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May 5, 2015

VIA OVERNIGHT DELIVERY

The Honorable Chief Justice Tani Cantil-Sakauye
And Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

Re: *Rolland Jacks, et al. v. City of Santa Barbara*
Supreme Court Case No. S225589 (Petition for Review Filed April 7, 2015)
Court of Appeal Case No. B253474

AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW
(Cal. Rules of Court, rule 8.500(g))

Dear Chief Justice Cantil-Sakauye and Associate Justices:

This Court has definitively stated that the fee paid to a city under a franchise to use streets and other public property for the construction and maintenance of utility facilities and equipment "is not a tax upon the property of the utility or a license charge for the privilege of operating its business; it is compensation for the privilege of using the streets and other public property within the territory covered by the franchise." *Pacific Tel. & Tel. Co. v. Los* Angeles (1955) 44 Cal. 2d 272, 283. The League of California Cities (the "League") respectfully submits this amicus curiae letter in support of the Petition for Review filed by the City of Santa Barbara (the "City") in this case, because the Court of Appeal's opinion failed to apply and thereby undermined this established rule. The opinion also overlooked the nature of franchises and the complex regulatory framework for utilities in California that, under our Constitution, vests the bulk of regulatory authority in the Public Utilities Commission ("PUC") yet reserves to cities and counties the power to issue and receive revenue from utility franchises for use of streets and other public property.

League member cities regularly establish fees or rents for the possession or use of public property and use those revenues for the common benefit of their citizens. Because these fees or rents -- including franchise fee revenues -- are collected as compensation for the privilege of using property, they have traditionally been considered outside the reach of laws governing the imposition of taxes. But the opinion calls into question the historic treatment of these fees or rents. Review by this Court is therefore necessary to settle important questions of law affecting all California cities, particularly the application of California Constitution articles XIII A, C, and D to franchise fees specifically – in light of the provisions of article XI, section 9, subdivision (g) and article XII, section 8 -- and other fees or rents for possession or use of government property

generally – particularly in consideration of the express exclusion of such fees from the definition of taxes under article XIII C, section 1, subdivision (e)(4). (Cal. Rules of Court, rule 8.500, subd. (b)(1).)

The League is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance. The League participated in the proceedings below by filing an amicus curiae brief in the Court of Appeal in support of the City.[1]

ARGUMENT

A franchise is a privilege conferred upon an individual or a corporation for use of a sovereign body's property. (*Mann v. City of Bakersfield* (1961) 192 Cal.App.2d 424, 429.) Under Government Code section 37350, California cities have broad authority to "purchase, lease, receive, hold, and enjoy real and personal property, and control and dispose of it for the common benefit." Specific authority to grant franchises for utility and other purposes is provided by Government Code section 39732.[2] Charter cities also have independent home rule authority flowing directly from California Constitution article XI, section 5, over their property, including the power to issue franchises, except to the extent preempted by statutes addressing matters of statewide concern. (*City of San Diego v. Kerckhoff* (1920) 49 Cal.App. 473, 478, 479.) As pertains to utilities and particularly franchises, a city's power is limited by both article XII of the California Constitution and statutes. (See generally, *S. Pac. Pipe Lines v. City of Long Beach*, (1988) 204 Cal. App. 3d 660, 666-667, 669-670 for a description of the framework of the shared power.)[3] Particularly relevant here, however, is that article XII, which creates the PUC and vests it with regulatory power, specifically reserves to cities the right "to grant franchises for public utilities or other businesses on terms, conditions, and in the manner prescribed by law." (Cal. Const. art. XII, § 8; see also Cal. Const. art. XI, § 9, subd. (b), granting to cities certain powers over utilities.) As noted above, this Court has plainly stated that a franchise fee is not a tax. (*Pacific Tel. & Tel. Co. v. Los Angeles*, *supra*, 44 Cal. 2d at p. 283.) That holding is as controlling today as it has been for more than half a century. (*City of Los Angeles v. Tesoro Refining & Marketing* (2010) 188 Cal. App. 4th 840, 846-847.)

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[1] The League has also reviewed the Petition for Review filed by the City. Rather than repeating those arguments here, the League endorses the City's arguments made in its Petition, and echoes the Petition's description of the adverse impacts of the decision on cities throughout California.

[2] Similar statutory authority exists for counties. (Gov. Code, § 26001 (franchises) and §§ 25220 et seq. (property).)

[3] The interplay between local and PUC authority is not limited to franchises. For example, in the regulatory context of mobile home rent control, the courts have made clear that issues such as amount and payment of utility rates are matters within the exclusive jurisdiction of the PUC, but the amount a park owner may charge for rent is subject to local control. (*Rainbow Disposal Co. v. Escondido Mobilehome Park Rental Review Bd.* (1988) 64 Cal. App. 4th 1159, 1169.)

The historic recognition that franchise fees and other charges for use of government property are not taxes is now expressly reflected in the California Constitution, under Proposition 26 passed by the voters in 2010. Article XIII C, section 1, subdivision (e) (4), excludes from the new definition of a "tax," "[a] charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property." Rather than applying the long-standing rule that franchise fees are essentially rent and not taxes, the Court of Appeal in this case looked instead at the economic consequence of the rent increase on the utility's customers. The court decided because the PUC required the utility to pass the increase in the franchise fee through to its customers, it was no longer rent but a tax. But cost increases of all types are commonly passed on to consumers. When characterizing a payment to the government, the focus must be on the legal foundation for the governmental action. For example, a city that owns a park and recreation facility may license concessionaires to sell food and beverages and may increase the fee charged for the license. It may also impose a transactions and use tax on consumers who buy the products. The concessionaire may pass on the cost of the license fee increase and may collect the transactions tax. While these charges may look the same to the consumer, they are fundamentally different under the law.

Further, the fact that a city may be economically motivated to raise revenue for general purposes through fees and rents for use of its property, including franchise fees, is of no consequence to the proper characterization of those fees and rents. Cities and other government entities cannot operate without revenue, and one way for a government entity to raise revenue is to charge for the use of its property. Another way is to impose taxes on property owned by others. A government entity can do both, under separate authority and subject to separate legal standards. This Court has plainly declared that separation, which the Court of Appeal has disregarded in the opinion.

CONCLUSION

For the reasons set forth above, and those set forth in the Petition for Review, the League urges this Court to grant the petition. If review is granted, the League intends to seek leave to file an amicus curiae brief more fully stating its arguments in support of the authority of cities to continue to impose charges for use of local public property under the rule of law that excludes those charges from the definition of taxes. The Court should grant review to settle this important issue of law because the matter has widespread implications for all California cities, utility companies, and residents.

Respectfully submitted,

Patrick Whitnell
General Counsel
SBN 184204

PROOF OF SERVICE
(Code of Civil Procedure §1013)
STATE OF CALIFORNIA - COUNTY OF SACRAMENTO

I, the undersigned, declare that I am a citizen of the United States and am employed in the City and County of Sacramento, State of California. I am over the age of 18 and not a party to this action; my business address is: 1400 K Street, Sacramento, CA 95814.

On May 5, 2015, I served the document(s) described as: **AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW** in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

[X] (**BY MAIL**) I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Sacramento, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] (**BY FAX**) I transmitted, pursuant to Rules 2001 et seq., the above described document(s) by facsimile machine (which complied with Rule 2003(3)), to the above-listed facsimile number(s). The transmission originated from facsimile phone number (916) 658-8240 and was reported as complete and without error. The facsimile machine properly issued a transmission report, a copy of which is attached hereto.

[ ] (**BY PERSONAL SERVICE**) I caused such envelope(s) to be delivered by hand to the offices of the addressee(s).

[ ] (**BY OVERNIGHT DELIVERY**) I caused said envelope(s) to be delivered overnight via an overnight delivery service in lieu of delivery by mail to the addressee(s).

Executed on May 5, 2015 at Sacramento, California.

[X] (**STATE**) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Janet M. Leonard

Rolland Jacks, et al. v. City of Santa Barbara
California Supreme Court – Case No. S225589
Second Appellate District, Division 6 - Case No. B253474
Santa Barbara Superior Court - Case No. 1383959

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