

2023 CSMFO ANNUAL CONFERENCE  
BACK TO THE CAPITAL

Have a Garbage Franchise Fee?  
Responding to *Zolly v. Oakland*  
February 1, 2023, 2:30 pm

Presented by: Kevin Siegel and Megan Burke

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**PROP. 218 (1996): ADDS ARTICLES XIIC AND XIID**

- Art. XIIC: Voter approval required for new taxes
- Art. XIID: Limits local governments' authority to raise revenue by other means, including property-related fees imposed as an incident of property ownership
  - Property-related fees include charges for water, sewer, and solid waste services

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**PROPERTY-RELATED FEE REQUIREMENTS**

- Fees cannot exceed costs of providing services
- Revenues cannot be used for any other purpose
- The amount charged to any parcel cannot exceed that parcel's proportionate costs of service
- Service must be used by, or immediately available to, the property being charged
- No fees for general government services

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## SOLID WASTE ISSUES UNDER PROP. 218

- Charges for solid waste services that are set, imposed, and collected by a public agency are generally subject to Proposition 218's requirements for property-related fees (*Howard Jarvis Taxpayers Ass'n v. City of Roseville* (2002); *Howard Jarvis Taxpayers Ass'n v. City of Fresno* (2005))
- Unknown whether fees or charges for solid waste services set, imposed and collected by waste hauler must satisfy Proposition 218's requirements. These charges include:
  - Hauler's costs for service
  - Agency's recoupment of fees charged by gov't for franchise
  - Hauler's recoupment of expenses for provision or services to gov't
  - Hauler's profits

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## PROPOSITION 26: REVISED ART. XIII C [re taxes]

- "Tax" means any levy, charge, or exaction ... imposed" by local gov't, unless exempt
- Exemptions:
  - Charge for specific benefit conferred or privilege granted; reasonable cost
  - Charge for specific gov't service or product; reasonable cost
  - Charge for reasonable regulatory costs for licenses, permits, investigations, inspections, audits, ag marketing orders, admin enforcement and adjudication
  - Charge for use, entrance, purchase, rental or lease of gov't property
  - Fines and penalties
  - Charges imposed as a condition of property development
  - Assessments and property-related fees imposed per Art. XIII D

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## PROPOSITION 26 (cont.)

- "Tax" means any levy, charge, or exaction ... imposed" by local gov't, unless exempt
- Fees for gov't services or to fund a regulatory program must be limited to the costs of service or costs of administering regulatory program
- Still unclear whether charges imposed by a private hauler for solid waste services, including franchise fees, are "imposed" by a local gov't
- Arguments that solid waste charges are not subject to Proposition 218 and 26
  - Hauler imposes service charges and local gov't administratively regulates
  - Franchise fees charged for reasonable value of local gov't property (e.g., exclusive right to provide solid waste services)
  - Other fees charged for local gov't services and regulatory programs
  - Solid waste services are not mandatory

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### ZOLLY V. CITY OF OAKLAND

- City adopted Franchise Agreement for Refuse and Recycling Services
- Franchise Agreement obligated the hauler to pay City franchise and other fees
- Original Complaint: Owners of multi-family residential buildings alleged franchise fees were passed-through on their bills, and were unlawful property-related fees imposed without compliance with Art. XIIIID (Prop. 218)
- Amended Complaint: Owners alleged franchise fees were unlawful taxes imposed without voter approval in violation Prop. 26

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### ZOLLY V. CITY OF OAKLAND (cont.)

- Superior Court sustained demurrer, dismissed suit
- Supreme Court reversed
- Standing:
  - Plaintiffs sufficiently pleaded they were effectively, or indirectly, paying franchisee fees through hauling service invoices
  - Oakland may still seek to prove otherwise
- Imposed:
  - To impose a charge merely means to establish the charge
  - Owners need not show that gov't directly compels them to pay
  - Not addressed: whether solid waste service charges set, collected, and retained by hauler are subject to Prop. 218's requirements

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### ZOLLY V. CITY OF OAKLAND (cont.)

- Burden is on Gov't
  - Gov't bears burden to prove fees are not taxes, and that the amount of the fee is not more than "reasonable costs" for gov't activity and "reasonable relationship" to burdens or benefits
- Exemption for Use of Gov't Property – subd. (e)(4)
  - Not for value of franchise rights
  - Only for physical or tangible property, e.g., right to use public property (travel on streets?)

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### ZOLLY V. CITY OF OAKLAND (cont.)

- Exemption for grant of specific benefit or privilege, that do not exceed costs – subd.(e)(1)
  - Maybe for grant to Hauler of rights to provide exclusive solid waste services
  - Reasonableness limitation: limited to administrative expenses for grant of franchisee?

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### WHAT TO DO?

- Retain consultant
- Evaluate fees and costs imposed through existing franchise, in anticipation of potential suit
- Evaluate fees and costs before amending or extending existing franchise, or entering new franchise

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### WHAT TO DO? (cont.)

- Identify property rights
  - Use of public rights-of-way by hauler?
  - Use of public rights-of-way for placement of containers?
  - Use of Corp Yard or other property
- Valuation analysis

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### WHAT TO DO? (cont.)

- Calculate costs related to services or regulatory programs
  - Expenses to negotiate, monitor, and administer agreement
  - Consultant and legal costs
  - Regulatory expenses – e.g., for AB 939 and SB 1383 compliance (recycling and composting)
- Revenues from fees for services or regulatory programs must be used to fund those services or programs

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### WHAT TO DO? (cont.)

- Work with Hauler to amend agreement to establish that franchisee fees are not paid by customers
- Charge separate fees for local gov't services and regulatory programs
- Limit franchise fee to reasonable value of local gov't property utilized for solid waste services

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### WHAT TO DO? (cont.)

- Impose solid waste service charges as property-related fees per Prop. 218
- If local gov't imposes fees per Prop. 218, then service charges and local gov't fees must comply with Prop. 218 substantive requirements
  - Cannot exceed costs of service
  - Cannot be used for general revenue purposes
  - Must be proportionate to costs of service

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### WHAT TO DO? (cont.)

- Solid waste charges imposed by the local gov't must also satisfy Prop. 218 procedural requirements
  - Notice explaining the basis for the fee calculations, reason for fee increases, amount of fees, and public hearing information
  - Notice mailed 45 days before public hearing
  - Hold public hearing and fees cannot be adopted if written protests received by majority of parcel owners

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### WHAT TO DO? (cont.)

- Taxpayer Protection and Government Accountability Act
- [ADDRESS]

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### QUESTIONS?



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