

Are Franchise Fees Illegal Taxes Under Props 218 and 26?

Are franchise fees charged by local public agencies to private refuse-hauling companies illegal taxes under Propositions 218 and 26? Last week, the First District Court of Appeal ruled that unless fees are "reasonably related to the value of the franchise" they are taxes, and thus illegally imposed without voter approval.

In *Zolly v. City of Oakland* (2020) __ Cal.App.5th __, 2020 WL 1498339, the First District considered whether the Alameda County Superior Court had properly sustained the City of Oakland's demurrer to a complaint alleging that franchise fees charged to a refuse hauler violated Cal. Const., arts. XIIIC and XIIID. The Court rejected various arguments by the City, including that the City is imposing the fees on the franchisor (not on the plaintiff customers/property owners), reasoning that the franchisee is actually passing the cost on to the ratepayers. Thus, the trial court had erroneously sustained the City's demurrer.

This holding extends *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248 by requiring that solid waste franchise fees must also be limited to the reasonable value of the franchise. In *Jacks*, the Court indicated that if the franchise fee is not excessive and was the result of bona fide, arms-length negotiations, then it likely represents the value of the franchise. (*Id*. at 269-70.)

We recommend that local public agencies who contract with private companies for trash hauling review their records for the approvals of their existing franchise agreements and evaluate potential risks. We also recommend, with respect to future franchise agreements, that local agencies consider several actions that may protect against a similar lawsuit, such as (1) taking steps to show that the franchise fees are the product of extensive negotiation and represent the parties' estimate of the reasonable value of the franchise, and (2) obtaining an expert opinion as to the value of the franchise, among other actions.

Our attorneys at Burke, Williams & Sorensen have experience and expertise in this challenging area of law. We stand ready and able to assist local public agencies in successfully navigating this field. Tom Brown, Megan Burke, and Kevin Siegel are among our attorneys who would be happy to assist in any way, large or small. They can be

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In the meantime, we wish you, your constituents, your colleagues, and your family and friends the best of health and success in navigating the COVID 19 crisis.

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