CITY OF OAKLAND

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April 11, 2022

Honorable Tani Cantil-Sakauye, Chief Justice
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: *Zolly v. City of Oakland*, Case No. S262634

Dear Chief Justice Cantil-Sakauye and Associate Justices:

On April 4, 2022, Petitioner City of Oakland ("Oakland") and the Zolly Respondents submitted simultaneous briefing to answer the Court's March 11, 2022 questions: (1) Does Cal. Const., art. XIII C, § 1, subdivision (e)(4) ["Exemption 4"] apply to the fees paid under the waste management contracts at issue in this case, and if so, why?; and (2) Are any other exemptions within article XIII C ["Article XIII C"] applicable to these fees?

Oakland and the Zolly Respondents largely agree on both counts. *First*, the parties agree that Exemption 4 applies to the fees at issue here because they are paid in part for "'the use of local government property.'" (Zolly Opening Supp. Br. 1; see Oakland Opening Supp. Br. 2-3 [noting that the right to "use the public street and/or other public places" was identified as "one part" of the franchise property interests conveyed upon the waste-haulers' purchase of the franchises].)

Second, the parties agree no other exemption applies. In particular, the parties agree that the first exemption covering charges imposed for specific benefits conferred upon or privileges granted to the payor does not apply because "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." (Zolly Opening Supp. Br. 2; see also *id.* 2-4 [espousing similar reasoning and textual analysis as Oakland in establishing that Exemption 1 does not apply].) Accordingly, the parties do not dispute that Exemption 4 applies to the Oakland fees, to the extent such fees are subject to Article XIII C in the first place. (See Oakland Opening Supp. Br. 3 [arguing the

Oakland fees are not subject to Article XIII C because they are voluntary contract consideration, not charges "imposed by local government"].)

The parties appear to diverge, however, as to what constitutes the "local government property" at issue and how its value is derived. The Zolly Respondents suggest the relevant property interests include only "the value of using Oakland streets," Zolly Opening Supp. Br. 1, but in fact, they encompass much more. The "local government property" here is a lucrative exclusive franchise comprised of varied rights and property uses, which derives its value based on what the market will bear.

Indeed, despite this disagreement, the Zolly Respondents' Opening Supplemental Brief reinforces the broad property rights involved (beyond just "use of the streets"), and that the Oakland franchise fees at issue are categorically exempt under Exemption 4 and thus not taxes as a matter of law. While arguing that Exemption 1 and Exemption 4 cannot both apply to "the same fee amount because they have inconsistent limits—i.e., reasonable costs versus value of the property interest conferred," see Zolly Opening Supp. Br. 3-4, the Zolly Respondents go on to explain:

> 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.

(*Id.* 4, fn. 3.)

The Zolly Respondents are correct that the Oakland fees must be considered as a whole and cannot be severed into distinct parts. The right to use city streets is alone insufficient to create the franchise for which the Oakland franchise fees are paid. The relevant local property interests necessarily comprise not *just* the right to use city streets (as the Zolly Respondents elsewhere appear to suggest), but the entire bundle of property interests that collectively form the franchise. (See, e.g., 34A Cal.Jur.3d, Franchises from Governmental Bodies, § 3 ["the right to use the streets and the right to take a profit from that use" "*conjointly* constitute the franchise"] [emphasis added]; 12 McQuillin Law of Municipal Corps., Franchise defined, § 34:2 [a "franchise" is "the grant of a right to maintain and operate public utilities within a municipality and to exact compensation for such services"]; Oakland's Consolidated Amicus Answer Brief ("Consol. Amicus Br.") 7-13.) Oakland's franchise fees are contract consideration for the purchase of the waste-hauling franchises—i.e., the right to conduct a public-service business, to earn profit from that service, and to use city streets as needed to provide those services to Oakland residents. Accordingly, they are exempt as charges for the "purchase" *and* "use" of local government property—the property being the franchise itself, not disaggregated aspects of that franchise such as the right to use city property (e.g., its streets). (Oakland Opening Supp. Br. 2.)

Though the Zolly Respondents concede that the franchise rights "are not severable" and, thus, that Oakland's franchise fees cannot be "split into two amounts," they try to do just that by segregating those fees into (1) a "non-tax" portion, i.e., the amount imposed "only for" and "reasonably related to the value of using Oakland streets"; and (2) a "tax" portion, i.e., the portion imposed for franchise interests other than "using Oakland streets," which thus allegedly exceeds the reasonable value of that one part of the franchise. (Zolly Opening Supp. Br. 1-2, 4, fn. 3.) Yet, the Oakland fees cannot be separated in this way. The Oakland franchise fees are not an aggregate sum of each individualized component of the franchise. Rather, those fees represent the value the market ascribed to the government property interests being offered for purchase (i.e., the franchise) and, thus, the price the waste-haulers were willing to pay to purchase those valuable rights.

Likewise, despite embracing Exemption 4's plain language, the Zolly Respondents abandon the plain-text analysis altogether in arguing that Exemption 4 is limited to "the value of the property interest conferred" and that Oakland's fees become a tax if they are not "reasonably related to the value of using Oakland streets." (Zolly Opening Supp. Br. 1, 3-4.) Exemption 4's plain text contains no such limit—indeed, it does not include the words "reasonable" or "value" at all. (See, e.g., Oakland Opening Brief ("OB") 22, 31-33 [discussing contrast between "reasonable cost" language in Exemptions 1-3 and absence of similar limiting language in Exemption 4].) The Zolly Respondents cannot rewrite Exemption 4 to include an unspoken "reasonable value" standard that is not apparent on its face. (See, e.g., *People v. Sup. Ct. (Pearson)* 48 Cal. 4th 564, 571.)

* * *

The parties agree that the Oakland franchise fees must be analyzed under Exemption 4 and do not fall under any other exemption (to the extent Article XIII C applies in the first place). Likewise, the Zolly Respondents expressly acknowledge that the Oakland franchise fees represent payment for non-severable property interests and franchise rights that cannot be "split" and must be considered as a whole. It follows, then, that the Oakland franchise fees are exempt in their entirety from the definition of "tax" under Exemption 4's categorical language, and thus that the *Zolly* appellate decision should be reversed.

Respectfully submitted,

Cedric C. Chao
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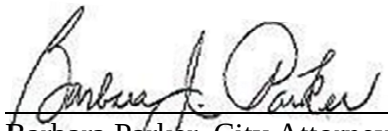

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Dated: April 11, 2022

/s/ *Cedric Chao*
Cedric Chao
CHAO ADR, PC

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/s/ Cedric Chao
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STATE OF CALIFORNIA
Supreme Court of California

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/s/Cedric Chao

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