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April 4, 2022

The Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Zolly et al. v. City of Oakland*, Case No. S262634 – Supplemental Letter Brief

Dear Chief Justice Cantil-Sakauye and Associate Justices:

In its March 11, 2022 order directing the parties to serve and file supplemental letter briefs, this court asks the parties two questions: "(1) Does Cal. Const., art. XIII C, § 1, subdivision (e)(4) apply to the fees paid under the waste management contracts at issue in this case, and if so, why? (2) Are any other exemptions within article XIII C applicable to those fees?"

First, subdivision (e)(4) does apply to the fees here because they are imposed at least in part for "the use of local government property" (Cal. Const., art. XIII C, § 1, subd. (e)(4))—the use of Oakland streets to conduct waste-management services. But for a fee to be non-tax under that subdivision, Oakland must prove its total amount is imposed only for that use. If the amount is not reasonably related to the value of using Oakland streets to conduct the corresponding waste-management services, then the excess part of the fee is an invalid tax.

Second, no other exemption applies to those fees. At first blush, it appears subdivision (e)(1), which covers "a charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged," could also apply. But that subdivision does not apply where, as here, the privilege conferred is the use of government property.

Subdivision (e)(4) and its limit apply to the fees paid here because they are paid at least in part for the use of Oakland streets to provide waste-management services.

The contracts and authorizing ordinances here grant two companies the exclusive right to use Oakland streets to provide discrete waste-management services. (2 JA 326, 331, 342.) In exchange, each company agrees to pay Oakland an annual fee. (2 JA 326, 331, 344, 351.) Subdivision (e)(4) exempts from the definition of "tax" a "charge imposed for … use of local government property[.]" (Cal. Const., art. XIII C, § 1, subd. (e)(4).) Thus, under the plain language of that subdivision, at least part of each fee amount is not a tax. (See *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037 [stating that, in ascertaining voter intent, this court first turns to the plain meaning of the initiative].)

Although the public has a common right to use city streets, a city can charge a business for using city streets for private gain. (See *Loska v. Superior Court* (1986) 188 Cal.App.3d 569, 579–580 (*Loska*).) And when a company pays a fee for the long-term use of city streets to

provide a vital public service, it signifies a franchise relationship. (*Santa Barbara County Taxpayer Assn. v. Board of Supervisors* (1989) 209 Cal.App.3d 940, 949; *Saathoff v. City of San Diego* (1995) 35 Cal.App.4th 697, 704 (*Saathoff*).) Because the contracts here grant a 10-year right to use Oakland streets to provide waste-management services—vital public services—they are franchise agreements and the amounts paid by the companies are, at least in part, franchise fees. (2 JA 325, 331; see also Pub. Resources Code, § 40059, subd. (a)(2) [permitting a locality to grant a "wholly exclusive franchise" for solid-waste-handling services].)[1] But even if the companies' paid use of Oakland streets were something other than a franchise, such as a permit or license, subdivision (e)(4) would still apply. After all, the subdivision uses the phrase "use of local government property" rather than "franchise."

Yet a fee here is exempt under subdivision (e)(4) only to the extent it is "imposed for" the use of local government property. (Cal. Const., art. XIII C, § 1, subd. (e)(4); see also Answer Brief on the Merits, p. 33; Appellants' Consolidated Answer to Amicus Curiae Briefs, pp. 9–10.) And "[t]o constitute compensation *for* a property interest, … the amount of the charge must bear a reasonable relationship to the value of the property interest[.]" (*Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 254 (*Jacks*) [interpreting the original version of article XIII C], italics added.) Because the operative complaint alleges that the fee amounts far exceed the values of the corresponding property interests granted to the companies, the complaint states a valid claim that the fees include invalid taxes.

Subdivision (e)(1) does not apply to the fees paid here because it does not cover charges for the use of local government property.

None of the other six exemptions within article XIII C, section 1, subdivision (e) applies. Initially it appears that the exemption provided by subdivision (e)(1) might apply. That exemption covers "[a] charge imposed for a specific benefit conferred or *privilege granted directly to the payor* that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege." (Cal. Const., art. XIII C, § 1, subd. (e)(1), italics added.) After all, use of public streets to conduct business is a " 'special privilege' " conferred by local government.[2] (*Loska, supra,* 188 Cal.App.3d at p. 580, quoting *People v. Galena* (1937) 24 Cal.App.2d Supp. 770, 775; see also *City of Oakland v. Hogan* (1940) 41 Cal.App.2d 333, 346 ["A franchise is a special privilege conferred upon a corporation or individual by a government duty empowered legally to grant it"].) Yet a contextual interpretation of subdivision (e)(1) reveals that it does not apply to charges paid for privileges, like the ones here, for the use of local government property. (See *People v. Valencia* (2017) 3 Cal.5th 347, 358 [stating that the

[1] Although *Ponti v. Burastero* (1952) 112 Cal.App.2d 846, 852 held that a 25-year exclusive contract for waste-hauling was not a franchise, that holding predated the California Integrated Waste Management Act of 1989, including section 40059. (See *Saathoff, supra,* 35 Cal.App.4th at p. 704 [stating that *Ponti* apparently relied on the fact that waste-hauling services was not a statutorily specified public utility].)

[2] The fact that a franchise is a special privilege previously led appellants to note that subdivision (e)(1) arguably applies "to the extent that a supposed franchise fee pays for something other than the use of public streets and rights of way." (Appellants' Consolidated Answer to Amicus Curiae Briefs, pp. 7–8, fn. 3.)

plain meaning of a constitutional provision must be construed in context, and sections " 'relating to the same subject must be harmonized, both internally and with each other, to the extent possible' "], quoting *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.)

The text of subdivision (e)(1) and subdivision (e)(4) shows that the former subdivision does not apply to the fees here.

First, the "reasonable costs" limitation in subdivision (e)(1) is incongruent with the government-property interests involved here. (Cal. Const., art. XIII C, § 1, subd. (e)(1).) The exemption is derived from *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, which explained that fees for government benefits or privileges are "reasonable related to specific costs or benefits[.]" (*Jacks, supra,* 3 Cal.5th at p. 262; accord *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210 (*San Buenaventura*).) Thus, subdivision (e)(1) applies when "the government seeks to recoup the costs of the program that results in a special benefit" or "the government seeks to offset costs borne by the government or the public as a result of the payee's activities." (*Jacks, supra,* at p. 268; see also *Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 240.) By contrast, "a fee paid for an interest in government property is compensation for the use or purchase of a government *asset* rather than compensation for a cost." (*Jacks, supra*, at p. 268; cf. *San Buenaventura, supra,* at pp. 1207–1208 [deducing from the cost limitations within article XIII D of the California Constitution that a " 'charge for a property-related service' " must be imposed on a property owner "to pay for the costs of providing a service to a parcel of property"], quoting Cal. Const., art. XIII D, § 2, subd. (e).) This mismatch suggests that subdivision (e)(1) was not designed to apply when the value received from the local government results primarily from the government's granting a property interest rather than incurring expenses.

Second, the fact that subdivision (e)(1) is limited to a privilege "granted directly *to the payor* that is not provided to those not charged" also suggests that the subdivision does not apply here. Although the "payor" of a franchise fee can indeed be the public-service company that receives the privilege (as here), in other instances the "payor" is the ratepayer. (See *Jacks, supra,* 3 Cal.5th at p. 269 & fn. 10.) That difference "does not alter the substance of the" charge because, either way, the "government charges are *ultimately* imposed on the ratepayers[.]" (*Id.* at p. 269, italics added; see also *id.* at p. 269, fn. 10.) Yet the text of subdivision (e)(1) could possibly apply only when the public-service company is the payor. Given that the financial burden on the ratepayers is the same regardless of whom the "payor" is, voters would not have intended for subdivision (e)(1) to cover franchise fees only when they are indirectly imposed on ratepayers.

Third, the more specific subdivision (e)(4) controls over the more general subdivision (e)(1). (Code Civ. Proc., § 1859.) Whereas a franchise is a special privilege (in that it is not a common right of the public), a privilege is not necessarily a franchise. (*Copt-Air v. City of San Diego* (1971) 15 Cal.App.3d 984, 987.) Moreover, the two subdivisions cannot both apply to the same fee amount because they have inconsistent limits—i.e.,

reasonable costs versus value of the property interest conferred.[3] (Answer Brief on the Merits, pp. 33, 36.) Thus, subdivision (e)(1) could not be construed as covering the fees here without restricting subdivision (e)(4) to a scope narrower than subdivision (e)(4)'s plain language permits. Instead, the subdivisions should be harmonized by excluding from the scope of subdivision (e)(1) privileges for the use, entry, rental, or sale of government property that are expressly covered by subdivision (e)(4).

Conclusion

Because the fees here pay for the use of government property, the exemption within subdivision (e)(4) (and the exemption's limit) apply. None of the other exemptions, including subdivision (e)(1), applies.

Kind regards,

/s/
Paul Katz of Katz Appellate Law PC
Attorney for Appellants

[3] Nor can a fee here be split into two amounts, with the amount pertaining to the right to conduct a public-service business covered by subdivision (e)(1) and the balance pertaining to the use of government property covered by subdivision (e)(4). The right to conduct a public-service business and the right to use of government property are not severable items of value here because one right is worthless without the other. A company cannot haul Oaklanders' waste without using Oakland streets and no one would pay to use Oakland streets to haul waste without the corresponding right to perform the service. (Cf. *Gonzales v. R. J. Novick Constr. Co.* (1978) 20 Cal.3d 798, 805 [holding that, upon appeal from part of a judgment, other parts of the judgment are reviewable when all the parts are interdependent].)

Certificate of Compliance

Appellants' counsel certifies in accordance with California Rules of Court, rule 8.520(c)(1) and (d)(2) that this supplemental brief contains 1,855 words as calculated by the Word software in which it was written.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California.

Respectfully submitted,

Dated: April 4, 2022 /s/

Paul Katz
Attorney for Appellants

STATE OF CALIFORNIA
Supreme Court of California

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