-unit building) would increase to $566.47/mo., or $19.46%;
- COM rates (for 1-cu. yd. bin) would increase to $193.11/mo., or $38.06%.

<u>Rate Table C – Option #2</u>

- SFD rates (for a 32-gallon cart) would increase to $43.70/mo., or 46.65%;
- MFD rates (for a 20-unit building) would increase to $653.22/mo., or $37.75%;
- COM rates (for 1-cu. yd. bin) would increase to $205.33/mo., or $46.79%.

<u>Rate Table C – Option #3</u>

- SFD rates (for a 32-gallon cart) would increase to $36.82/mo., or 23.56%;
- MFD rates (for a 20-unit building) would increase to $546.97/mo., or $15.35%;
- COM rates (for 1-cu. yd. bin) would increase to $156.34/mo., or $11.77%.

76. During a slide presentation made by Administrator Gardner at the July Council Meeting, a chart was presented detailing recent contract awards in Alameda County comparable to the Zero Waste Contracts, including:

- Albany ('11): 45%
- Berkeley ('09): 25%
- Berkeley ('14): 25%
- Castro Valley ('09): 45%
- Dublin ('11): 27%
- Emeryville: ('11): 45%
- Hayward ('07): 32%
- Livermore ('10-'11): 38%

77. The comparable contract awards listed in Paragraph 76, which were cited by Administrator Gardner as being a basis for assessing the proposed rates under the Zero Waste RFP, compute as follows:

- Mean rate increase in Alameda County: 35.25%

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1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

- Median rate increase in Alameda County: 35%
- Highest rate increase in Alameda County: 45%
- Lowest rate increase in Alameda County: 25%

78. In the July Agenda Report, Bulky Pickup service options for MFD properties were considered, and addressed the recent City Council directive to include a service option allowing tenants of MFD properties to order Bulky Pickup service directly from the provider. PWD's assessment of such an alternative was as follows:

> "[Bulky Pickup service ordered directly by tenants] would increase rates by 15% for building owners with **no assurances that there would be higher participation in the service to justify the higher costs, which could be passed on in rent increases.** Staff recommends that the program remains as proposed..." (Emphasis added)

79. Under Option #3, Bulky Pickup service would be available directly to all tenants of MFD properties, running contrary to PWD's recommendation to retain the existing program wherein MFD property managers act as the point of contact for such service.

80. Under Option #3, EBMUD would become the processor for commercial organic materials, and require a new facility to be constructed on a tight timeline. City Council authorized the inclusion of EBMUD into the bidding process nearly two years after the Zero Waste RFP process had begun and initial bids had been accepted and reviewed.

81. In the July Agenda Report, the use of EBMUD and its future facility as the handler of commercial organics received the following assessment:

> "As discussed in staff's May 29, 2014 Agenda Report, the [Defendant] can achieve environmental benefits that are equal or superior to EBMUD with the WMAC proposal, at a lower cost to ratepayers. **Using EBMUD would increase WMAC's commercial organics rates for carts by approximately 9% and rates for bins by approximately 14%. The EBMUD option increases cost to commercial ratepayers and does not improve or enhance the City's Zero Waste goals.**" (Emphasis added)

82. At the conclusion of the July Council Meeting, Administrator Gardner laid out the options for City Council to proceed with:

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- To select an option for delivery of services (i.e., which proposer gets what contracts);
- To make a motion to adopt the appropriate ordinances; and
- To make a motion to adopt the set of preferred rate tables.

83. City Council, defying both PWD's recommendation of selecting Option #1 and ignoring the stated risks of proceeding with Option #3, voted unanimously to approve Option #3, along with Rate Table C, and award the Zero Waste Contracts to CWS. In approving Option #3 and Rate Table C ("Option 3C"), a motion was made to adopt the corresponding ordinances, which were to thereafter be given a second reading on August 13, 2014 by City Council.

84. On or around August 6, 2014, WMAC submitted a letter to Mayor Quan, Administrator Gardner, and all member of the City Council to protest the award of the Zero Waste Contracts to CWS. In its letter, WMAC argued that "such an award violate[d] the terms and conditions of the procurement process authorized pursuant to City resolution," noting that, "[a]ny company qualified and interested in proposing on said services was required to submit such proposals, and identify any partners and/or subcontractors by no later than January 9, 2013." WMAC's letter went on to assert that, "[i]n its May 29th motion, the Council derailed the approved procurement process and allowed new bids on all components of the respective services..."

August 13, 2014 Special Concurrent Meeting of the Oakland Redevelopment Successor Agency and City Council, and WMAC's Subsequent Lawsuit

85. On August 13, 2014, a Special Concurrent Meeting of the Oakland Redevelopment Successor Agency and City Council was held, during which a second reading was made of the ordinances to implement Option 3C (the "August Council Meeting").

86. For consideration by City Council at the August Council Meeting, the City

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Administrator, on August 11, 2014, approved an agenda report prepared by PWD (the "August Agenda Report").

87. One significant change to CWS's final proposal since the July Council Meeting, which was addressed in the August Agenda Report and considered by City Council at the August Council Meeting, was with respect to the terms for illegal dumping and Bulky Pickup services. Per the August Agenda Report, under CWS's most recent proposal, CWS agreed to provide on-site illegal dumping pickup if Council selected direct tenant-access to Bulky Pickup service. **The Council's selecting of direct tenant-access to Bulky Pickup service was critical here, as the August Agenda Report goes on to state that the cost of on-site illegal dumping pickups would be paid for using surplus Bulky Pickup service revenue that was not expended due to less than expected direct pickup requests from tenants of MFD properties.**

88. Per Administrator Gardner, CWS's proposal for direct-tenant access to Bulky Pickup service at MFD properties "would result in a $6.67 increase per MFD. CWS could make [illegal dumping pickups] on-site."

89. At the August Council Meeting, Councilmember Gallo stated for the record: "I am opposing [Option #3] and think that Option #2 is the best deal for the City."

90. In response to Councilmember Gallo's stated preference for Option #2, Councilmember Kaplan stated for the record:

> "I know you weren't part of this procurement process, but wanted to let you know that we hired an outside consultant and paid them over $1 million to attract a competitive bidding process **when in fact no competitive bids were attracted**. I asked for a copy of the consultant's written report and was told there is no written copy of the consultant's recommendation after over $1 million had been spent." (Emphasis added)

91. At the conclusion of the August Council Meeting, Ordinance Nos. 13253, 13254,

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13255 were adopted, granting the Zero Waste Contracts to CWS with the approval of Option 3C.

92. On or around August 18, 2014, WMAC filed a lawsuit against CWS, City Council, the City Administrator, PWD, and Defendant, alleging that City Council steered, at the very last minute, the Zero Waste Contracts to an ill-prepared, local company over the recommendation of PWD.

The Memorandum of Understanding between WMAC and CWS, and the September 22, 2014 Special Concurrent Meeting of the Oakland Redevelopment Successor Agency and Oakland City Council

93. On or around September 18, 2014, WMAC and CWS entered into a Memorandum of Understanding ("MOU"), wherein the two proposers agreed that WMAC would receive the MMO Contract and Disposal Contract, while CWS would retain the RR Contract.

94. Paragraph 6 of the MOU agreed to the following:

> **WMAC expects to negotiate a mutually acceptable contract with [Defendant] that contemplates revised commercial, multifamily, and roll-off rates but [WMAC] shall not exceed the residential rates approved by [Defendant] for the CWS MMO Contract and Disposal Contract.** (Emphasis added)

95. On or around September 19, 2014, Administrator Gardner approved the issuance of an agenda report prepared by PWD in advance of a Special Concurrent Meeting of the Oakland Redevelopment Successor Agency and City Council (the "First September Council Meeting"). This report recommended adopting legislation to amend Ordinance Nos. 13253 and 13255 "to facilitate MOU implementation."

96. On the agenda of the First September Council Meeting was the proposed adoption of amended versions of Ordinance Nos. 13253 and 13255, which would effectuate the

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awarding of the MMO Contract and Disposal Contract, respectively, to WMAC; the terms of the MOU were also presented to City Council at the First September Council Meeting.

97. At the First September Council Meeting, Administrator Gardner encouraged City Council to adopt the amended versions of Ordinance Nos. 13253 and 13255, stating: "[WMAC and CWS] have agreed to provide the services we've outlined in the two ordinances before you. We are able to effectuate these two ordinances, and the points to which [WMAC and CWS] have agreed are consistent with the [Defendant's] interests."

98. According to the First September Agenda Report, if the amended versions of Ordinance Nos. 13253 and 13255 were adopted, the adjusted rates and rate impacts (relative to then-existing rates) for SFD, MFD and COM ratepayers would be as follows:

- SFD rates (for a 32-gallon cart) would remain unchanged from the rate approved by City Council on August 13, 2014, at $36./mo., or a 29.88% increase;
- MFD rates (for a 20-unit building) would increase to $616.90/mo., or a $30.09% increase;
- COM rates (for a 1-cu. yd. bin) would increase to $194.10/mo., or a $38.76% increase.

99. During Administrator Gardner's presentation at the First September Council Meeting, he made the following remarks concerning the rate and rate impacts described in paragraph 89:

- "Our primary focus has been on the [SFD] 32-gallon rate, which is most of our subscribers;"
- "Rebalancing these contracts does not effect that [SFD] rate, but it does have impacts on commercial rates and on multifamily rates;"
- **The [MFD] rates have gone up rather substantially because of the rebalancing of these rates to maintain the [SFD rates];"**
- **"And [COM], the rate is $194, which is a 39% increase and that is a**

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substantial increase over the July 30th rates, and again, that's for rebalancing the rates to keep the [SFD] rate where it was." (Emphasis added)

100. Taken aback by Administrator Gardner's explanation for the projected MFD and COM rate increases that the amended versions of Ordinance Nos. 13253 and 13255 would effectuate, Councilmember Brooks asked Administrator Gardner, pointedly, "did I understand you correctly that you smooth the rate by transferring the costs to [MFD] and [COM]?" In response to this question, Administrator Gardner provided the following answer:

> **"By separating [SFD, MFD, and COM] areas of service, what we attempted to do was maintain the same rate that we had on August 13th for the 32-gallon can residential rate. That resulted in having to increase rates in two other areas, and those areas are commercial and multifamily. I believe the overall dollar amount in the pot [] is the same, but by having separated those three services, and breaking them up in the way that we did and to maintain the residential rate, it was necessary to raise both the commercial and the multifamily rate."** (Emphasis added).

101. Towards the end of the First September Council Meeting, Councilmember McElhaney introduced a motion (the "September Motion"), that included, among other things, the following changes to the MMO Contract and Disposal Contract:

- Amending Section 7 so that the Franchisee was **required** to allow Civicorps to handle commercial organics collection and deliver to EBMUD;
- Amending Section 8 to **require** the Franchisee to enter into an agreement with Civicorps for the collection and delivery of commercial organics, and to enter into a separate agreement with EBMUD for the processing of commercial organics, subject to the approval of the City Administrator;
- Amending Section 12 so that the Franchisee was **required** to include "green" bin service at all MFD properties, and that **"in no event shall green cart service be discontinued."** (Emphasis added).

102. At the conclusion of the First September Council Meeting, the September Motion was passed by City Council.

103. After the passage of the September Motion, City Council asked WMAC

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representative David Tucker if WMAC was in acceptance of the motion. Mr. Tucker responded by stating, "We are in agreement with most, but there are a couple items that we will need to work with staff to make sure the[y're] clarif[ied] because they are just being brought to our attention this evening, and we need to address those."

The September 29, 2014 Special Concurrent Meeting of the Oakland Redevelopment Successor Agency and Oakland City Council

104. On September 29, 2014, a special concurrent meeting of the Oakland Redevelopment Successor Agency and City Council was held (the "Second September Council Meeting"), during which a second reading of Ordinance Nos. 13253 and 13255 was carried out prior to final passage.

105. The Second September Council Meeting resulted in the amending of Ordinance Nos. 13253 and 13255 with the adoption of Ordinance Nos. 13258 and 13259, including the adoption of those new provisions included in the September Motion just one week earlier.

The "Missing" Rates and Further Amendments to the Zero Waste Ordinances

106. On or around December 9, 2014, City Council amended Ordinance No. 13254, by adopting Ordinance No. 13274, and extended the RR Contract from a 10-year term (with two 5-year options) to a single, 20-year term. If the Zero Waste RFP had originally allowed for bids under the RR Contract be made on a 20-year term, at least two additional companies, independent from WMAC and CWS, would have submitted bids.

107. On or around December 9, 2014, City Council amended Ordinance No. 13258, by adopting Ordinance No. 13273, which authorized certain contamination rates under the MMO Contract for customers who improperly disposed of recycling and organic materials.

108. On or around December 9, 2014, City Council adopted Ordinance No. 13272

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C.M.S., to allow the City Administrator the authority to amend the MMO Contract in order for Defendant to establish and receive a $3,240,000 franchise fee pursuant to Public Resources Code section 41901, effective July 1, 2015. This fee, which would reduce the larger franchise fee under the MMO contract dollar for dollar, would be allocated from WMAC, the franchisee under the MMO Contract, to the ratepayers. The revenues of this fee were to be deposited by Defendant into Fund No. 1710, known as the Recycling Fund.

109. On or around February 20, 2015, the MMO Contract between WMAC and Defendant was executed. Inexplicably, Defendant entered into the MMO Contract with WMAC despite the parties having neglected to propose, negotiate, or agree to rates for several services required under the MMO Contract for the rates approved on September 29, 2014.

110. On or around June 25, 2015, just one week prior to the Zero Waste Contracts taking effect, WMAC formally requested that Defendant approve those rates identified as "missing" from the rate tables approved by City Council for the MMO Contract on September 29, 2014.

111. On July 1, 2015, the implementation of services under the Zero Waste Contracts began.

112. On September 24, 2015, in advance of an upcoming meeting with City Council to consider adoption of WMAC's proposed "missing" rates, the City Administrator approved an agenda report prepared by PWD (the "September 2015 Agenda Report").

113. Per the September 2015 Agenda Report, with the exception of Roll-Off Ancillary Fees, the proposed "missing" rates were for services that WMAC was required to provide under the MMO Contract.

114. Among the "missing" service rates omitted by WMAC and Defendant were

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those for lock and key services ("Key Service") at MFD properties. Key Service was provided under the then-exiting contracts, and the scope of this service would remain unchanged under the new Zero Waste Contracts.

115. Per the September 2015 Agenda Report, the proposed rate for Key Service under the MMO Contract was $50.65 per MFD property per month. Key Service was provided under the then-existing contracts at no additional charge.

116. On or around September 29, 2015, a Special Concurrent Meeting of the Oakland Redevelopment Successor Agency and City Council was held (the "September 2015 Council Meeting"), to consider proposed amendments to Ordinance No. 13258 (also previously amended by Ordinance 13273) for the MMO Contract.

117. Attachment A to the September 2015 Agenda Report is WMAC's June 25, 2015 letter formally requesting from Defendant its approval of the proposed "missing" rates for the MMO Contract.

118. Per this WMAC June 25 letter, PWD indicated in an email to WMAC that the "missing" rates would have to be approved by City Council, and that PWD planned to submit the omitted rates to City Council in December 2015 for consideration and approval. In response, WMAC threatened to discontinue collection from compactor bins and "quickly migrate customers to regular bins" if Defendant did not approve these rates by July 14, 2015. WMAC further demanded that these "missing" rates be retroactively applied to a start date of July 1, 2015.

119. On or around October 6, 2015, City Council adopted Ordinance No. 13331, which amended Ordinance No. 13258 and approved all of WMAC's proposed "missing" rates as-is, without further negotiation or attempt by Defendant to have these rates justified, much

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less reduced.

120. On or around October 12, 2015, Defendant and WMAC executed the First Amendment to the MMO Contract (the "FAMMO"), thereby implementing the additional rate and contract provisions authorized by Ordinance No. 13331.

121. The FAMMO made several changes to section 7 of the MMO Contract regarding franchise fees, including the replacement of "Franchise Fees" language with "Franchise and AB939 Fees." Further amendments to section 7 included setting the total franchise fee and AB939 fee for the first fiscal year of the MMO Contract at an initial amount of $25,034,000, of which $3,240,000 was to be allocated to the AB939 fee, subject to certain adjustments.

Retroactive Billing of Exorbitant Push/Pull Service Charges

122. Push services, as described in the MMO Contract, include "dismounting from the collection vehicle, moving the Bins or Carts from their storage location for Collection and returning the Bins or Carts to their storage location… [and] may include unlocking and relocking the Bin or enclosure." ("Push/Pull Service").

123. At the July Council Meeting the charges for Push/Pull Service at MFD properties, as represented under Option 2C (wherein WMAC would be awarded the MMO Contract and Disposal Contract and CWS would be awarded the RR Contract), were as follows:

- 0-25ft. distance = $171.43
- 26-50ft. distance = $347.62
- 51-75ft. distance = $523.81
- 76-100ft. distance = $695.24
- 100ft. + ft. distance = $871.43

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124. Yet, when the MMO Contract was executed in February 2015 and the Zero Waste Contracts were collectively awarded in the same manner as described in Paragraph 123, the Push/Pull Service charges for MFD properties were inexplicably raised as follows:

- 0-25ft. distance = $183.19
- 26-50ft. distance = $371.47
- 51-75ft. distance = $559.75
- 76-100ft. distance = $742.94
- 100ft. + ft. distance = $931.22

125. When the FAMMO was executed it made changes to the "Accessibility" provision of section 10 of the MMO Contract by implementing the new Key Service rates approved by Ordinance No. 13331, and requiring Defendant and contractor to meet and confer and use "reasonable efforts to work together to insure that protocols" be developed to identify with specificity, "(i) the actions required of MFD Customers to avoid incurring charges for push service, and (ii) the methodology for applying push charges to MFD Customers with multiple containers and/or frequency of service ... provided, however, that [Defendant] agrees that charges for push services may be based on a per-container, per-day charge."

126. On or around January 1, 2016, MFD properties were retroactively charged for three months of Push/Pull Service, from October 2015 through December 2015, without any prior notification.

127. In advance of these Push/Pull charges being imposed, Defendant failed to undertake any outreach to educate Plaintiffs how to avoid being charged for Push/Pull Service or how to opt out of the Push/Pull Service prior to being retroactively charged on January 1, 2016.

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128. Despite attempts made by Plaintiffs to have these Push/Pull Service charges rescinded by CWS and WMAC, and submitting multiple complaints to City Council and Defendant regarding the unfair imposition of these Push/Pull Service charges, no retroactive charges for Push/Pull Service were rescinded, and no payments made by Plaintiffs for these retroactive fees were refunded.

The 2015-2016 Alameda County Grand Jury Final Report

129. In June 2016, Alameda County released a Grand Jury Final Report (the "Grand Jury Report"), that included findings and conclusions stemming from an investigation into the awarding of the Zero Waste Contracts. This investigation was spurred by citizen complaints regarding sharp rate increases, improperly awarded contracts, the illegal imposition of certain collection rates on local businesses, and that the franchise fee passed on to Oakland ratepayers was actually an illegal tax.

130. The Grand Jury Report concluded that: (1) the Defendant's contracting process failed to achieve a competitive bidding environment; (2) the Defendant's contracting process was for all intents and purposes abandoned by City Council before the process was completed; (3) the Defendant's contracting process lacked reasonable transparency; (4) collection rates paid by Oakland businesses and multi-family residences were markedly higher than surrounding communities; and (5) franchise fees paid by the Defendant's garbage collection contractor, passed on to Oakland ratepayers, are disproportionately higher than franchise fees paid to other Bay Area municipalities and special districts.

131. The Grand Jury Report also investigated whether Defendant was an integral party to the settlement agreement between WMAC and CWS, but "found no such evidence. Instead, evidence presented to the Grand Jury suggests the [Defendant] was marginally

involved, if at all, other than simply ratifying the end result of the agreement."

132. The Grand Jury also looked for evidence that analysis of the costs of the services provided under the Zero Waste Contracts bore a reasonable relationship to the rates charged to Oakland's citizens. The Grand Jury also sought evidence that numerous economic provisions identified in the City Council's thirty-two policy directives had been analyzed to identify costs and corresponding impact to Oakland ratepayers. **The Grand Jury Report found that "no evidence was presented to the Grand Jury indicating the value of many ancillary costs had been analyzed, or that economic provisions had been analyzed for potential impact to ratepayers. The Grand Jury also heard testimony that no analysis was performed related to ancillary collection services, such as bin push rates.** (Emphasis added).

133. With respect to the franchise fee passed on to the ratepayer, the Grand Jury surveyed franchise fees paid to surrounding government entities and found that "the franchise fees paid the [Defendant] under by WMAC under its contract are disproportionately higher than those surrounding government entities."

134. The Grand Jury Report concluded that "the Grand Jury is troubled that these [franchise] fees, which represent 30% of the ratepayers' monthly bills, were not transparently reported or openly discussed with the public at any time during the contracting process."

Proposition 218 and the Constitutional Limits on Property-Related Fees

135. Proposition 218, adopted by the California electorate in 1996, and incorporated into the California Constitution by the addition of articles XIII C and D, serves as a limit on the ability of local governments to exact revenue from taxpayers without their consent. *Howard JarvisTaxpayers Ass'n v. City of Riverside* (1999) 73 Cal.App.4th 679, 683.

136. Article XIII C, section 2, requires voter approval for local tax levies, while

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Article XIII D, section 6, prohibits the imposition of certain property-related fees and assessments.

137. Fees or charges for refuse collection services, including recycling, are considered property-related for purposes of Article XIII D.

138. Article XIII D, section 6, subdivision (b)(1) provides that "revenues derived from the [property-related] fee shall not exceed the funds required to provide the property-related service." Additionally, Article XIII D, section 6, subdivision (b)(3) mandates that the "amount of a [property-related] fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel."

139. Therefore, revenues derived from refuse and recycling collection services may not exceed the funds required to provide such service, and fees or charges imposed on a parcel for refuse and recycling collection services, may not exceed the proportional cost of service to that parcel.

140. Property-related fees or charges that exceed the cost of service operate as a tax. *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1506.

141. Property-related fees or charges that exceed the actual cost of service, and are deemed to be a tax, are subject to Article XIII C and must be submitted to the electorate and approved by a majority vote before being imposed. *Id.*

142. Pursuant to Article XIII C, section 1, 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, and the amount is no more than necessary to cover the reasonable costs of the governmental

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activity, and that the manner in which those costs are allocated to a payor bear a fair and reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

FIRST CAUSE OF ACTION
Violation of California Constitution, article XIII D, section 6, subdivision (b)(3)
(Asserted by all Plaintiffs against Defendant)

143. Plaintiffs re-allege paragraphs 1 through 136 above as though fully set forth herein.

144. From the outset of the Zero Waste RFP process, Defendant claimed its primary goal was to achieve good rates and services for the ratepayers of Oakland.

145. However, Defendant's failure to allow for 20-year bids on the RR Contract resulted in only two companies submitting proposals under the Zero Waste RFP, which, by City Council's own acknowledgment, was not a competitive bidding process.

146. Defendant's insistence on incorporating myriad alternative service options long after the Zero Waste RFP was issued, not only violated and undermined the Zero Waste RFP process, but caused precious months and critical negotiating leverage to be wasted.

147. By the time the Zero Waste Ordinances were eventually adopted, and the Zero Waste Contracts executed, Defendant had made an insufficient attempt to understand what the actual cost of services was. This incomplete evaluation included the passage of the MMO Contract while allowing several service rates to be omitted from the final rate tables, and led Defendant to project rate increases for MFD and COM ratepayers that, in reality, represents less than half of the Zero Waste Rates being imposed on Plaintiffs under the Zero Waste Contracts.

148. Defendant's August 14, 2014 adoption of Option 3, which was not recommended by PWD, led to an inevitable lawsuit from the more qualified proposer, WMAC, and the execution of the MOU between the proposing parties at the last minute.

149. The MOU, First September Council Meeting and Second September Council Meeting culminated in Defendant's adoption of Ordinance Nos. 13258 and 13259. These

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ordinances, taken together with Ordinance No. 13254, reflect Option 2 from the July Council Meeting, wherein WMAC was to be awarded the MMO Contract and Disposal Contract and CWS the RR Contract.

150. The projected rates under Option 2C for SFD ratepayers, which constitute the largest class of ratepayers in the City of Oakland, were $43.70 per month (for a 32-gallon cart).

151. In an attempt to save face and minimize public backlash for the mishandling of the Zero Waste RFP process and negotiations, and for bending to the will of WMAC, Defendant intentionally took steps to rebalance the rates and maintain the SFD rate as if Option 3C had, in fact, been implemented.

152. In order to effectuate this rate rebalancing, Defendant relied on the Zero Waste Ordinances, which all authorize the City Administrator to negotiate with the franchisee consistently with the governing ordinance, its related Agenda Report(s) and rate tables, as well as the "general form of the contract," where applicable.

153. After re-balancing the rates to effectively subsidize the SFD rate at the expense of MFD and COM ratepayers, the September Agenda Report projected that, with the adoption of amended versions of Ordinance Nos. 13253 and 13255, overall rate increases for MFD ratepayers (for a 20-unit MFD property), would be 30.09%.

154. From June 2015 to June 2016, the Zero Waste Rates at Plaintiff CLAYTON's MFD property under the Zero Waste Contracts have risen 79.76%, from $373.75 per month to $671.87 per month. This computes to $1,344 per unit per year for his MFD property located in the Allendale District that includes section 8 housing. By comparison, Plaintiff CLAYTON's garbage, recycling, and disposal bill under the Zero Waste Contracts for his Oakland SFD residence in Rockridge is $386.88 per year.

155. From June 2015 to March 2016, the Zero Waste Rates at Plaintiff ZOLLY's MFD property under the Zero Waste Contracts rose 112.54%, from $736.85 to $1,566.05.

156. From June 2015 to March 2016, the Zero Waste Rates at Plaintiff MCFADDEN's MFD property under the Zero Waste Contracts rose 155.37%, from $355.61 per month to $908.11 per month. By comparison, Plaintiff MCFADDEN's SFD residence in

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Oakland has experienced just a 23% rate increase in his garbage, recycling, and disposal bill under the Zero Waste Contracts.

157. Page three of Exhibit A to the July Agenda Report provided the following, unexplainable rate impact examples for 8-unit and 50-unit MFD properties, as opposed to using only a MFD 20-unit property example:

- 8-Unit MFD Property: 61.55% rate increase;
- 20-Unit MFD Property: 42.17% rate increase;
- 50-Unit MFD Property: 61.55% rate increase.

158. At no time during any of the City Council meetings described in this Complaint did PWD, the City Administrator, RFP Manager Katchee, Mayor Quan, or any councilmember explain why an 8-Unit MFD property would have the same exact rate increase (down to the 1/100 of a percentage point) as a 50-Unit MFD property, nor why a 20-unit MFD property would see a rate increase that is almost one-third less than that of a 50-Unit MFD property. Furthermore, no empirical evidence is provided in the July Agenda Report (or any other report) that would justify these projected rate increases for 8-, 20-, and 50- unit MFD properties.

159. The Zero Waste Rates being imposed on Plaintiffs under the Zero Waste Contracts are not representative of the actual cost of service attributable to their respective MFD properties, as a portion of these charges are being imposed to subsidize SFD rates and effectuate Defendant's stated goal of maintaining the SFD rate where it was on July 30, 2014.

160. The Zero Waste Rates being imposed on Plaintiffs under the Zero Waste Contracts are further not representative of the actual cost of service attributable to their respective MFD properties, as they include Key Service charges of $41.91 per month. Plaintiffs contend that these Key Service charges, which services simply consist of using a key

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copy to access their bins and remained unchanged from the then-existing service, are not representative of the actual cost of this service.

161. The Zero Waste Rates being imposed on Plaintiffs under the Zero Waste Contracts are further not representative of the actual cost of service attributable to their respective MFD properties, as they include inflated "Push/Pull" Service charges that are not representative of the actual cost of service, but were nonetheless imposed on Plaintiffs by Defendant's adoption of the Zero Waste Ordinances and execution of the FAMMO. This service was mandatory from at least October 2015 through December 2015, as Plaintiffs were retroactively charged without notice or outreach from Defendant on how to opt-out of the service, and Defendant has not responded to Plaintiffs requests for relief.

162. The Zero Waste Rates being imposed on Plaintiffs under the Zero Waste Contracts are further not representative of the actual cost of service attributable to their respective MFD properties, in light of the stark rate increases compared to all similar contracts recently entered into in Alameda County, and as described in Paragraphs 76-77 of this Complaint.

163. The Zero Waste Rates being imposed on Plaintiffs under the Zero Waste Contracts are further not representative of the actual cost of service attributable to their respective MFD properties, as they incorporate a franchise fee that has not been empirically justified by Defendant and, as admitted by Defendant, 18% of which is applied towards Defendant's "general fund." Plaintiffs contend that the value of Defendant's franchise fee under the Zero Waste Contracts is excessive for the franchisees' privilege of using the avenues and highways of Oakland, and operates as a tax being passed through by the franchisees to Plaintiffs in the Zero Waste Rates.

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164. The Zero Waste Rates being imposed on Plaintiffs under the Zero Waste Contracts are further not representative of the actual cost of service attributable to their respective MFD properties, because a portion of the Bulky Pickup service charges are excessive, and being used to subsidize on-site illegal dumping pickups throughout Oakland, which Defendant was aware of and assented to when it initially selected CWS for the Zero Waste Contracts, and which Defendant allows to occur at present.

165. The Zero Waste Rates being imposed on Plaintiffs under the Zero Waste Contracts are further not representative of the actual cost of service attributable to their respective MFD properties, because Defendant has allowed WMAC to increase rates simply for being required by Defendant to use EBMUD facilities instead of its own. Instead of the charges relating to use of the EBMUD facility being representative of the actual cost of that service, those charges serve the narrow purpose of having WMAC recoup its costs for existing equipment and systems that became redundant when City Council forced EBMUD's facility to be used. City Council and defendant were made aware of this by RFP Manager Katchee, and City Council turned a blind eye in exchange for furthering the interests of EBMUD, all at the expense of the ratepayers and Plaintiffs.

166. Additionally, Defendant failed to account for the decreased cost of service that resulted with the passage of Ordinance No. 13274, which extended the RR Contract from a 10-year term to a 20-year term. This extension allowed CWS to amortize its costs over a longer period of time, and minimize interest levels on its debt service by virtue of the extended term. Yet, Defendant made no attempt or effort to adjust the relevant rate tables pursuant to these discounting factors, and consequently the ratepayers and Plaintiffs now bear the same burden under the RR Contract while CWS benefits from a wider profit margin and further pads its

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pockets.

SECOND CAUSE OF ACTION
Violation of California Constitution, article XIII D, section 6, subdivision (b)(1)
(Asserted by all Plaintiffs against Defendant)

167. Plaintiffs re-allege paragraphs 1 through 161 above as though fully set forth herein.

168. Discussed at the May Council Meeting was the franchise fee Defendant would charge the franchisee(s) under the Zero Waste Contracts. As of May 2014, the franchise fee would equal $30 million per year.

169. In discussing the $30 million per year franchise fee under the Zero Waste Contracts, the following statements were made by Councilmember Gallo, Administrator Blackwell, and RFP Manager Katchee at the May Council Meeting:

- Councilmember Gallo: "One of the big issues here is the $30 million franchise fee that we are asking the franchisee to give back to the City… that's close to $20/mo per resident. We need to clearly define what that cost is… How did we arrive at that number? What's the formula to get there?... the first thing each vendor said to me was, 'well I gotta pay you $30 million back for doing business with you.' **People say it's a franchise fee... well, it's taxation. Indirectly, I'm taxing for you to do business in Oakland. So I think that needs to be answered and I haven't heard an answer yet."**

- City Administrator Blackwell: "The portion of the Franchise Fee that goes to keeping the streets clean remains unchanged … **so the increase in the franchise fee is not tied to an increase in the street cleaning serve.**

- RFP Manager Katchee: **"For the franchise fee, there's a small amount that goes into the General Fund…"**

170. In none of the Complaint's previously described agenda reports or City Council meetings is a cost-breakdown of the franchise fee provided, much less shown to have been empirically justified by Defendant.

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1 171. By July 2014, as evidenced by Section 7 of Ordinance 13253 C.M.S. for the
2 MMO Contract, the franchise fee had been changed to equal $25,034,000 per annum. No
3 reason for this change in value was ever provided by PWD, City Council, the City
4 Administrator, or Defendant, nor was there an explanation as to how this figure was calculated.
5
6 172. Section 6 of Ordinance No. 13258, adopted in September 2014 after the MOU
7 was entered into between WMAC and CWS, specifies that from July 1, 2015 to June 30, 2025,
8 the Franchisee under the MMO Contract "shall pay the [Defendant] a monthly franchise fee of
9 $25,034,000 per annum, subject to annual adjustment on July 1 each year, as specified in the
10 [MMO] [C]ontract."
11
12 173. In neither the First September Agenda Report, Second September Agenda
13 Report, First September Council Meeting nor the Second September Council Meeting, is a
14 cost-breakdown or formula of the franchise fee described in Paragraph 167 provided, much
15 less empirically justified by Defendant.
16
17 174. No line-item breakdown, formula, or empirical justification is ever provided for
18 the $3,240,000 franchise fee approved under Ordinance No. 13272 in December 2014.
19 175. The Zero Waste Ordinances allow for the franchise fees to be passed through
20 from the franchisee to the ratepayer, resulting in the ratepayer being responsible for its funding.
21
22 176. The revenues recovered under the franchise fees approved and implemented by
23 Defendant's adoption of the Zero Waste Ordinances exceed the funds necessary to provide the
24 property-related service for which they are meant.
25 177. The portion of excessive revenues being passed through to Plaintiffs should
26 therefore be deemed a tax, improperly imposed without voter approval.
27
28 178. Additionally, the non-franchise fee charges which comprise the balance of the

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Zero Waste Rates exceed the funds necessary to provide the property-related services they are meant to cover.

179. Those non-franchise fee related charges were approved by Defendant through the adoption of the Zero Waste Ordinances and implemented through Defendant's approved rate-tables under the Zero Waste Contracts.

180. The portion of excessive non-franchise fee revenues being passed through to Plaintiffs should therefore be deemed a tax, improperly imposed without voter approval.

THIRD CAUSE OF ACTION
Violation of California Constitution, article XIII D, section 6, subdivision (b)(2)
(Asserted by all Plaintiffs against Defendant)

181. Plaintiffs re-allege paragraphs 1 through 175 above as though fully set forth herein.

182. California Constitution, Article XIII D, section 6(b)(2) requires that revenues derived from a property-related fee or charge not be used for any purpose other than that for which the fee or charge was imposed.

183. In the "Cost Summary/Implications" section of the July Agenda Report, and again restated in Exhibit A to the July Agenda Report when answering Councilmember Gallo's question regarding how the franchise fee is calculated, is the following statement:

> "Adoption of these ordinances will sustain the City's franchise fees, which are currently $30 million per year, and with the adoption of these ordinances will be $28 million per year. 70% are used to support City sanitation services provided by PWD, **18% of the fees will go into the General Fund** and 11% is used to support mandated Integrated Waste Management Act (AB 939) program development and planning for solid waste reduction and recycling, franchise contract management, environmental compliance, and related activities." (Emphasis added)

184. Franchise fees are paid by a franchisee in consideration of their right to use the avenues and highways of the franchisor, and not to be used for revenue purposes.

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185. Because no legitimate cost-justification for the value of the franchise fees approved by Defendant through adoption of the Zero Waste Ordinances and implementation through the Zero Waste Contracts, and because at least 18% of the collected franchise fees are allocated to Defendant's General Fund, these fees are actually a tax implemented for revenue seeking purposes and not for the services of which they ostensibly relate under the Zero Waste Ordinances.

186. Because these fees are really a tax masquerading as a franchise fee, they should be deemed a tax upon Plaintiffs, and subject to voter-approval under California Constitution Article XIII C.

187. With regard to non-franchise fee related charges approved by Defendant through the Zero Waste Ordinances and Zero Waste Contracts, a portion of the Zero Waste Rates relating to Bulky Pickup service at MFD properties ostensibly covers direct tenant-access to such service. However, instead of this portion of revenue being exclusively used to fund the costs associated with providing direct tenant-access for Bulky Pickup service, as required, it is also being used to subsidize on-site illegal dumping pickups throughout the territory of Oakland proper.

188. On information and belief, tenants of Plaintiffs' MFD properties who submit direct requests for Bulky Pickup service are being turned away by the franchisee, and instructed to have the MFD property manager make the Bulky Pickup request.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment against Defendant as follows:

As to the First Cause of Action for violation of Article XIII D, section 6, subdivision b(3), Plaintiffs pray for:

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1. A determination that the Zero Waste Rates imposed on Plaintiffs' Property, negotiated by PWD, and approved by City Council, City Administrator, and Defendant, exceed the proportional cost of the property-related services attributed to Plaintiffs' Property;
2. A determination that those excessive charges in the Zero Waste Rates being imposed on Plaintiffs' Property amount to an improperly imposed tax, subject to voter approval;
3. Grant injunctive relief to prevent that portion of the Zero Waste Rates determined to be an improper tax from further being imposed on Plaintiffs' Property without prior voter approval;
4. Grant injunctive relief to reimburse Plaintiffs for all payments made in connection with those improperly imposed taxes under the Zero Waste Ordinances;
5. Order Defendant to show cause why injunctive relief should not be granted;
6. For attorney's fees pursuant to California's Private Attorney General Statute;
7. For costs incurred in this action;
8. For such other relief as the Court may deem proper.

As to the Second Cause of Action for violation of Article XIII D, section 6, subdivision b(1), Plaintiffs pray for:

1. A determination that the Zero Waste Rates negotiated by the PWD, and approved by City Council, City Administrator and Defendant, resulted in revenues that exceed the funds required to provide the property-related services for which they are meant;
2. A declaration that such revenues exceeding the funds required to provide the property-related services for which they are meant amount to an improperly imposed tax, subject to voter approval;
3. Grant injunctive relief to prevent that portion of the Zero Waste Rates determined to be an improper tax from further being imposed on Plaintiffs' Property without prior voter approval;

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4. Grant injunctive relief to reimburse Plaintiffs for all payments made in connection with those improperly imposed taxes under the Zero Waste Ordinances;
5. Order Defendant to show cause why injunctive relief should not be granted;
6. For attorney's fees pursuant to California's Private Attorney General Statute;
7. For costs incurred in this action;
8. For such other relief as the Court may deem proper.
9. As to the Third Cause of Action for violation of Article XIII D, section 6, subdivision b(2), Plaintiffs pray for:

1. A determination that Defendant has approved and imposed, through the passage of the Zero Waste Ordinances, charges on Plaintiffs' Property that has derived revenues not being used for the purpose for which the fee or charge was imposed;
2. A determination that the property related charges being imposed on Plaintiffs' Property that has derived revenues not being used for the purpose for which the fee or charge was imposed amount to an improperly imposed tax, subject to voter-approval;
3. A determination that a portion of franchise fee revenues derived through Defendant's negotiation and passage of the Zero Waste Ordinances are being used for purposes other than that for which the fee is imposed, including general government services;
4. A determination that that portion of the franchise fee being used for purposes unrelated to that for which the fee is imposed, including general governmental services, amounts to an improperly imposed tax, subject to voter approval;
5. Grant injunctive relief to prevent that portion of the Zero Waste Rates determined to be an improper tax from further being imposed on Plaintiffs' Property without prior voter approval;
6. Grant injunctive relief to reimburse Plaintiffs for all payments made in connection with those improperly imposed taxes under the Zero Waste Ordinances;
7. Order Defendant to show cause why injunctive relief should not be granted;

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8. For attorney's fees pursuant to California's Private Attorney General Statute;

9. For costs incurred in this action;

10. For such other relief as the Court may deem proper.

ZACKS, FREEDMAN & PATTERSON, PC

Dated: June 28, 2016

By: Andrew M. Zacks
Attorneys for Plaintiffs

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EXHIBIT B

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FILED BY FAX
ALAMEDA COUNTY
December 01, 2017
CLERK OF
THE SUPERIOR COURT
By Alicia Espinoza, Deputy
CASE NUMBER:
RG16821376

SUPERIOR COURT - STATE OF CALIFORNIA

COUNTY OF ALAMEDA – UNLIMITED CIVIL JURISDICTION

ROBERT ZOLLY, RAY MCFADDEN, and STEPHEN CLAYTON Plaintiffs, vs. CITY OF OAKLAND; and DOES 1-50, inclusive, Defendant.	CASE NO. RG16821376 PLAINTIFFS' OPPOSITION TO DEMURRER TO SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF Date: February 16, 2018 Time: 10:00 a.m. Dept: 20 Judge: Hon. Paul Herbert

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II. ARGUMENT

A. Under *Jacks*, The Franchise Fees Are Subject To Constitutional Scrutiny

1. In *Jacks*, The Supreme Court Held That Franchise Fees Are Subject To Prop. 218 Analysis

A detailed history of Prop. 218 and its predecessors is unnecessary at this point, having been fully briefed on the prior two demurrers. In short, to ensure its effectiveness, "[t]he provisions of Proposition 218 'shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.'" (Jacks, supra, 3 Cal.5th at 267) Accordingly, Jacks quite clearly ruled in Plaintiffs' favor that Proposition 218 applies to franchise fees without regard for how they are passed through:

> Just as the amount of fees imposed to compensate for the expense of providing government services or the cost to the public associated with a payer's activities must bear a reasonable relationship to the costs and benefits that justify their imposition, fees imposed in exchange for a property interest must bear a reasonable relationship to the value received from the government. To the extent a franchise fee exceeds any reasonable value of the franchise, the excessive portion of the fee does not come within the rationale that justifies the imposition of fees without voter approval. Therefore, the excessive portion is a tax. If this were not the rule, franchise fees would become a vehicle for generating revenue independent of the purpose of the fees.
>
> (Jacks, supra, 3 Cal.5th at 269)

Plaintiffs are entitled to an opportunity to determine how much of the franchise fees violate the Jacks standard. Nothing in Jacks supports Oakland's position that Prop. 218 does not apply, at all, to the franchise fee scheme at issue here. Without limiting themselves, Plaintiffs intend to prove to this Court that the franchise fees here violate the Jacks standard because they include amounts which the franchisees would not pay if Oakland did not force multi-family dwelling owners to subscribe to service at rates sufficient to cover these amounts. In other words, the value of the franchises conferred cannot include the equivalent of a tax that can simply be passed through to captive

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Thus, under Jacks' own analysis, informed by Proposition 218's own command that it be construed liberally to promote its objectives of limiting governments' ability to extract revenue from their residents, Oakland's arguments have been rejected by the Supreme Court. All franchise fees are subject to some level of Prop. 218 analysis. The contours of that analysis will be determined in this litigation.

3. Oakland's Argument That Ratepayers Are Not Technically Obligated To Subscribe To The Franchisees' Services Because They Can, In Theory But Not In Practice, Obtain A Self-Hauling Permit Is False

First, Oakland states that residents have the option to not accept the services WMAC and CWS provide; therefore nothing is imposed on them. (MPA at 10:26-27) This is disingenuous. This suit is not brought by, or on behalf of, Oakland residents per se. Oakland residents residing in multi-family buildings do not subscribe to these services; the owners of those buildings do. Indeed, in Oakland's suit against CWS, Oakland alleges that "multi-family dwelling property owners [are] required to purchase recycling services from CWS. . . ." (RJN, Exh. B, 15, emph. added) Also: "Multifamily buildings are required to subscribe to no less than the minimum weekly Trash service of 20-gallons per unit." (RJN, Exh. B, internal exh. D, 5th page) That Oakland argues something completely contrary here is inexplicable.

Second, ratepayers cannot refuse to pay for the service unless they opt out, which is a practicably impossible option:

> The permit shall . . . require the permit holder to deliver the solid waste to an approved transfer facility or disposal facility and to deliver any organics to a transfer facility, a material recovery facility, or a processing facility for processing; require the permit holder to maintain records indicating such waste was removed from the premises and disposed of and processed consistent with this section or was composted onsite; authorize City officials to inspect the premises at reasonable periods of time; require the payment of an annual fee . . . for the administrative costs to the City associated with issuing the permit and monitoring the self-hauler's operations, including components associated with periodic inspection of

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EXHIBIT C

Zolly v. City of Oakland

No. A154986

Court of Appeal of California, First Appellate District, Division One

March 8, 2019

Reporter
2019 CA App. Ct. Briefs LEXIS 668 *

Robert Zolly, Ray McFadden, and Stephen Clayton, Plaintiffs and Appellants, vs. City of Oakland, Defendant and Respondent

Type: Brief

Prior History: Appeal from the Superior Court of Alameda. Judge Paul D. Herbert. Case No. RG 16 821376.

Counsel

[*1] Zacks, Freedman & Patterson, PC, Andrew M. Zacks, No. 147794, San Francisco, CA, Katz Appellate Law, Paul J. Katz, No. 243942, Oakland, CA, Attorneys for Appellants.

Title

Appellants' Opening Brief

Text

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Appellants know of no person or entity that should be listed in this certificate.

INTRODUCTION

Since July 2015, Oakland residents have seen their waste-collection bills skyrocket. Appellants, who own multi-family properties and pay their tenants' waste-collection bills, have been particularly affected. The reason? Oakland executed new agreements with two public utilities, giving them the exclusive rights to collect compostables and recyclables, and to collect and dispose of garbage. The agreements provided that the utilities together would pay

"First, it specifically defined ' "tax," ' and did so broadly, to include 'any levy, charge, or exaction of any kind imposed by a local government.' (Art. XIII C, § 1, subd. (e).) However, the new definition has seven exceptions." (*Citizens, 6 Cal.5th at p. 11.)* The only exception that possibly applies here is for "[a] charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local **[*21]** government property." (Cal. Const., art. XIII C, § 1, subd. (e)(4).)

"Second, Proposition 26 requires the local government to prove 'by a preponderance of the evidence that … [an] 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).)" (*Citizens, supra, 6 Cal.5th at p. 11.)* For an exception to apply, then, a city must prove that the charge's overall amount and allocation fit within these limits. (*City of San Buenaventura v. United Water Conservation Dist. (2017) 3 Cal.5th 1191, 1200* (*City of San Buenaventura*); see also *id. at pp. 1209-1214.)* Because the charges in *Jacks* "were imposed prior to the enactment of Proposition 26," the Court analyzed the charges there under the Proposition 218 version of article XIII C. (*Jacks, supra, 3 Cal.5th at p. 260, fn. 4;id. at p. 263, fn 6.)* But the analysis of franchise **[*22]** fees under Proposition 26 is likely the same as *Jacks'* analysis under Proposition 218. First, the purpose of Proposition 26 "was to *reinforce* the voter approval requirements set forth in Propositions 13 and 218." (*Jacks, supra, 3 Cal.5th at p. 263.)* Second, Proposition 26's requirement that a charge's allocation "bear a fair or reasonable relationship to the payor's … benefits received from the governmental activity" was derived from *Sinclair Paint Co. v. State Bd. of Equalization (1997) 15 Cal.4th 866* (*Sinclair Paint*). (*City of Buenaventura, supra, 3 Cal.5th at p. 1212.)* Likewise, and as explained further below, *Jacks*' requirement that the amount of a franchise fee bear a reasonable relationship to the franchise's value also was derived from *Sinclair Paint*. (*Jacks, supra, 3 Cal.5th at pp. 260-262, 267-270.)* Because a franchise is a benefit that a utility receives from the government (see *infra* Part I.D.), Proposition 26's reasonable-relationship test and *Jacks'* reasonable-relationship test should be construed as equivalent. [2] (See *In re Adoption of Sewall (1966) 242 Cal.App.2d 208, 224* **[*23]** ["In construing a statute, the court is free to study the history and purpose of the enactment and the previous state of the legislation on the subject, as well as other statutes *in pari materia* and the benefits sought to be provided"].)

But to the extent that Proposition 26 changes the analysis of franchise fees from *Jacks*, those changes would have to make it more difficult for a franchise fee not to qualify as a tax. Any other interpretation would contradict the entire purpose of Proposition 26 to **[*24]** reinforce Proposition 218's goal of preventing cities from disguising taxes as fees. (*Boling v. Public Employment Relations Board (2018) 5 Cal.5th 898, 918* [stating that the Court "will not adopt a narrow or restricted meaning of statutory language if it would result in an evasion of the evident purpose of a statute, when a permissible, but broader, meaning would prevent the evasion and carry out that purpose"], cleaned up.)

Therefore, because *Jacks* shows that the appellants here have stated a claim under Proposition 218 (see *infra* Part I.G.), they have necessarily stated a claim under Proposition 26.

D. *The state Constitution bars a city from disguising a tax as a franchise fee that bears no reasonable relationship to the value of the franchise conferred.*

An increasingly popular way for local governments to extract taxpayer money without getting voter approval is to increase franchise-fee amounts. (*Jacks, supra, 3 Cal.5th at pp. 267, 269.)* A franchise fee is the price a utility pays to a city to have the right "to use public streets or rights-of-way" to conduct business. (*Id. at pp. 262, 267.)* Because a utility recovers **[*25]** the cost of a franchise fee from its customers, the utility is a "a conduit through which government charges are ultimately imposed on ratepayers[.]" (*Id. at p. 269.)* If unchecked, then, cities could evade the constitutional limits on their revenue-raising power by charging exorbitant franchise fees. (*Ibid.*)

---

[2] Because a franchise fee "is compensation for the use or purchase of a government *asset* rather than compensation for a cost" (*Jacks, supra, 3 Cal.5th at p. 268),* the requirement from Proposition 26 that a charge's amount "is no more than necessary to cover the reasonable costs of the governmental activity" is not applicable in this context (see *ibid.*). Relatedly, the term "governmental activity" in Proposition 26 should be construed as "governmental asset" in this context.

EXHIBIT D

Zolly v. City of Oakland

No. S262634

SUPREME COURT OF CALIFORNIA

July 10, 2020

Reporter
2020 CA S. CT. BRIEFS LEXIS 489 *

Robert ***Zolly***, Ray McFadden, and Stephen Clayton, Plaintiffs and Appellants, vs. City of ***Oakland***, Defendant and Respondent

Type: Brief

Prior History: After a Published Opinion From the First District Court of Appeal, Division One. Appeal No. RG16821376. Superior Court of Alameda, Case No. RG16821376.

Counsel

Zacks, Freedman & Patterson, PC, Andrew M. Zacks, No. 147794, San Francisco, CA, Katz Appellate Law, Paul J. Katz, No. 243942, ***Oakland***, CA, Attorneys for Appellants .

Title

Answer to Petition for Review

Text

[*1] INTRODUCTION

In its petition for review, ***Oakland*** seeks to render obsolete this court's recent decision in *Jacks v. City of Santa Barbara (2017) 3 Cal.5th 248 (Jacks)*. *Jacks* blocked one way that cities try to raise taxes without getting the requisite voter approval-by using a utility to collect an exorbitant amount from ratepayers and calling that amount a "***franchise*** fee" (i.e., the price paid for the utility to use city property). *Jacks* held that, when a ***franchise***-fee amount exceeds the value of the ***franchise*** conferred, that imbalance reveals the city has padded the fee with a tax subject to the voter-approval requirement of article XIII C of the California Constitution.

the local government to prove 'by a preponderance of the evidence that ... [an] 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).)" (*Citizens, supra, at p. 11*, alterations in original.)

Oakland contends **[*6]** that the fourth exception covers all charges that are nominally ***franchise*** fees. (PFR 19-30.) But that contention should be met with skepticism. As explained above in Part I, the original version of article XIII C provided that a so-called ***franchise*** fee was actually a tax to the extent its amount exceeded the reasonable value of the ***franchise***. (*Jacks, supra, 3 Cal.5th at pp. 269-271*.) That limit was needed to prevent ***franchise*** fees from becoming "a vehicle for generating revenue independent of the purpose of the fees"-a "concern that is more than merely speculative." (*Id. at p. 269*.) And the whole point of Proposition 26 was to make it even *tougher* for cities to generate revenue from residents without getting voter consent. (See *Schmeer v. County of Los Angeles (2013) 213 Cal.App.4th 1310, 1322* [stating that Proposition 26 was "an effort to close perceived loopholes in Propositions 13 and 218"].)

Yet ***Oakland***'s interpretation of Proposition 26 would mean that the initiative *erased* Proposition 218's limit on ***franchise***-fee amounts. This court should be extremely reluctant to adopt such a counterintuitive interpretation. (See *Boling v. Public Employment Relations Board (2018) 5 Cal.5th 898, 918* [stating that this court avoids a construction **[*7]** that " ' "would result in an evasion of the evident purpose of [a statute]" ' " when possible], citation omitted and alteration in original.)

Fortunately-as ***Zolly*** correctly ruled-the current text of article XIII C does not compel that perverse result. (***Zolly***, *supra, 47 Cal.App.5th at p. 88*.) The fourth exception covers "[a] charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property." (Cal. Const., art. XIII C, § 1, subd. (e)(4).) And a city has the burden to prove by the preponderance of the evidence that a given charge fits within that exception. (Cal. Const., art. XIII C, § 1, subd. (e).) So how does a city prove that the whole amount of a charge is actually imposed for a utility's use of government property and not for revenue-generation unrelated to that use? *Jacks*' ***franchise***-fee test still supplies the answer: it depends on whether the charge's amount "reflect[s] a reasonable estimate of the value of the ***franchise***." (*Jacks, supra, 3 Cal.5th at p. 267*.) Only charges that pass this test are truly "amounts paid in exchange for property interests"-i.e., real ***franchise*** fees excepted from the definition **[*8]** of tax. (*Ibid.*)

Oakland relies on the fact that, in contrast to the first three exceptions, the fourth exception does not include the word "reasonable." But unlike the first three exceptions, which involve cities being reimbursed for *expenses*, a ***franchise*** fee is compensation for a city *asset.* (*Jacks, supra, 3 Cal.5th at p. 268*.) The first three exceptions, then, need the word "reasonable" to ensure that cities are not reimbursed for profligate spending. (See Voter Information Guide, Gen. Elec. (Nov. 2, 2010) argument in favor of Prop. 26, p. 60 [stating that local politicians "need to control spending, not use loopholes to raise taxes"].) By contrast, the fourth exception does not need the word "reasonable" to provide a meaningful limit on ***franchise*** fees because the value of the relevant asset (i.e., the ***franchise***) is set by the market. (See *Jacks, supra, at p. 270*.)

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(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

(Cal. Const., art. XIII C, § 1, subd. (e).)

EXHIBIT E

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ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco
10/18/2018
Clerk of the Court
BY:ERNALYN BURA
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

HOWARD JARVIS TAXPAYERS ASSN., BRANDON KLINE, ANGELIQUE BACON, DEIDRE DAWSON,

Plaintiffs,

v.

The BAY AREA TOLL AUTHORITY, and the CALIFORNIA STATE LEGISLATURE,

Defendants.

No. CGC-18-567860

FIRST AMENDED COMPLAINT FOR DECLARATORY RELIEF (CCP § 1060) AND INVALIDATION (STS. & HY. § 30922) OF BRIDGE TOLL INCREASE

INTRODUCTION

Pursuant to authorization from Senate Bill 595, which the Legislature passed despite its failure to receive two-thirds legislative approval, Regional Measure 3 appeared on the June 5, 2018, ballot in nine Bay Area counties. It was placed on the ballot by resolution of the Bay Area Toll Authority, a regional public agency for the nine counties. Regional Measure 3 received 475,690 affirmative votes out of 886,529, or 53.66%. The Bay Area Toll Authority has declared that Regional Measure 3 passed by a simple majority vote and is about to implement the $3 bridge toll increase described in the measure.

If Regional Measure 3 is deemed a state tax, then the bill authorizing it, Senate Bill 595, required 2/3 legislative approval in both the Senate and Assembly. It did not satisfy this requirement in the Assembly. Alternatively, if it is a local special tax, then Regional

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Measure 3 required 2/3 voter approval, which it did not receive. Since the bridge toll increase cannot be deemed an exempt local or state fee, it must be invalidated.

PARTIES

1. Plaintiff Howard Jarvis Taxpayers Association ("HJTA") is a nonprofit public benefit corporation, comprised of over 200,000 California taxpaying members, organized and existing under the laws of California for the purpose, among others, of engaging in civil litigation on behalf of its members and all California taxpayers to ensure constitutionality in taxation. HJTA has members, including two of the plaintiffs, who reside in one or more of the nine counties listed in the above caption ("the nine Bay Area Counties"), who voted against Regional Measure 3 and who would be subject to paying its increased toll charges if enforced. HJTA has members, including one of the plaintiffs, who reside outside the nine Bay Area Counties who did not have the opportunity to vote on Regional Measure 3, but will be subject to paying its increased toll charges if enforced.

2. Plaintiff Brandon Kline is a resident and registered voter in the City of Vacaville, which is located in Solano County. He voted against Regional Measure 3. Mr. Kline works as an Environmental Compliance Officer for San Francisco State University in San Francisco. To get to work he must drive over two bridges, the Carquinez Bridge and the San Francisco-Oakland Bay Bridge. He is therefore subject to the increased toll on two bridges per commute if it is enforced.

3. Plaintiff Angelique Bacon is a resident and registered voter in the City of Vallejo, which is located in Solano County. She voted against Regional Measure 3. Ms. Bacon works as a Consumer Affairs representative for the California Public Utilities Commission in San Francisco. To get to work she must drive over two bridges, the Carquinez Bridge and the San Francisco-Oakland Bay Bridge. She is therefore subject to the increased toll on two bridges per commute if it is enforced.

4. Plaintiff Deirdre Dawson is a resident and registered voter in the City of Lodi, which is located outside the nine Bay Area Counties. She did not have the opportunity to vote on Regional Measure 3. Ms. Dawson works as a Court Reporter in the City of

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1 Martinez. To get to work she must drive over the Antioch Bridge and is therefore subject to
2 the increased toll once per commute if it is enforced.

3 5. Defendant California Legislature ("Legislature") is the legislative branch of the
4 California State government and was responsible for declaring Senate Bill 595 to have
5 passed despite the lack of two-thirds legislative approval in the Assembly.

6 6. Defendant Bay Area Toll Authority ("BATA") was created by Streets &
7 Highways Code section 30950 as a public instrumentality governed by the Board of
8 Directors of the Metropolitan Transportation Commission. BATA is responsible for
9 programming, administration, and allocation of toll revenues. Per Senate Bill 595, BATA
10 was responsible for setting the dollar amount of the proposed toll increase, setting the
11 election date, writing the ballot question, and calculating the election results of Regional
12 Measure 3 upon receiving reports from each County Clerk, then, if it determined that a
13 simple majority of voters had approved the measure, implementing the increased toll
14 amount. (Sts. & Hy. Code, § 30923(a)-(f).)

15 **FIRST CAUSE OF ACTION**
For Declaratory Relief and Invalidation of Senate Bill 595
16 Against Defendant Legislature

17 7. Plaintiffs repeat and incorporate Paragraphs 1 through 6 as if fully set forth herein.

18 8. The Legislature passed Senate Bill 595 ("SB 595") in 2017. Among other
19 things, SB 595 added section 30923 to the Streets & Highways Code. Section 30923
20 authorized BATA to select the amount of a proposed toll increase, not to exceed $3, for the
21 following seven bridges within BATA's jurisdiction: Antioch, Benicia-Martinez, Carquinez,
22 Dumbarton, Richmond-San Rafael, San Mateo-Hayward and San Francisco-Oakland Bay.
23 Section 30923 required the Board of Supervisors for each of the nine Bay Area Counties to
24 call a special election, to be consolidated with a statewide election selected by BATA, to
25 present the proposal known as Regional Measure 3 ("RM 3") to the voters. Section 30923
26 authorized BATA to implement the increased toll amount if it found that RM3 was approved
27 by a simple majority of all voters in the nine Bay Area Counties.

28 9. Section 3 of article XIII A of the California Constitution provides that "[a]ny

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1 change in state statute *which results in* any taxpayer paying a higher tax must be imposed
2 by an act passed by not less than two-thirds of all members elected to each of the two
3 houses of the Legislature." (Cal. Const., art. XIII A, § 3(a), emphasis added.) Section 3(b)
4 defines state taxes so that all monetary exactions are presumed to be taxes. It defines "tax"
5 as "any levy, charge, or exaction of any kind imposed by the State." (*Id.*, § 3(b).) While
6 there is an exception for "[a] charge imposed for entrance to or use of state property" (*Id.*, §
7 3(b)(4)), it applies only to the extent "that the amount is no more than necessary to cover
8 the reasonable costs of the governmental activity, and that the manner in which those costs
9 are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or
10 benefits received from, the governmental activity." (*Id.*, § 3(d).)

11 10. RM3 bridge toll funds are to be used for the specific purposes listed in Streets
12 & Highways Code section 30914.7. These specific purposes include new Bay Area Rapid
13 Transit ("BART") railway cars and other BART enhancements, the repair or replacement of
14 San Francisco Bay ferry vessels, the replacement and expansion of San Francisco's MUNI
15 vehicle fleet, improved ship access for the Port of Oakland, and a grant program to fund
16 bicycle and pedestrian trails.

17 11. Plaintiffs do not use these rail, ferry, shipping, bicycle or pedestrian services
18 when they drive across state-owned bridges. The "governmental activity" that plaintiffs use
19 is the provision, operation and maintenance of bridges. The RM3 toll increase is not
20 "necessary to cover the reasonable costs" of plaintiffs' "entrance to or use of" the state-
21 owned bridges. Nor does the amount of the increase "bear a fair or reasonable relationship
22 to [plaintiffs'] burdens on, or benefits received from, the governmental activity." (*Id.*, § 3(d).)
23 The section 30914.7 expenditures to be funded by the RM3 toll increase will benefit entities
24 and persons not paying the toll increase. For these reasons, the RM3 toll increase does not
25 fit the exemption for "entrance to or use of state property."

26 12. Because the RM3 toll increase does not fit the exemption for "entrance to or
27 use of state property," it is by default a "tax." Because SB 595, by authorizing BATA to
28 impose the tax, constitutes a "change in state statute which results in [plaintiffs] paying a

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higher tax," it needed two-thirds approval in each house to be passed by the Legislature.

13. While SB 595 received 27 votes or 67.5% in the Senate, it received only 43 votes or 54% in the Assembly. SB 595 therefore failed to garner the approval of "two-thirds of all members elected to each of the two houses of the Legislature." (Cal. Const., art. XIII A, § 3(a).) Without such approval, the bill did not pass the Legislature and therefore was not eligible for the Governor's signature. SB 595 and the bridge toll increase it authorized are invalid.

14. An actual controversy exists between the parties in that plaintiffs believe SB 595 did not become law and the bridge toll increase is therefore invalid; whereas defendants believe SB 595 became law and the bridge toll increase is valid in all respects.

15. Plaintiffs desire a judicial determination of the rights and duties of the parties, including a declaration as to whether SB 595 became law and whether the RM3 bridge toll increase is valid.

WHEREFORE, plaintiffs pray for judgment as hereinafter set forth.

SECOND CAUSE OF ACTION
For Declaratory Relief and Invalidation of Regional Measure 3
Against Defendant BATA

16. Plaintiffs repeat and incorporate Paragraphs 1 through 15 as if fully set forth herein.

17. BATA is a local government. "'Local government' means any county, city, city and county, including a charter city or county, *any special district*, or any other local or *regional governmental entity*." (Cal. Const., art. XIII C, § 1(b).)

18. Section 24 of article XIII of the California Constitution provides that "[t]he Legislature may not impose taxes for local purposes but may authorize local governments to impose them."

19. The Legislature, through SB 595, authorized BATA to impose a toll increase on the seven bridges within its jurisdiction if the voters approved it.

20. On or about January 24, 2018, The BATA Board of Directors adopted Resolution No. 123 to place RM3 on the June 5, 2018 ballot. RM3 proposed a $3 toll

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increase, in three scheduled increments of $1 each, for the seven bridges within BATA's jurisdiction.

21. Similar to article XIII A regarding state taxes, article XIII C of the California Constitution defines local taxes so that all monetary exactions of local governments are presumed to be taxes. It defines a local "tax" as "any levy, charge, or exaction of any kind imposed by a local government, except" for seven listed exceptions. (Cal. Const., art. XIII C § 1(e).) The RM3 bridge toll increase fits none of the seven exceptions. It is therefore, by default, a tax.

22. "All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes." (Cal. Const., art. XIII C, § 2(a).) BATA is a special purpose agency. It may levy only special taxes.

23. "'Special tax' means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund." (Cal. Const., art. XIII C, §1(d).) RM3 bridge toll funds are to be used for the specific purposes listed in Streets & Highways Code section 30914.7, several of which were listed above in Paragraph 10.

24. Both because BATA is a special purpose agency and because RM3 funds are committed to specific purposes, RM3's toll increase is a "special tax."

25. "No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote." (Cal. Const., art. XIII C, §2(d).) "Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district." (Cal. Const., art. XIII A, § 4.)

26. Because RM3 proposed a special tax, it needed two-thirds voter approval. It received the approval of only 53.66% of the voters in the nine Bay Area Counties. Without two-thirds approval, RM3 did not pass. RM3 and the bridge toll increase it authorized are invalid.

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27. An actual controversy exists between the parties in that plaintiffs believe RM3 did not become law and the bridge toll increase is therefore invalid; whereas defendants believe RM3 became law and the bridge toll increase is valid in all respects.

28. Plaintiffs desire a judicial determination of the rights and duties of the parties, including a declaration as to whether RM3 became law and whether the bridge toll increase fee is valid.

WHEREFORE, plaintiffs pray for judgment as follows:

PRAYER

Based on the foregoing allegations, plaintiffs pray for judgment against defendants BATA and/or the State Legislature as follows:

1. For a declaration that Senate Bill 595 is invalid due to its lack of two-thirds legislative approval; and/or

2. For a declaration that Regional Measure 3 is invalid due to its lack of two-thirds voter approval; and

3. For costs of suit, including attorney fees under Code of Civil Procedure section 1021.5; and

4. For such other relief as the Court considers just and proper.

DATED: October 17, 2018.

Respectfully submitted,

JONATHAN M. COUPAL
TREVOR A. GRIMM
TIMOTHY A. BITTLE
LAURA E. MURRAY

/s/ Timothy A. Bittle
Timothy A. Bittle
Counsel for Plaintiffs

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VERIFICATION

I, Timothy A. Bittle, declare:

I am one of the attorneys of record for plaintiffs in this action. I am authorized to verify this complaint on behalf of Howard Jarvis Taxpayers Association. The other plaintiffs are absent from the County of Sacramento where I have my office, and I make this verification for that reason as well.

I have read the attached complaint. Except as to matters stated on information and belief, the allegations contained in the complaint are true of my own knowledge and, with regard to those matters stated on information and belief, I believe them to be true.

I certify, upon penalty of perjury under the laws of the State of California, that the foregoing is true and correct and that this verification was executed on the date shown below in the City of Sacramento, California.

DATED: October 17, 2018.

Timothy A. Bittle

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EXHIBIT F

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ELECTRONICALLY
FILED
Superior Court of California, County of San Francisco
03/20/2019
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BY:EDNALEEN ALEGRE
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

HOWARD JARVIS TAXPAYERS ASSN., BRANDON KLINE, ANGELIQUE BACON, DEIDRE DAWSON,

Plaintiffs,

v.

The BAY AREA TOLL AUTHORITY and the CALIFORNIA STATE LEGISLATURE,

Defendants.

No. CGC-18-567860

PLAINTIFFS' OPPOSITION TO MOTIONS FOR JUDGMENT ON THE PLEADINGS BY BATA AND THE LEGISLATURE

Res. # 02060403-09

Date: April 3, 2019
Time: 9:30 a.m.
Dept.: 302, Hon. Ethan P Schulman

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receive a liberal, practical common-sense construction .... The literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245.)

"To resolve ambiguities in initiative propositions, the courts may consider indicia of the voters' intent found in the analysis and arguments contained in the official ballot pamphlet." (*Citizens for Responsible Gov't v. City of Albany* (1997) 56 Cal.App.4th 1199, 1209 n.1; *Legislature v. Eu* (1991) 54 Cal.3d 492, 504.) "A court is ... obliged to construe the statute according to the [voters'] own statement of its purpose, *if it can*." (*Botello v. Shell Oil Co.* (1991) 229 Cal.App.3d 1130, 1135; *Citizens for Responsible Gov't*, 56 Cal.App.4th at 1209 n.1.) "[S]tandard rules of statutory construction ... obligate the court to attempt to reconcile or harmonize conflicting statutory provisions in an effort to give effect to all provisions *if it is possible*" (*Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com.* (1990) 51 Cal.3d 744, 764 (citations omitted)) "giving effect and meaning *so far as possible* to all parts thereof, with the primary purpose of harmonizing them and effectuating the legislative intent as therein expressed." (*City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 790 n.37.)

Applying these principles of statutory construction to Proposition 26, it is possible to effectuate the voters' intent as to part of the fourth exception. Parsing the relevant portion of that sentence, it consists of two independent lists separated not only by a comma, but also by the conjunction "or." The sentence exempts: "A charge imposed for [1] entrance to or use of state property**, or** [2] the purchase, rental, or lease of state property ...." It is possible to apply subdivision (d)'s reasonable cost and reasonable allocation requirement to the first list, even if its application to the second list is illogical. BATA and the Legislature would have the Court throw out the baby with the bath water, but applying subdivision (d) where it is possible to do so fulfills the Court's "solemn duty jealously to guard the sovereign people's initiative power, 'it being one of the most precious rights of our democratic process.'" (*Strauss v. Horton* (2009) 46 Cal.4th 364, 453; *Legislature v. Eu* (1991) 54 Cal.3d 492, 501.)

Therefore, the Legislature's motion for judgment on the pleadings – which is based

EXHIBIT G

FILED
San Francisco County Superior Court

APR 3 2019

CLERK OF THE COURT
BY: [signature] Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

(UNLIMITED JURISDICTION)

HOWARD JARVIS TAXPAYERS ASSN., et al.,

Plaintiffs,

vs.

The BAY AREA TOLL AUTHORITY, et al.,

Defendants.

No.: CGC-18-567860

Action Filed: July 5, 2018

ORDER GRANTING DEFENDANT CALIFORNIA STATE LEGISLATURE'S MOTION FOR JUDGMENT ON THE PLEADINGS

Hearing:

Date: April 3, 2019
Time: 9:30 a.m.
Dept.: 302
Reservation No.: 03060403-15

(The Honorable Ethan P. Schulman)

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This matter came on regularly for hearing before the Court pursuant to the motion for judgment on the pleadings filed by Defendant California State Legislature. Robin B. Johansen of Remcho, Johansen & Purcell, LLP appeared on behalf of Defendant California State Legislature; Michael C. Weed of Orrick, Herrington & Sutcliffe LLP appeared on behalf of Co-Defendant Bay Area Toll Authority; and Timothy A. Bittle of Howard Jarvis Taxpayers Foundation appeared on behalf of Plaintiff Howard Jarvis Taxpayers Association.

The matter having been argued and submitted for decision, the Court orders as follows:

Defendant California State Legislature's motion for judgment on the pleadings is granted without leave to amend as to the first cause of action for declaratory relief and invalidation of SB 595. The Legislature has met its burden to show the applicability of the exception for "entrance to or use of state property" from the general definition of "tax" in Article XIIIA, section 3(b)(4) of the California Constitution. Therefore, the toll increase imposed by SB 595 is not a tax subject to a two-thirds supermajority vote requirement. The Court takes judicial notice of the documents provided by the Legislature and by Co-Defendant Bay Area Toll Authority.

The reasonable cost requirement in Article XIIIA, section 3(d) is inapplicable. In section 3(b), only the first three exceptions to the definition of "tax" contain language mandating that charges not exceed the "reasonable costs" to the State of conferring benefits or granting privileges, providing services, or performing regulatory acts. (Cal. Const. art. XIIIA, §§ 3(b)(1), 3(b)(2), 3(b)(3).) In contrast, the remaining two exceptions contain no comparable language. (Cal. Const. art. XIIIA, §§ 3(b)(4), (3)(b)(5).) Where no ambiguity exists, the language of statutes and voter initiatives amending the constitution are given their plain meaning. (Code Civ. Proc. § 1858; *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1316 [holding that the language of the initiative is the best indicator of the voters' intent and that those words are given their ordinary and usual meaning]; see also *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 543 ["Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure . . . and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language."] [citations omitted].) Consequently, there is no need to rely upon Plaintiffs'

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interpretation of voter intent in evaluating the plain language of the provision. There is no reasonableness requirement in the "charge imposed for entrance to or use of state property" exception, so it is improper to read one into the provision. (Cal. Const. art. XIIIA, § 3(b)(4).)

Canons of statutory interpretation support this interpretation of the language. Reading the burden shifting language regarding reasonableness in section 3(d) as applying to all five exceptions to the definition of tax, as requested by Plaintiffs, would render references to reasonableness in the first three exceptions mere surplusage—a result to be avoided in interpreting statutes and constitutional provisions. (See *People v. Hudson* (2006) 38 Cal.4th 1002, 1010 ["As we have stressed in the past, interpretations that render statutory terms meaningless as surplusage are to be avoided."].) Further, the principle of avoiding absurdity in constitutional construction cautions against reading the reasonable cost requirement into the final two exceptions for charges, purchases, rentals, or leases related to state property and for fines and monetary penalties. (See *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616 [holding that courts follow plain meaning "unless a literal interpretation would result in absurd consequences the Legislature did not intend"]; *Amador Valley Joint Union High School District v. State Board of Equalization* (1978) 22 Cal.3d 208, 245 ["The literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers."].) Plaintiffs' contention that the reasonableness requirement should apply to half of section 3(b)(4) but not the other half is contrary to the rules of statutory construction which require, wherever reasonable, "interpretations which produce internal harmony, avoid redundancy, and accord significance to each word and phrase." (*Pacific Legal Foundation v. California Unemployment Insurance Appeals Board* (1981) 29 Cal.3d 101, 114.) Further, the canon of constitutional avoidance requires the Court to presume the validity of a challenged legislative act (in this case SB 595) unless the conflict with the constitution is clear and unquestionable. (See *Taxpayers for Improving Public Safety v. Schwarzenegger* (2009) 172 Cal.App.4th 749, 769–70 ["In considering the constitutionality of a legislative act we presume its validity, resolving all doubts in favor of the Act. Unless conflict with a provision of the state or federal Constitution is clear and unquestionable, we must uphold the Act."] [quotation omitted].)

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EXHIBIT H

EXHIBIT H

A157598 / A157972

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

HOWARD JARVIS TAXPAYERS ASSOCIATION, ET AL.

Appellants,

v.

BAY AREA TOLL AUTHORITY, ET AL.

Respondents.

RANDALL WHITNEY

Appellant,

v.

METROPOLITAN TRANSPORTATION COMMISSION

Respondent.

After Judgments of the Superior Court for the County of San Francisco,
Case Nos. CGC-18-567860 / CPF 18-516276; Hon. Ethan P. Schulman

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APPELLANTS' OPENING BRIEF

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allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (Cal. Const., art. XIII A, § 3(d).) The first three exceptions in subsection (b) contain Burdens 2 and 3. But they do not contain Burden 1. None of the exceptions contain Burden 1. Since there is nothing in subsection (b) to limit the application of Burden 1, it logically should apply to all five exceptions. For all five exceptions, then, the State should at least bear the burden of proving that its "exaction is not a tax."

The fourth exception applies when a charge is "imposed *for* entrance to or use of state property." If the State bears the burden of proving that the RM3 toll increase is not a tax, then it must show that the increase is "*for* entrance to or use of state property," not "for" some other purpose unrelated to the payer's entrance to or use of state property. It is not enough to just label the exaction a charge for entrance to state property, or to collect the charge at the entrance to state property. It must be "for" that purpose and "not a tax."

While Proposition 26 does not supply the factors for differentiating a tax from an exempt charge "for" entering or using state property, that void is easily filled with the century of jurisprudence cited and quoted earlier, starting with *City of Madera v. Black* (1919) 181 Cal. 306. Under that body of law, "[a] valid fee may not be imposed for unrelated revenue purposes." (*Cal. Farm Bureau Fed'n v. State Water Res. Control Bd.* (2011) 51 Cal.4th 421, 437.) "If revenue is the primary purpose ... the imposition is a tax." (*Weisblat v. City of San Diego* (2009) 176 Cal.App.4th 1022, 1037.)

The trial court granted the Legislature's motion for judgment on the pleadings without requiring any proof from the Legislature that the RM3 toll increase is "for" use of the bridges and "not a tax" for unrelated revenue purposes. Appellants' complaint, however, alleged that "RM3 bridge toll

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EXHIBIT I

A157598 / A157972

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

HOWARD JARVIS TAXPAYERS ASSOCIATION, ET AL.

Appellants,

v.

BAY AREA TOLL AUTHORITY, ET AL.

Respondents.

RANDALL WHITNEY

Appellant,

v.

METROPOLITAN TRANSPORTATION COMMISSION

Respondent.

After Judgments of the Superior Court for the County of San Francisco,
Case Nos. CGC-18-567860 / CPF 18-516276; Hon. Ethan P. Schulman

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APPELLANTS' CONSOLIDATED REPLY BRIEF

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has the burden of showing that the tolls are *not a tax*"]; BATA/MTC Brief at 59 ["this aspect of section 3(d) applies to *all five* enumerated exceptions"].)

Respondents argue, however, that they satisfied Burden 1 by simply *identifying* which exception they believe is applicable to the RM3 toll increase. (*Id.*) Appellants disagree. Burden 1 requires the State to "prov[e] *by a preponderance of the evidence* that a levy, charge, or other exaction is not a tax." Simply pointing to an exception and saying, "that one applies," *proves* nothing.

Appellants contend the State must still show that the RM3 toll increase is "not a tax" under the century-old definition of a tax, by showing that it is "imposed *for* entrance to or use of state property," and not "imposed for unrelated revenue purposes." (*Cal. Farm Bureau Fed'n v. State Water Res. Control Bd.* (2011) 51 Cal.4th 421, 437-38.)

Since appellants seek only the application of Burden 1, since none of the five exceptions contains Burden 1, and since respondents therefore concede that Burden 1 applies to all five exceptions, respondents' surplusage argument is a red herring that this Court is not being asked to decide.

B. ***A New Categorical Exemption Is Not Needed to "Avoid Absurdity"***

Respondents' second argument is that it would be "absurd" to apply subsection (d) to anything but the first three exceptions. However, this argument, like the first, attacks a "reasonable cost" theory that appellants have not presented. Appellants have not argued that the "reasonable cost" burden in subsection (d) applies to the fourth and fifth exceptions. Appellants seek only the application of Burden 1, "the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax."

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Respondents fret that the fourth exception "for entrance to or use of state property" also exempts the "purchase, rental, or lease of state property," and the fifth exception exempts judicial fines and penalties "as a result of a violation of law." It is in the public interest, they argue, for fines to punish crime and for the sale or lease of state property to fetch top dollar, therefore no "reasonableness" requirement should apply to either one. (Legislature's Brief at 38; BATA/MTC Brief at 63.)

Appellants have agreed, however, here and in the trial court, that fines are meant to punish crime and that state property should not be sold or leased for less than fair market value. Appellants are not arguing that a new, stricter "reasonableness" requirement should apply to fines or prices.

The law already contains a reasonableness requirement for criminal fines and penalties. They must be proportionate to the crime under the excessive fines clauses of the state and federal constitutions: "Cruel or unusual punishment may not be inflicted *or excessive fines imposed*." (Cal. Const., art. I § 17; U.S. Const., 8th Amend; *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728; *Timbs v. Indiana* (2019) 139 S.Ct. 682, 689 [Fourteenth Amendment's Due Process Clause applies Eighth Amendment's excessive fines prohibition to the states].) Thus, fines and penalties must be reasonably related to the severity of the crime; in other words, the "cost" to society.

The law also contains a reasonableness requirement for sales and leases. Article XVI, section 6, of the California Constitution prohibits the Legislature from making "any gift, of any public money or thing of value to any individual, municipal or other corporation." California courts have construed this "gift of public property" clause to prohibit the sale or lease of state property without adequate consideration. Consideration is adequate if it approximates

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EXHIBIT J

A157598 / A157972

COURT OF APPEAL OF THE STATE OF CALIFORNIA
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APPELLANTS' PETITION FOR REHEARING

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that the Legislature has used the most economical means of expression in drafting a statute.'" (*River Garden*, 186 Cal.App.4th at 942; *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 772–73.) "Rules such as those directing courts to avoid interpreting legislative enactments as surplusage are mere guides and will not be used to defeat legislative intent." (*People v. Cruz* (1996) 13 Cal.4th 764, 782 (citations omitted).)

Here, subdivision (b) admittedly contains some redundancy when compared to subdivision (d). But for the sake of avoiding a little repetition, this Court has sacrificed two-thirds of the subdivision (d) test for distinguishing a valid fee from a tax needing voter approval. That is a misapplication of the rule against surplusage which will produce a serious corruption of voter intent if not corrected. Courts must "*give significance to every word*, avoiding an interpretation that renders any word surplusage." (*Regents of Univ. of Cal. v. Pub. Employment Relations Bd.* (1st DCA No. A157597, 2020 Cal.App. LEXIS 578, at *22 (June 25, 2020); *Weaver v. Chavez* (2005) 133 Cal.App.4th 1350, 1355.)

Giving significance to every word in subdivision (d) compels the conclusion that it is more than just a procedural burden-shifting provision. It also contains a three-part substantive test for determining whether any fee qualifies for an exemption from section 3's "tax" definition.

C. __Applying Subdivision (d) to All of (b) is Not Absurd__

Although respondents argued, and this Court repeated, that applying subdivision (d) beyond the first three exceptions would produce absurd results because it would apply to the price of property sales and to criminal fines, appellants answered that argument in Section III. B of their Reply Brief.

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In a nutshell, Proposition 26 is not alone in requiring that criminal fines be for their intended purpose, reasonable, and proportional. Under the excessive fines clauses of the state and federal constitutions, "Cruel or unusual punishment may not be inflicted *or excessive fines imposed*." (Cal. Const., art. I § 17; U.S. Const., 8th Amend; *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728; *Timbs v. Indiana* (2019) 139 S.Ct. 682, 689.) Thus, fines and penalties must be reasonably related to the severity of the defendant's crime and the harm he caused; in other words, the "cost" to society.

The law also contains a reasonableness requirement for sales and leases. Article XVI, section 6, of the California Constitution prohibits the Legislature from making "any gift, of any public money or thing of value to any individual, municipal or other corporation." California courts have construed this "gift of public property" clause to prohibit the sale or lease of state property without adequate consideration. Consideration is adequate if it approximates fair market value. (*Post v. Prati* (1979) 90 Cal.App.3d 626, 635; *Winkelman v. City of Tiburon* (1973) 32 Cal.App.3d 834, 845.) The acquisition of property is an investment, and its "cost" includes not just money but also risk, which accounts for any appreciation in value. A sale or lease for fair market value, then, does not exceed the state's "cost."

Given that the amounts of fines and prices are already controlled by other provisions of the state constitution, it is not impossible or absurd to apply subdivision (d) to fines and prices. A fine is not a tax if it is not excessive under the excessive fines clause. A price is not a tax if it represents adequate consideration under the gift of public property clause.

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EXHIBIT K

SUPREME COURT OF CALIFORNIA

HOWARD JARVIS TAXPAYERS ASSOCIATION, ET AL.

Appellants,

v.

BAY AREA TOLL AUTHORITY, ET AL.

Respondents.

RANDALL WHITNEY

Appellant,

v.

METROPOLITAN TRANSPORTATION COMMISSION

Respondent.

After the Denial of a Petition to Rehear a Published Decision of the
Court of Appeal, First District, Division 2 (Case Nos. A157598 / A157972)

PETITION FOR REVIEW

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increase will benefit entities and persons not paying the toll increase." (1st Amended Complaint, par. 11.)

Because most of the revenue from the toll increase will be used neither for the bridges nor to benefit the motorists who pay the toll, but rather to subsidize the commute of non-payers using other transportation facilities, plaintiffs alleged that the increased toll was a "tax." They alleged that the bill placing it on the ballot, SB 595, therefore needed but did not receive two-thirds approval in the Legislature.[1]

Defendants the Metropolitan Transportation Commission, the Bay Area Toll Authority, and the California Legislature each moved for judgment on the pleadings. They argued that the toll increase was not a tax as defined by the State Constitution because it was a charge for entrance to and use of state-owned property which, they argued, is a categorical exemption not subject to the additional burdens of proof, such as nexus and proportionality, set forth in article XIII A, section 3(d). These motions were granted without leave to amend. Plaintiffs appealed.

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[1] Plaintiffs also alleged that Regional Measure 3 was placed on the ballot by the Bay Area Toll Authority, a local agency, triggering the constitution's requirement of two-thirds *voter* approval. The Court of Appeal construed SB 595 as not merely *authorizing* BATA to propose Regional Measure 3, but rather *requiring* it to do so, making the toll increase a charge imposed by the Legislature. The Court of Appeal's interpretation of SB 595 is less important to taxpayers than the violence it did to Proposition 26, and the ramifications likely to follow. This Petition for Review, therefore, is limited to the Proposition 26 question.

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> *able 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.

The Court of Appeal held that subdivision (d) does not apply to the fourth exception for public property charges because subdivision (d) is only "a burden shifting provision [that] does not impose substantive requirements in addition to those stated in subdivision (b)." (*HJTA v. BATA*, 51 Cal.App.5th at 461).

It is obvious, however, that subdivision (d) *does* impose additional substantive requirements beyond just reinforcing the reasonable cost limitation. Subdivision (d) provides: "The State bears the burden of proving by a preponderance of the evidence [1] that a levy, charge, or other exaction is not a tax, [2] that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and [3] 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."

Subdivision (d) thus contains all three elements of the pre-Proposition 26 test for distinguishing a valid fee from a tax: (1) that the fee is not a tax; in other words, that it is not imposed for revenue purposes; (2) that the amount is no more than necessary to recover the reasonable costs of the governmental activity, and (3) that those costs are allocated in a manner that fairly or reasonably relates to the payor's burdens on, or benefits received from, the governmental activity. (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1214 (subdivision (d) contains separate substantive

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requirements).)

Had subdivision (d) not contained all three substantive elements of the pre-Proposition 26 "tax" versus "fee" test, it would have been impossible for this Court to observe that "the language of Proposition 26 is drawn in large part from pre-Proposition 26 case law distinguishing between taxes subject to the requirements of article XIII A ... on the one hand, and regulatory and other fees, on the other." (*City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210.)

Nothing in the wording of the first three exceptions suggest that subdivision (d) is toothless. Nor does anything in the wording of subdivision (d) suggest that all three of its limitations are activated as to exceptions 1, 2 and 3 of subdivision (b), but all three of its limitations go dormant upon reaching exception 4 because it is meant to be a new categorical exemption that escapes all three facets of the age-old "tax" versus "fee" test.

IV
IGNORING SUBDIVISION (d) CREATES A WORSE SURPLUSAGE PROBLEM

As shown above, the Court of Appeal erred when it construed article XIII A, section 3, subdivision (d) as "not impos[ing] substantive requirements in addition to those stated in subdivision (b)." Based on that error, the Court then concluded that subdivision (d) could not be applied to subdivision (b)'s exception for public property related fees because, to do so "would render the express reasonableness language in the first three exceptions as surplusage." (*HJTA v. BATA*, 51 Cal.App.5th at 460.)

Since subdivision (d) does *not* mirror the first three exceptions of

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