

Zolly v. City of Oakland Requires Reexamination of Local Franchise Fees

On August 11, 2022, the California Supreme Court issued its decision in [Zolly v. City of Oakland](#), which could have a significant impact on local solid waste franchise fees.

Background

Local governments often award franchises for solid waste collection and management. These franchises and associated franchise fees have traditionally not been treated as taxes or regulatory fees by local governments.

In *Zolly*, the Court examined whether Oakland's solid waste franchise agreement constitutes a tax under Proposition 26. Oakland granted two solid waste franchises in 2012, under which the franchisees agreed to pay the city approximately \$25 million annually. The owners of multifamily properties challenged Oakland's franchise fees, which a local grand jury found to be "disproportionately higher than franchise fees paid to other Bay Area municipalities and special districts."

Some solid waste franchise fees are based on the local government's actual administrative costs of granting the franchise, but many are not. Local governments have traditionally argued that franchise fees are not considered taxes under Proposition 26, and are not limited to recovery of the local government's actual costs, because they are:

- The product of voluntary contractual negotiations and so paid in exchange for franchise rights; and/or,
- A charge imposed for entrance to, or use of, local government property, or the purchase, rental, or lease of local government property.

Supreme Court's Analysis

In *Zolly*, the Supreme Court rejected Oakland's contention that franchise fees are not taxes because they are merely consideration for a contract negotiated between the two parties. The "imposition" requirement was satisfied when Oakland used its authority to enact the franchise charges into law by ordinance. It then turned to whether any of Prop. 26's exemptions apply.

Oakland relied heavily on the Article XIII C Section 1(e)(4) exemption applicable to charges imposed for entrance to, use, or purchase of local government property.

- The Court rejected Oakland's claim that the franchise itself is local government property. It determined the term "local government property" refers to physical objects under control of the local government (streets, land, and buildings). Franchises do not qualify as "local government property" because they are merely property interests and did not exist before the grant.
- The Court rejected Oakland's argument that franchise fees are exempt as charges imposed for use of local government property. It noted that Oakland failed to show that the "right" granted to the franchisees was "anything more than the generally available prerogative to drive on public roads and rights of way." The Court left open a door for Oakland to claim in further proceedings that it granted waste haulers a special ability to drive heavy vehicles and place waste bins on public streets.

- The Supreme Court strongly hinted that solid waste franchise fees may qualify under a different Prop. 26 exemption, for "[a] charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged," but only if the fee "does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege." Oakland had not relied on that exemption, and consequently the court did not finally decide whether this provision actually applies to solid waste franchise fees, and if so, what types of local government costs might be recoverable in those fees.

Takeaways

Zolly requires local governments to take a fresh look at their solid waste franchise fees.

- Local governments cannot claim franchise fees are outside the purview of Prop. 26 because they are the product of voluntary contractual negotiations or are not directly imposed on residents.
- Local governments cannot claim that a franchise is local government property that can be sold, rented, or leased.
- Local governments likely can claim that their solid waste franchise fee is exempt from Prop. 26 as "a benefit conferred or privilege granted to the payor"; however, they will have to show that the fee does not exceed the reasonable cost to the local government of conferring that benefit.
- If the solid waste franchise grants operators some special privilege to use public property beyond that enjoyed by the general public (like operating heavy trucks or placing waste bins on public roads and rights of way), the local government *may* still be able to argue that the fee constitutes a charge for use of local government property, but the extent to which this will be accepted in future cases is unclear.
- Further litigation is likely concerning all of the foregoing items.
- **Talk to your county counsel about whether your jurisdiction needs to renegotiate rates and adjust franchise fees in light of Zolly.**