Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: May 29, 2025

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: Solid Waste Collection Franchise Fee Increases

INTRODUCTION

On May 2, 2025, the Office of the City Auditor issued a Performance Audit of the City of San Diego's (City) Trash, Recycling, and Organics Collection and Handling (Audit Report). The audit examined the solid waste collection franchise agreements, fee structure, and performance of private solid waste haulers that have been granted a non-exclusive franchise from the City (franchise haulers). As a result of the audit, the Office of the City Attorney was asked if an increase in fees charged to the franchise haulers can be presented to the City Council immediately or if the City must conduct a franchise fee study to support any fee increases before bringing them forward.

QUESTION PRESENTED

Can the City increase franchise fees without conducting a franchise fee study to support the increase?

SHORT ANSWER

The City may legally increase franchise fees provided the increase is compliant with Proposition 26, which, as interpreted by a recent California Supreme Court ruling, requires a comprehensive fee study or other documentation supporting the amount of any increase. This recent case held that franchise fees are a tax unless they fall under one of the enumerated exemptions to Proposition 26's definition of a tax. The Court rejected arguments that franchise fees were exempt as a matter of law and required the local municipality to present evidence to demonstrate the fee fits under one of the listed exemptions. Based on this recent ruling, if the City increases the fees without conducting a franchise fee study and the fee is challenged, the City will need to produce evidence demonstrating compliance with Proposition 26.

BACKGROUND

In 1996, the City established a non-exclusive solid waste collection franchise system to regulate the business of collecting, transferring, transporting, disposing of, and recycling solid waste to (i) ensure the orderly operation of the business and (ii) minimize the adverse effects it may have on the local environment, including the public health, safety, welfare, and quality of life. San Diego Municipal Code (SDMC or Municipal Code) § 66.0107(a). Another purpose was to "require compensation for the value of the franchise issued." San Diego Charter (Charter) § 105; SDMC § 66.0107(b).

Non-exclusive franchises are granted to private solid waste haulers, who operate under the terms set forth in franchise agreements executed with the City. The franchise agreement generally imposes a franchise fee on the hauler for every ton of solid waste collected within the City, with the exception of solid waste that is exempted by law.[1] SDMC §§ 66.0108, 66.0109, 66.0118. The current rate is $17 per ton for Class I franchisees and $18 per ton for Class II franchisees. *See* San Diego Resolution R-311987 (October 10, 2018). The rate difference is based on the fact that Class I franchisees are limited to collecting and transporting no more than 75,000 tons per year whereas Class II franchisees, who each have a greater market share than any Class I franchisee, may collect an unlimited amount of tonnage. San Diego Ordinance O-18848 (Sept. 18, 2000); SDMC § 66.0118.

ANALYSIS

I. FRANCHISE FEES ARE SUBJECT TO PROPOSITION 26

Voter initiatives have limited local governments' ability to raise revenue through taxes, fees, and other charges, beginning with Proposition 13 in 1978. In 1996, the California electorate passed Proposition 218, which added articles XIIIC and XIIID to the California Constitution. While article XIIID mandated substantive and procedural requirements related to property-related fees, article XIIIC expressly required a majority vote to approve general taxes and a two-thirds vote to approve special taxes. (Cal. Const. art. XIIIC, § 2, subds. (b), (d).)[2] Neither Proposition 218 nor Proposition 13 defined what constitutes a tax.

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[1] *See* Non-Exclusive Franchise Agreement for Solid Waste Management Services (Jan. 26, 2023) (on file with the City Clerk as Document No. OO-21560). Our Office has also issued several memoranda analyzing whether specific waste is exempt from franchise fees. 2008 City Att'y MOL 24 (2008-4; Apr. 4, 2008) (Solid waste generated in connection with housing projects owned and/or managed by the Housing Commission is not exempt from the City's solid waste collection franchise fee); 2008 City Att'y MOL 30 (2008-5; Apr. 4, 2008) (the City of San Diego Redevelopment Agency (RDA) does not constitute a state agency cloaked with state sovereign immunity from the City's franchise regulations and therefore, RDA waste is not exempt from the City's solid waste collection franchise fee); 2023 City Att'y MOL (2023-3; July 5, 2023) (the San Diego Unified Port District and San Diego Metropolitan Transit System are not exempt from solid waste collection franchise fees); 2025 City Att'y MOL (2025-2; April 21, 2025) (solid waste generated at federal facilities not exempt from franchise fees, whereas waste generated at state government facilities as part of state agency governmental functions is generally exempt).

[2] All references to "article" refer to articles of the California Constitution unless otherwise noted.

In 2010, the California voters approved Proposition 26, which amended the California Constitution to define tax as "any levy, charge, exaction, of any kind imposed by the government," unless the measure falls within one of seven express exemptions. Cal. Const. art. XIIIC, § 1, subd. (e). Proposition 26 specified that any charge imposed by a government agency that does not fall under one of its enumerated exemptions is a tax, and that the agency imposing the charge has the burden of proving it fits within one of the exemptions.

In 2022, the California Supreme Court addressed the applicability of Proposition 26 to solid waste collection franchise fees. *Zolly v. City of Oakland,* 13 Cal. 5th, 780 (2022)(*Zolly*). In *Zolly*, the Court held that franchise fees were subject to the requirements of Proposition 26, rejecting arguments that because the haulers voluntarily negotiated and agreed to the terms of the franchise, the fees did not fall within Proposition 26's definition of a tax. *Id.* at 791-92. The Court explained that the meaning of "impose" in Proposition 26's language, covers transactions resulting from contractual and voluntary negotiations between a private party and local government entity. *Id.* Therefore, the Court held that unless the franchise fees fall under one of the enumerated exemptions to the definition of a tax under Proposition 26, or were approved by the voters, the fees are invalid as illegal taxes.

II. FRANCHISE FEES ARE NOT CATEGORICALLY EXEMPT FROM THE VOTER APPROVAL REQUIREMENTS UNDER PROPOSITION 26

In *Zolly,* the Court also rejected the City of Oakland's argument that franchise fees categorically fall under one of Proposition 26's exemptions, noting the need for fact-specific evidence focusing on the actual benefit exchanged between the waste haulers and local government to make such a determination. *Id* at 794. The exemptions to the definition of "tax" under Proposition 26 are:

> (1) 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.
>
> (2) A charge imposed for a specific government service or product provided 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 providing the service or product.
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> (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
>
> (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
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> (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
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> (6) A charge imposed as a condition of property development.

> (7) Assessments and property-related fees imposed in accordance with the provisions of article XIIID.

Cal. Const., art. XIIIC, § 1, subd. (e) (Exemptions (1) through (7)).

In *Zolly*, the City of Oakland argued their franchise fee was exempt as a matter of law as a "charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property" (Exemption 4). *Zolly,* 13 Cal. 5th at 794, 797. First, the Court rejected the premise that the franchise itself is a form of government property, finding that Exemption 4 generally applied to tangible physical property. *Id.* at 794-95. The Court also rejected the City's argument that the right to use public streets or rights-of-way to transact business, provide services, and operate a utility for recycling services, ***on its face***, satisfied the exemption. The Court left open the possibility that franchise fees could satisfy Exemption 4 if Oakland presented evidence that the haulers paid the fees in exchange for specific use of government property that they would not have enjoyed had they not paid the fee,[3] but noted that Oakland had not established that the service providers' ability to use public streets or other public places "means anything more than the generally available prerogative to drive on public roads and rights-of-way." *Id.* at 795.

The analysis by the Court also did not reject the possibility that franchise fees could fall under Exemption 1, which exempts 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 charge "does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege." Cal. Const., art. XIIIC, § 1, subd. (e)(1). The Court did not determine how the "reasonable costs" language in Exemption 1 may apply to franchise fees. The Court also left open the question whether the term "reasonable costs," should be understood to extend beyond the purely administrative costs involved in granting a franchise.[4] *Zolly,* 13 Cal. 5th at 796.

Under *Zolly,* local governments must now provide evidence to support fees adopted under either Exemption 1 or 4. Based on this recent case, this Office recommends that the City conduct a franchise fee study to support the franchise fees currently being charged as well as any proposed

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[3] The Court noted that in other cases, the utility paying the franchise fee had gained a specific use of local government property beyond what was otherwise available to the public (i.e., an easement to install equipment; compensation for undergrounding of electrical equipment). *Id.* at 795.

[4] The audit report estimated potential costs for road repair from commercial haulers based a Districted Exclusive Collection System Study in 2018, and a 2024 Performance Audit of the City's Street Maintenance Program. Use of street repair costs in determining solid waste fees is currently being challenged in *Rogers v. City of Redlands*, which contested the use of street repair costs in determining trash fees based on language in California Vehicle Code section 9400.8, which provides that "no local agency may impose a tax, permit fee, or other charge for the privilege of using its streets or highways." *Rogers v. City of Redlands*, No. G063580, 2024 WL *519105*, at **24* (Cal. Ct. App. 4th Dist. January 25, 2024) (not reported). The case is currently before the Fourth District Court of Appeal, where the City of Redlands is appealing the lower court's decision that the Vehicle Code prohibited such calculations. A decision is anticipated during the summer of 2025.

increases unless other documentation that supports current or increased franchise fee is available or could be produced.

CONCLUSION

Franchise fees are subject to Proposition 26 and will be considered a "tax" unless the fees fall under one of the seven exemptions to the definition of a tax enumerated in California Constitution article XIIIC, § 1, subd. (e)(1)-(7). In *Zolly v. City of Oakland*, the Court determined that franchise fees are not automatically exempt.

Under *Zolly,* local governments must now provide evidence to show that franchise fees fall under one of Proposition 26's listed exemptions. Based on this recent case, this Office highly recommends that the City conduct a franchise fee study to support the franchise fees currently being charged as well as any proposed increases unless other documentation that supports current or increased franchise fees is available or could be produced.

HEATHER FERBERT, CITY ATTORNEY

By ***/s/ Nicole M. Denow***
Nicole M. Denow
Senior Deputy City Attorney

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cc: Charles Modica, Independent Budget Analyst
Andy Hanau, City Auditor
Kirby Brady, Interim Environmental Services Department
Jeremy Bauer, Environmental Services Assistant Director
Jeremy Culuko, Interim Environmental Services Assistant Director