

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

No. S262634

**Robert Zolly, Ray McFadden,
and Stephen Clayton**
Plaintiffs and Appellants,

vs.

City of Oakland
Defendant and Respondent

Motion for Judicial Notice

After a Published Decision from the Court of Appeal
First Appellate District, Division One, Appeal No. A154986
Alameda County Superior Court Case No. RG16821376

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MOTION FOR JUDICIAL NOTICE

Pursuant to rules 8.54, 8.252(a) , and 8.520(g) of the California Rules of Court, Evidence Code section 452, subdivisions (c) and (d), and Evidence Code section 459, appellants move for judicial notice of the following document:

- A. Excerpt from the 2015–2016 Alameda County Grand Jury Final Report

This document is attached to appellants' counsel's included declaration as Exhibit A.

MEMORANDUM OF POINTS AND AUTHORITIES

This motion seeks judicial notice of an excerpt from the 2015–2016 Alameda County Grand Jury Final Report. The excerpt covers the grand jury’s report about Oakland’s current waste-collection franchise contracts, which are at the heart of this lawsuit.¹ Pursuant to California Rules of Court, rule 8.252(a)(2)(C), the grand jury report is subject to judicial notice because it is an official act of this state’s judicial department and a court record from this state. (*In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 4, citing Evid. Code, § 452, subds. (c) & (d); see also Evid. Code, § 459 [providing that a reviewing court “may take judicial notice of any matter specified in Section 452”].) Further, because this appeal contests a dismissal following the sustaining of a demurrer, this court “accept[s] as true” the grand jury report’s contents. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 672.)

Appellants requested that the superior court and the Court of Appeal take judicial notice of this same grand jury report. (See Cal. Rules of Court, rule 8.252(a)(2)(B).) But the courts declined to take judicial notice of it because they believed it was immaterial. (See *ibid.*)

Far from being immaterial, however, the grand jury report sheds light on the key issue in this appeal. (See Cal. Rules of Court, rule 8.252(a)(2)(A).) The Supreme Court in *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 269 held that “[t]o the extent a franchise fee exceeds any reasonable value of the franchise, the excessive portion ... is a tax” subject to the voter-approval requirement of article XIII C of the state Constitution. Accordingly, in their second amended complaint here, appellants allege that Oakland’s franchise fees for waste-collection exceed the values of the corresponding franchises and are thus invalid taxes imposed without voter approval. The grand jury report supports this central allegation with facts about Oakland’s

¹ The report does not relate “to proceedings occurring after the ... judgment [of dismissal] that is the subject of the appeal.” (Cal. Rules of Court, rule 8.252(a)(2)(D).)

flawed request-for-proposal process and how one of the franchise fees at issue here is disproportionately high compared to franchise fees in surrounding communities.

A “trial court's refusal to take judicial notice does not preclude the appellate court from doing so.” (*Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1380.) Given the grand jury report’s relevance to the dispositive issue in this appeal, this court should exercise its discretion to take judicial notice of the report.

CONCLUSION

This court should take judicial notice of the attached grand jury report.

Respectfully submitted,
Katz Appellate Law PC

Dated: December 21, 2020

By _____ /s/ _____

Paul J. Katz
Attorney for Appellants

DECLARATION OF PAUL J. KATZ

I, Paul J. Katz, hereby declare and state:

1. I am appellants' co-counsel in this appeal. I am licensed to practice law in the State of California.
2. I have attached as Exhibit A to this declaration a true and correct copy of the following document: an excerpt from the 2015–2016 Alameda County Grand Jury Final Report.
3. This excerpt is an exact copy of the excerpt that appellants requested the superior court and Court of Appeal to take judicial notice of.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct. Executed this 21st day of December, 2020, in Oakland, California.

/s/

Paul J. Katz, Declarant

EXHIBIT A



**2015 - 2016
ALAMEDA COUNTY GRAND JURY
FINAL REPORT**

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CITY OF OAKLAND’S COSTLY PURSUIT OF ZERO WASTE FRANCHISE CONTRACTS

EXECUTIVE SUMMARY

The Grand Jury received numerous citizen complaints concerning increases to garbage and composting collection rates in the city of Oakland as a result of the city’s new Zero Waste franchise contracts. The Grand Jury also received citizen complaints that these 2015 franchise agreements for garbage and recycling collection had been awarded improperly; that garbage collection rates charged to Oakland businesses violated California law; and that \$30 million in franchise fees paid to the city passed on to Oakland ratepayers are an alleged “illegal tax.”

The Grand Jury undertook a comprehensive investigation related to the solicitation and award of the city’s Zero Waste contracts. The Grand Jury determined that: (1) although intended, the city’s contracting process failed to achieve a competitive bidding environment; (2) the city’s contracting process was for all intents and purposes abandoned by the city council before the process was completed; (3) even though intended, the city’s contracting process lacked reasonable transparency; (4) collection rates paid by Oakland businesses and multi-family residences were markedly higher than surrounding communities; and (5) franchise fees paid by the city’s garbage collection contractor, passed on to Oakland ratepayers, are disproportionately higher than franchise fees paid to other Bay Area municipalities and special districts.

A franchise agreement is an authorization granting an exclusive contract by a government entity to a private enterprise enabling them to carry out specified commercial activities. Oakland ratepayers are the primary beneficiaries of the Zero Waste franchise contracts.

The city council owed a duty to, among other things, safeguard the ratepayers’ financial interests. Nevertheless, the city council failed its duty. Reasonable financial analysis of numerous ancillary collection services directly impacting rates was not performed, and there was little to no public debate concerning disproportionately high franchise fees.

BACKGROUND

In 2006, the city of Oakland enacted a Zero Waste policy and corresponding strategic plan. The city’s intent was to reduce refuse tonnage deposited in landfills by 90%, from 400,000 tons in 2006, to 40,000 tons in 2020.

Over the next nine years the city implemented its Zero Waste strategic plan. They designed a process and schedule for soliciting franchise contracts for collection, diversion, recycling and landfill disposal services. These were essential elements to achieving the city's environmental goals. These contracts needed to be in place well in advance of June 2015, the expiration of an existing citywide collection and disposal services contract with Waste Management of Alameda County (WMAC), and a recycling collection contract with California Waste Solutions (CWS) that covered a portion of Oakland. A lapse of service between contracts would result in uncollected garbage creating a significant public health crisis.

In 2009, the city hired a consulting firm to assist its public works staff in developing and implementing a Request for Proposal (RFP) process for the award of franchise contracts for: (1) garbage and compostables collection (in the city's RFPs, garbage and compostable materials are referred to as "Mixed Material and Organics"), (2) residential recycling collection, and (3) landfill disposal services. In addition to setting forth the technical performance requirements for the anticipated contracts, the city's RFPs also sought to foster a competitive bidding environment. In short, the city hoped to receive multiple contract proposals from a spectrum of potential contractors.

In the course of developing the RFP, the city council issued 32 policy directives to public works staff. Specific directives required: that licensing recyclers serve Oakland businesses; that franchise contracts include provisions on city policies for equal benefits, living wage, and campaign contributions; that disclosure of a felony history be eliminated from initial job applications; requirements to pay competitive wages and benefits, defined as equivalent or better than collectively bargained contracts in surrounding counties; inclusion to the maximum extent possible of Oakland local business and employment of Oakland residents; labor peace plans in the event of labor disputes or unrest; and requirement for a customer service call center located within Alameda County. During the RFP process, a specific policy directive mandated a "cone of silence" which was imposed to safeguard the integrity of the city's RFP process by keeping proposers from improperly influencing elected officials.

In 2012, the city issued two formal, comprehensive RFPs for: (1) collection of garbage and compostables, and collection of residential recycling, and (2) landfill disposal services. The city's two RFPs collectively numbered more than 500 pages of contract requirements and bid submission procedures. The city issued fourteen addenda to the original RFPs for the two collection services contracts, and seven addenda to the original RFP for landfill disposal services. Most of the city's issued addenda answered bidder's questions, clarified contract provisions, or revised proposal submittal times.

On April 24, 2012, in a report to the city council, staff cautioned that “established industry standards for these types of Contracts necessitate thoughtful application of provisions to secure the desired economic and social benefits ... [and] the RFP process must strike a balance between securing economic benefits for Oakland and achieving the best customer rates for the services, it must guard against unintentional bias or infeasible requirements that would suppress competition.”

Over the course of the next three years, the city engaged in what can only be described as a tortured procurement process. This process evolved dramatically toward its conclusion and culminated in the award of three franchise contracts to two incumbent firms. Even though the city started the contracting process in 2011, and with good intentions, the city ultimately ran out of time and thus lost control of key final decisions. The city’s goal was that the selection process be open and transparent. However, the process moved to “behind closed-door” negotiations between the two contractors. In the end, the public and even city staff were left on the sidelines.

INVESTIGATION

During the course of its investigation the Grand Jury reviewed thousands of pages of documents, screened several hours of Oakland City Council meeting videos, reviewed statutes and ordinances, and interviewed city officials, complainants and other citizens.

The documents examined by the Grand Jury included: RFP’s for each of the three franchise agreements, contract proposals submitted by WMAC and CWS, best and final offers submitted by WMAC and CWS, Oakland Public Works staff and consultant’s reports, city council meeting minutes, the Memorandum of Agreement between WMAC and CWS, correspondence, and the final executed franchise contracts awarded to WMAC and CWS.

The Grand Jury examined and analyzed hundreds of pages of garbage and recycling collection rate sheets submitted to the city by WMAC and CWS, including the final rate sheets incorporated into the executed franchise contracts. In addition, the Grand Jury examined garbage, composting, and recycling rates charged in other Alameda, San Francisco, and Contra Costa communities, and examined franchise fees paid to other California municipalities for comparable garbage, composting, and recycling services.

The City Received Only Two Responsive Contract Proposals

The RFP requirements never achieved the city’s goal to create a competitive bidding environment for the city’s Zero Waste franchise contracts. Initially, six

potential bidders expressed interest for garbage and recycling collection services, and five potential bidders for landfill disposal services. However, in January 2013, the city received contract proposals from only two firms, the incumbent entities CWS and WMAC. A third proposal was received that was deemed unresponsive to the city's bidding requirements.

CWS submitted a contract proposal for garbage and recycling services, but not for landfill disposal services. WMAC submitted a contract proposal for all three franchise contracts. In its proposal, WMAC submitted a discounted, "bundled rate" structure, conditioned on the city awarding all three franchise contracts to WMAC. In the evaluation process, city staff raised questions whether the CWS proposal was in fact responsive in light of infrastructure required to perform garbage collection services and in the time frame required to perform the service.

The Grand Jury reviewed documents showing that an innovative bid was contemplated by a third contractor. This bidder indicated that they were capable of providing the services, but the structure of the RFP was inflexible after its release. For example, the contractor believed that the city might be better served with a city-owned transfer station, but the RFP did not appear to allow for such innovation.

As a non-incumbent contractor, this third potential bidder would need to construct a transfer station, and observed its construction would be at a significant capital cost. Furthermore, environmental requirements could take 3-5 years to obtain approvals, which would delay a new transfer station being operable until half-way through the contract period. In the interim, the contractor would have to pay a third party a premium to perform that function. It was apparent to this contractor that such an investment was too risky. Unfortunately, the city did not recognize that the RFP favored an incumbent bidder with an existing infrastructure until it was too late.

City Staff Was Under-Resourced and Lacked the Time to Manage the Complexity of the RFP Process and Implementation of Oakland's Zero Waste Strategic Plan

The Grand Jury heard testimony that the city's RFP process was the first of its kind for the city of Oakland for establishing waste franchise contracts. No prior existing process was in place, and public works staff was challenged by the complexity and volume of what was required to evaluate and negotiate the contract proposals received from WMAC and CWS.

For close to six months, from January to June 2013, public works staff and the city's retained consultant evaluated proposals submitted by CWS and WMAC.

In June 2013, city staff presented its evaluation to the city council, recommending that staff conduct separate contract negotiations in parallel with CWS and WMAC. Acting on the city council's direction, public works staff commenced negotiations with CWS and WMAC. Noteworthy, staff's parallel negotiations would extend over the next year. Time for an ordered contract transition was quickly running out. Likely unintended, this extended period of negotiation also resulted in a vacuum of public information.

In May 2014, public works staff recommended the city award all three franchise contracts to WMAC. Staff advised the city council that WMAC's bundled rate structure provided the lowest overall rate option for Oakland citizens. However, the city council rejected those recommendations, directed staff to continue contract negotiations, and to solicit best and final offers (BAFO) from CWS and WMAC, and allowed CWS to expand its bid to include the landfill disposal services.

On June 13, 2014, CWS and WMAC submitted best and final offers. For the first time, CWS included in its BAFO a proposal for landfill disposal services. At this juncture, with just a year to the expiration of existing collection contracts, the contracting process started to devolve. New parties were injected into the contract negotiations at the last hour. City staff was presented best and final offers that were in many regards new contract proposals. Indeed, CWS' BAFO submission numbered more than 700 pages. The Grand Jury notes that initial proposals had taken more than 18 months to evaluate and negotiate. City staff was now asked to compress its evaluation and present final recommendations in less than six weeks. At this point neither the complex process that had been designed, nor the expertise of the consultants that had been hired, could be sufficiently utilized.

Following its review and analysis of the contractors' BAFO submissions, public works staff again recommended that the city's most prudent option was to award all three franchise contracts to WMAC. Staff pointedly advised the city council that WMAC's proposal "would provide the best value for the Oakland ratepayers and the best customer experience, while meeting the city's Zero Waste Goal." Further, in its agenda report to the city council, staff identified concerns that CWS lacked the existing infrastructure necessary to perform services at the expiration of the existing contract. Despite staff's warning that it risked a critical interruption to services at the expiration of the existing contracts, the city council voted to award all three franchise contracts to CWS.

In Light of a Negotiated Settlement Between WMAC and CWS, The City's Contracting Process Was in Essence Abandoned, Moved Behind Closed Doors, and Lacked Transparency

In August 2014 WMAC filed a lawsuit against the city and CWS alleging various irregular actions related to the contracting process. WMAC sought to rescind the ordinances awarding all three franchise agreements to CWS. At the same time, WMAC began collecting signatures for a ballot referendum that asked Oakland voters to invalidate the ordinances awarding the franchise contracts to CWS. Had the measure qualified for the ballot, the final determination of the Zero Waste contractor would have come after the existing contracts had expired. The city was in danger of potentially losing garbage services, and creating a public health crisis.

In September 2014, WMAC and CWS settled their dispute and as part of the agreement, WMAC dropped its lawsuit and referendum efforts. The parties signed a Memorandum of Agreement that provided WMAC would be awarded franchise contracts for garbage and compostable collection, and landfill/disposal services, and CWS would retain the portion of the new franchise contract for residential recycling collection. The parties also agreed that WMAC would pay a total of \$15 million to CWS: \$2.5 million in settlement of all costs and fees and other claims and \$12.5 million for “a ten year right of first refusal ... for any of CWS recycling businesses in Alameda County....” The parties’ Memorandum of Agreement was conditioned on the city council amending its ordinance to award the franchise contracts as CWS and WMAC had agreed.

Within days, the city council voted to adopt the agreement. With little time for staff analysis, on September 29, 2014, the city council voted to amend its ordinance to award a franchise contract for garbage and compostables collection and landfill disposal services to WMAC, and to maintain the franchise contract for residential recycling with CWS. Shortly thereafter, the city council voted to extend the term for CWS’ franchise contract from an initial 10 year term to 20 years pursuant to the MOA.

The Grand Jury investigated whether the city of Oakland was an integral party to the settlement agreement between WMAC and CWS, but found no such evidence. Instead, evidence presented to the Grand Jury suggests the city was marginally involved, if at all, other than simply ratifying the end result of the agreement.

The Grand Jury found that the city staff’s initial recommendation, to award all three franchise contracts to WMAC, was the least costly alternative for ratepayers. City council repeatedly rejected staff recommendations, placing the

contracting process and timeline for award in jeopardy. This undermined the contracting process and produced a non-competitive result.

Impact to Oakland Ratepayers Received Insufficient Attention from Public Works Staff and the Oakland City Council.

From the onset, staff and city council knew that implementing the Zero Waste policy would result in substantial increases for Oakland's ratepayers, thus emphasizing the need for thorough cost and rate analysis. The Grand Jury looked for evidence that analysis of the estimated costs of the services provided under the franchise contracts bore a reasonable relationship to rates charged to Oakland's citizens. The Grand Jury also sought evidence that numerous economic provisions identified in the city council's 32 policy directives had been analyzed to identify costs and corresponding impact to Oakland's ratepayers. However, no evidence was presented to the Grand Jury indicating the value of many ancillary service costs had been analyzed, or that other economic provisions had been analyzed for potential impact to ratepayers. The Grand Jury also heard testimony that no analysis was performed related to ancillary collection services, such as bin push rates.

It appears to the Grand Jury that the city council paid minimal attention to the impact of the cost for services provided to the ratepayers. The contract awarded to WMAC for garbage collection and landfill disposal services includes the following provisions directly impacting ratepayers:

- (1) rates are adjusted annually to fully capture WMAC's increased costs based on new or increased franchise fees and government fees;
- (2) rate adjustments include additional 1.5% over and above other adjustments for the second through fifth contract years resulting in lower first year costs;
- (3) a special Local 6 labor wage adjustment for the second through fifth contract years;
- (4) proposal reimbursement fees of \$750,000 paid to city;
- (5) city may set other fees as it deems necessary, with garbage collection service rates adjusted to include such other fees; and
- (6) WMAC collections services for the city, as enumerated in the contract, are provided without charge.

The city council neither requested, nor performed, its own analysis to determine the corresponding economic impact to Oakland ratepayers for these contract requirements.

In addition, again with no apparent economic impact analysis, the city council required WMAC to subcontract for services that WMAC was capable of providing on its own. WMAC was obligated to enter into a subcontract with a jobs training nonprofit to “provide organics collection for commercial ratepayers on a subscription basis,” and a subcontract with a local utility district “for processing and diversion of organics collected from commercial ratepayers.” Evidence presented to the Grand Jury indicated WMAC could self-perform these services at a lower cost to ratepayers.

Public Not Clear How Rates Paid for Residential and Commercial Collection Services Are Reasonably Related to the Actual Cost of Services

In order to establish the impact of the new contract rates on the citizens of Oakland, the Grand Jury collected rate sheets for nine Alameda County cities. The Grand Jury compared monthly rates for the standard residential single-family dwelling garbage, recycling and organics collection as well as the rates for commercial trash and organics collection for one to six cubic yard bins from one to six times weekly.

The Grand Jury’s comparison showed Oakland’s rate for residential single-family dwellings as well as the rates for commercial trash collection to be toward the higher end, but reasonably similar to the other cities in the county. However, at the time of the study by the Grand Jury, all rates for the collection of organics from commercial ratepayers were 33% higher than average and the highest in the county.

In response to the outcry of local small businesses and multi-unit residential ratepayers, these rates have since been adjusted closer to the county average. This rate reduction was achieved at the expense of a number of original requirements the city council demanded, including a local call center, extension of the contract term, community outreach, and options to increase rates further in the future.

A second comparison study was also performed by the Grand Jury contrasting the rates in the original proposals of both WMAC and CWS, their best and final offers and the final contract awarded to WMAC by the city. This study clearly shows reductions across the board for single family residential as well as commercial waste collection and recycling, along with significant increases in the rates for the collection of organics from those same commercial customers, in an apparent attempt to balance out the needed reductions.

The Grand Jury also requested a recap of the total book of business (the anticipated rates that would be collected under the core contract) resulting from these contract negotiations. The city estimate was \$111.3 million annually, which was \$655,000 more than WMAC's original proposal and \$1.4 million over their "best and final offer" for each year.

The Franchise Fees Paid to the City Are Disproportionate in Size Compared to Similar Fees Paid to Other Municipalities.

The franchise agreement awarded to WMAC provides for a \$30 million "franchise fee," paid annually, and passed on per the agreement to ratepayers. A franchise fee has been in existence in previous waste contracts. The Grand Jury surveyed franchise fees paid to surrounding government entities and found that the franchise fees paid to the city of Oakland by WMAC under its contract are disproportionately higher than those surrounding government entities. Over the life of this ten-year agreement, with annual increases as provided, over \$300 million in additional fees are to be absorbed by Oakland's ratepayers.

The Grand Jury is troubled that these fees, which represent 30% of the ratepayers' monthly bills, were not transparently reported or openly discussed with the public at any time during the contracting process.

CONCLUSION

Evidence presented to the Grand Jury indicates that significant resources were allocated to design and achieve a competitive bidding environment for the city's RFP without achieving its goals. The city of Oakland paid over \$1 million for consulting services for guidance in the RFP and contract award process. Several years of work by city staff were also dedicated to the creation of a competitive bidding process. Given the inordinate time and resources expended during the course of the RFP process, and the substantial monetary value of the anticipated franchise contracts, the city expected multiple bidders and competitive contract proposals. However, the process was ultimately ineffective and failed to achieve this result.

The process was originally designed to be independent of political influence with every effort to ensure transparency. For example, the Zero Waste website published every major document, staff report, and notices of meetings relating to the process. It was a genuine effort to educate the community with continuous updates on the process. In the end, this process was abandoned. The final decisions about how the contracts would ultimately be awarded, the rates, and the last minute payouts between contractors were a mystery to the

public and to the city. New rate tables and the contractors' settlement were distributed to staff and to the council. And, without meaningful analysis, the contracts were approved by the Oakland City Council a short time later.

FINDINGS

Finding 16-6:

Financial analysis of numerous contract provisions providing for economic benefits to the city was insufficient. Little or no analysis of the ultimate financial impact to ratepayers was performed.

Finding 16-7:

The city of Oakland's contracting process failed to achieve a competitive bidding environment.

Finding 16-8:

The city drafted RFP provisions that favored the incumbents and suppressed competition.

Finding 16-9:

The city's official contracting process was abandoned and replaced by the contractors' closed-door negotiations.

Finding 16-10:

Public transparency was undermined by the contractors' closed-door negotiations.

Finding 16-11:

There was little to no public debate before the city council concerning disproportionately high franchise fees.

Finding 16-12:

Collection rates paid by Oakland businesses and multi-family residences were markedly higher than those in surrounding communities.

Finding 16-13:

Franchise fees paid by the city's garbage collection contractor, passed on to Oakland ratepayers, are disproportionately higher than franchise fees paid to other Bay Area municipalities and special districts.

RECOMMENDATIONS

Recommendation 16-4:

Given the complexity and enormous financial impact of the existing franchise contracts, the city of Oakland should start planning and preparing to solicit competitive bids for contracts to be in place sufficiently in advance of the expiration of the existing agreements.

Recommendation 16-5:

The city of Oakland should ensure, when available, that the RFP processes be flexible enough to allow potential vendors to propose alternative, innovative responses.

Recommendation 16-6:

The city of Oakland must ensure that subsequent agreements are solicited and awarded with complete transparency to the ratepayers, the parties whom ultimately bear the cost of the services. Rates charged should be reasonably related to the cost of the services provided.

Recommendation 16-7:

To ensure transparency, the city of Oakland must publicly report on and have public discussion regarding franchise fees (and how those fees are to be used) in any city contract.

Recommendation 16-8:

The Oakland City Council must ensure adequate resources to validate the completeness and accuracy of contract proposals. This may require the support of an independent financial analysis.

Recommendation 16-9:

The city of Oakland should immediately begin to consider a long term strategy to correction of the short-comings of the current contract, including:

- a) Specific timelines and milestones required to assure a truly competitive process is developed;
- b) Evaluation of innovations such as a city-owned transfer station;
- c) Regular financial review and assessment focused on the actual cost of services provided and ratepayer impact; and
- d) Involvement of impacted communities and public transparency.

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **ZOLLY v. CITY OF
OAKLAND**

Case Number: **S262634**

Lower Court Case Number: **A154986**

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/s/Paul Katz

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