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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

SHARON YARBER, Plaintiff and Appellant, v. CITY OF RANCHO PALOS VERDES, Defendant and Respondent.	B272288 (Los Angeles County Super. Ct. No. BC558417)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Shepard Wiley, Jr., Judge. Affirmed.

Girardi & Keese, Thomas V. Girardi, Howard B. Miller, Robert Finnerty, and Alexandra T. Steele; Law Offices of Martin N. Buchanan and Martin N. Buchanan; Slovak, Baron, Empey, Murphy & Pinkey, Thomas S. Slovak and Stephen J. Schultz for Plaintiff and Appellant.

Daley & Heft, Scott Noya and Lee H. Roistacher, for Defendant and Respondent.

In 1996, the voters of the City of Rancho Palos Verdes (City or Palos Verdes) approved a three percent user tax on all municipal utilities, including telephone service. As adopted, the telephone user tax applied to most telephone service, but expressly excluded services "exempt from or . . . not subject to . . . the tax imposed under Section 4251 of Title 26 of the United States Code." (Rancho Palos Verdes Municipal Code, § 3.30.040, subd. (C).)

When the voters approved the telephone user tax in 1996, Internal Revenue Code section 4251 exempted some very limited categories of telephone users (such as servicemen in combat zones and certain nonprofit organizations), but otherwise applied to all telephone service. (26 U.S.C. § 4253.) By 2006, however, the federal courts and the Internal Revenue Service had interpreted section 4251 to exclude most cell phone plans from the federal tax. Accordingly, in 2006, the Palos Verdes City Council (City Council) adopted Ordinance No. 443 (the 2006 ordinance), which deleted the reference to Internal Revenue Code section 4251 from the Rancho Palos Verdes Municipal Code in order "to impose the utility user tax on telephone communication services in a manner that is consistent with how it has been historically imposed."

Plaintiff Sharon Yarber (plaintiff) is a resident of the defendant City who pays the telephone user tax through her cellular telephone provider. In 2014, plaintiff filed a complaint asserting that the 2006 ordinance violated Propositions 62 and 218, which prohibit local governments from imposing, extending, or increasing taxes without voter approval. Plaintiff urged that when Palos Verdes voters approved a utility user tax in 1996, they "specifically voted *not* to tax services that were exempt from taxation under" Internal Revenue Code section 4251. Thus,

plaintiff suggested, eliminating the reference to the Internal Revenue Code had the effect of imposing, extending, or increasing taxes within the meaning of Propositions 62 and 218.

The City demurred, asserting that the 2006 ordinance did not violate Propositions 62 or 218 as a matter of law. The trial court sustained the demurrer without leave to amend and subsequently entered a judgment of dismissal.

We affirm. While the 2006 ordinance made a technical change to the Rancho Palos Verdes Municipal Code, it did not impose, extend or increase the telephone tax. Accordingly, as a matter of law, the 2006 ordinance did not violate Propositions 62 or 218.

BACKGROUND

I.

The 1986 and 1993 Utility User Tax

In 1986, and again in 1993, the City Council enacted a user tax on various utilities, including telephone service (utility user tax). As adopted in 1993, section 3.30.040 of the Rancho Palos Verdes Municipal Code provided in pertinent part:

"A. There is hereby imposed a tax upon the amounts paid for intrastate, interstate, . . . or international telephone communication services, including cellular telephone services and other telephone services that gain access to the public switched network by means of various technologies, by every person using such services in the City. The tax imposed by this section shall be at the rate of three percent (3%) of the charges made for such services and shall be paid by the person paying for such telephone services. Said tax shall apply to all such charges billed to a telephone account having a situs in the City. [¶] . . . [¶]

"C. Notwithstanding the provisions of subsection (A), the tax imposed under this section shall not be imposed upon any person for using intrastate, interstate, or international telephone communications services to the extent that the amounts paid for such services are exempt from or are not subject to the tax imposed under Section 4251 of Title 26 of the United States Code."

II.
In 1996, the Palos Verdes Voters Adopt a Utility User Tax

In November 1996, the Palos Verdes voters were asked to vote on the following question: "Shall Ordinance CC be adopted to validate and continue the collection of the existing 3% utility users tax?"

In relevant part, Ordinance CC stated: "The adoption of Chapter 3.30 of Title 3 of the Rancho Palos Verdes Municipal Code, which imposes a tax of three percent (3%) on utility users in the City is hereby validated and approved to the full extent permitted by law. The provisions of Chapter 3.30 are attached as Exhibit '1' to this Ordinance and are incorporated herein by this reference. This Section . . . is intended to authorize the continued collection of the tax, to validate the prior adoption of the tax, and to validate taxes previously collected pursuant to Chapter 3.30 of the Rancho Palos Verdes Municipal Code."

The "City Attorney's Impartial Analysis of Proposition CC" told the voters as follows:

"The ballot proposition submitted to the voters seeks to validate and reenact the City's existing utility user tax that was adopted by the City Council on September 21, 1993.

"The utility user tax is a tax on the use of telephone, electricity, cogenerated electricity, natural gas, and water in the City. The tax is paid by the consumer as part of the consumer's utility bill.

"The ballot proposition limits the amount of the tax to a maximum of 3%, which is the current rate. The City Council can repeal, reduce or adjust the rate of the tax from time to time, but can never increase the tax above the 3% cap without additional voter approval. [¶] . . . [¶]

"The City's utility user tax is a general tax, and the revenues from the tax are placed in the City's general fund. General taxes are taxes that are not limited to a specific purpose and are used for general city functions, such as law enforcement, street maintenance, and parks and recreation services.

"The ballot proposition is proposed in response to a recent California Supreme Court decision. When the City Council adopted the utility user tax in 1993, courts had ruled that general taxes could be adopted by a city council without additional voter approval. The California Supreme Court recently overturned those earlier decisions, holding that general taxes require voter approval.

"The City Council has proposed this ballot proposition to allow the voters the opportunity to validate and approve the City's existing utility user tax. The tax currently generates revenues of approximately $1,500,000 per year for the City. The proposition requires approval by a majority of the voters voting at the election.

"A 'yes' vote on the proposition ratifies the past collection of the utility user tax and authorizes the continued collection of the tax. A 'no' vote will result in the tax no longer being collected and

possible liability to the City to refund sums previously collected under the existing utility user tax."

The ballot materials did not include the text of the proposed municipal code, but advised voters that, "If you desire a complete copy of Chapter 3.30 of the Rancho Palos Verdes Municipal Code, which is entitled 'Utility User Tax' and is referred to as Exhibit '1' in the Ordinance being proposed by [City Council], please call the City Clerk's office . . . and a copy will be mailed at no cost to you."

The voters approved Ordinance CC on November 5, 1996.

III.
Internal Revenue Code
Sections 4251 and 4252

When the City adopted Ordinance CC in 1996, section 4251 of the Internal Revenue Code (IRC) imposed a tax (sometimes referred to as a "federal excise tax") on, among other things, "local telephone service" and "toll telephone service." (26 U.S.C. § 4251(b)(1)(A)–(B).) Section 4252(b) of the IRC defined "[t]oll telephone service" as:

"(1) a telephonic quality communication for which (A) there is a toll charge *which varies in amount with the distance and elapsed transmission time of each individual communication* and (B) the charge is paid within the United States, and

"(2) a service which entitles the subscriber, upon payment of a periodic charge (determined as a flat amount or upon the basis of total elapsed transmission time), to the privilege of an unlimited number of telephonic communications to or from all or a substantial portion of the persons having telephone or radio telephone stations in a specified area which is outside the local

telephone system area in which the station provided with this service is located." (26 U.S.C. § 4252(b), italics added.)[1]

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[1] When sections 4251 and 4252 of the IRC were adopted in 1965, only AT&T provided long distance telephone service. (*National Railroad Passenger Corp. v. U.S.* (D.C. Cir. 2005) 431 F.3d 374, 375 (*NRPC*).) AT&T offered two billing plans: "The first, Message Toll Service (MTS), charged each individual call based on duration, distance traveled, and time of day. Under the second plan, Wide Area Telephone Service (WATS), customers purchased blocks of usage time for a flat fee. WATS customers paid either a flat monthly rate for an unlimited number of calls and minutes or a lower rate for up to fifteen hours of calling plus a further charge for each additional hour." (*Id.* at p. 375.) Congress designed IRC section 4252(b)(1) to cover MTS, and section 4252(b)(2) to cover WATS, such that "section 4252(b) covered *all* long-distance services existing in 1965." (*NRPC*, *supra*, at p. 375, italics added.)

By 1979, some long distance telephone service was billed based on only the length of telephone calls made by the user, without regard to distance. In a 1979 ruling, the Internal Revenue Service concluded that a long distance telephone call for which the charge varied with elapsed transmission time but not with distance constituted "toll telephone service" within the meaning of IRC section 4252(b)(1). The Internal Revenue Service ruling explained: "The toll charges described in [IRC] section 4252(b)(1), that vary in amount with both distance and elapsed transmission time of the individual communication, reflect Congress' understanding of how the charges for long distance calls were computed at the time the section was enacted. The intent of the statute would be frustrated if a new type of service otherwise within such intent were held to be nontaxable merely because charges for it are determined in a manner which is not within the literal language of the statute." (Rev. Rul. 79-404, 1979-2 C.B. 382.)

Until 2006, the Internal Revenue Service (IRS) interpreted sections 4251 and 4252 of the IRC to apply to *all* telephone service, with the limited exception of those services specifically exempt pursuant to IRC section 4253.[2] (Notice 2005-79, 2005-46 I.R.B. 952–953.) In 2005 and 2006, however, telephone service providers and customers challenged the application of IRC sections 4251 and 4252 to long distance telephone plans whose fees did not vary according to *both* "the distance and elapsed transmission time of each individual communication"—e.g., to cell phone plans that charged customers according to the length of calls, without regard to the distance of the transmission. Five federal circuit courts agreed with the challengers, holding that IRC sections 4251 and 4252 did not apply to such plans. (*Reese Bros., Inc. v. United States* (3d Cir. 2006) 447 F.3d 229; *Fortis, Inc. v. United States* (2d Cir. 2006) 447 F.3d 190; *NRPC*, *supra*, 431 F.3d 374; *OfficeMax, Inc. v. United States* (6th Cir. 2005) 428 F.3d 583; *American Bankers Ins. Group v. United States* (11th Cir. 2005) 408 F.3d 1328.)

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[2] A limited statutory exemption from the tax imposed by IRC section 4251 was provided in IRC section 4253 for public pay phone operators, news services, communications companies, service members in combat zones, international organizations, state and local governments, and certain nonprofit organizations. (26 U.S.C. § 4253.)

Neither party has suggested that the exemptions set out in IRC section 4253 are relevant to any of the issues before us. Thus, for ease of discussion, we will refer to the federal excise tax, as it was enforced by the IRS until mid-2006, as having taxed "all" telephone service.

In June 2006, the IRS issued Notice 2006-50, which stated that in light of the holdings of the five federal circuit court cases, it would no longer collect federal excise taxes on any "long distance" or "bundled" service. "Long distance service" was defined as "telephonic quality communication with persons whose telephones are outside the local telephone system of the caller." "Bundled service" was defined as "local and long distance service provided under a plan that does not separately state the charge for the local telephone service." (Notice 2006-50, 2006-25 I.R.B. 1141-1144.) In January 2007, the IRS issued Notice 2007-11, which clarified and modified Notice 2006-50. (Notice 2007-11, 2007-5 I.R.B. 405–406.)

IV.

City Council Ordinance 443

In September 2006, the City Council adopted the 2006 ordinance. The recitals to the 2006 ordinance state that "for ease of administration and the convenience of the telephone communication service providers," the Rancho Palos Verdes Municipal Code had defined telephone communications services by referring to federal excise tax law. Until May 25, 2006, the IRS had administered the federal excise tax "in a manner consistent with both Revenue Ruling 79-404[3] and the manner in which the City intended to administer and apply its tax on telephone communication services, including applying the Federal Excise Tax to long-distance charges which varied in amount with either distance or elapsed transmission time of the involved communication." However, the IRS's revised interpretation of the federal excise tax, as expressed in IRS Notice 2006-50, announced that after July 31, 2006, the IRS

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[3] See footnote 1, *ante*.

would no longer apply the federal excise tax to long distance charges and bundled long distance service.

The recitals further state that "it has always been and continues to be the City's intent that its tax on telephone communication services be applied to: (1) long-distance charges which vary in amount either by elapsed transmission time or with distance, or both, and (2) to bundled long-distance and local charges provided under a single plan that does not separately state the charges for local telephone services." Further, "the interpretation of the Federal Excise Tax embodied in IRS Notice 2006-50 is inconsistent with both the original legislative intent of the City's telephone user tax and the manner in which the City has historically imposed its telephone user tax [¶] . . . [and] the City Council wishes to continue to impose the utility user tax on telephone communication services in a manner that is consistent with how it has been historically imposed." Therefore, the ordinance "clarifies and restates the type of telephone service that is subject to the tax without reference to the Federal Excise Tax and does not increase the tax or change or expand the type of telephone services that are subject to the tax."

The 2006 ordinance omitted section 3.30.040, subsection (C) of the Rancho Palos Verdes Municipal Code, which had exempted from the utility user tax services that are "exempt from or are not subject to the tax imposed under Section 4251 of Title 26 of the United States Code." The ordinance also added a new section 3.30.040, subsection (B), which provided that the utility user tax would not apply to specifically exempted services, such as telephone service originating within a combat zone by a member of the armed services, paid for by a nonprofit hospital, a nonprofit

educational organization, or an international organization, or used in the collection of news for the public press.

The ordinance further stated: "Because the provisions of the Rancho Palos Verdes Municipal Code, as amended by this ordinance, do not alter the amount of the City's telephone user tax, do not expand the application of the tax, and are substantially the same as the previous provisions of the Code as they read immediately prior to the adoption of the ordinance, the amendments made by this ordinance shall be construed as continuations of the earlier provisions and not as new enactments."

The City suspended collection of the telephone user tax in August 2014, and repealed it in May 2015.

V.

The Present Litigation

A. Complaint and First Amended Complaint

Plaintiff filed the present action on September 22, 2014, and filed a first amended complaint on February 20, 2015. The City demurred to the first amended complaint, and the trial court sustained the demurrer with leave to amend.

B. Second Amended Complaint

Plaintiff filed the operative second amended complaint on June 29, 2015. It alleged as follows: Prior to 2006, the Rancho Palos Verdes Municipal Code excluded from its utility user tax services "exempt from or not subject to the tax imposed under sections 4251, 4252, and 4253 of Title 26 of the United States Code ('Federal Excise Tax'). Thus, any services not taxable under the Federal Excise Tax [could not] be lawfully taxed by the City," and telephone service billed at rates "that do not vary with both distance and transmission time, therefore, . . . fall outside of the

Federal Excise Tax, and hence, the [utility user tax]." In 2006, without voter approval, the City amended the utility user tax by striking the reference to the federal excise tax. The 2006 ordinance violated Propositions 62 and 218, which provide that no local government may impose a general tax unless such tax is approved by the voters.

The second amended complaint asserted that the City's actions gave rise to six causes of action: (1) declaratory relief, (2) money had and received, (3) unjust enrichment, (4) writ of mandamus, (5) violation of Government Code section 53723 (Proposition 62), and (6) violation of the California Constitution, Article XIII, section C (Proposition 218). Plaintiff sought a declaration that the utility user tax had been illegally applied and collected, an accounting of the funds "illegally collected under the guise of the [utility user tax]," a writ of mandate requiring the City to provide a constitutionally adequate legal remedy to taxpayers, an order that the City account for and return the taxes illegally collected, prejudgment interest, and attorney fees.

C. City's Demurrer to Second Amended Complaint

The City demurred to the second amended complaint. On April 6, 2016, the court heard joint argument on the demurrers in the present case and in a related case, *Gonzalez v. City of Norwalk*, case No. BC553119, in which the plaintiffs challenged a change to the telephone user tax passed by the Norwalk City Council.

The court sustained the demurrers in both actions without leave to amend. With respect to *Gonzalez v. City of Norwalk*, the court explained as follows:

"[Plaintiffs'] . . . argument is this: [Proposition 62] provides that cities cannot 'impose' a general tax unless they submit that

tax to the city's electorate, which Norwalk did not do in 2007. [Plaintiffs] therefore would conclude the Norwalk tax is invalid.

"[Plaintiffs'] logic is incorrect. Norwalk voters approved [the] 5.5% phone tax in 2003. The City Council's 2007 deletion of the federal reference changed an invisible legal detail in an old and voter-approved tax. The deletion did not impose a new tax. [Plaintiffs do] not allege the 2007 deletion had the effect of costing taxpayers more tax dollars. Before and after the 2007 deletion, as [plaintiffs] conceded in oral argument, the 5.5% tax on monthly cell phone bills remained the same. As far as taxpayers were concerned, then, the deletion had no practical or discernible effect. The Norwalk City Council thus did not 'impose' a phone tax in 2007. This claim fails.

"[Plaintiffs'] constitutional argument likewise fails. [Their] constitutional argument is as follows: Section 2(b) of Article [XIII C] of the California Constitution specifies that no local government may 'impose, extend, or increase' any general tax unless voters approved the tax. [Plaintiffs say] Norwalk indeed did 'impose,' 'extend,' and 'increase' this tax in 2007. But Norwalk did not 'impose' this tax in 2007, as the previous paragraph established. Nor did it 'increase' the tax, because the level and the size of the tax remained exactly the same.

"That leaves us with the third constitutional verb: 'extend.' Did the 2007 City Council action 'extend' the phone tax? The answer is no.

"To construe the word 'extend,' it is proper to consult the Proposition 218 Omnibus Implementation Act, which the Legislature passed in response to Prop 218. Our Supreme Court mentioned this statute when interpreting California's Constitution. (See *Greene v. Marin County Flood Control &*

Water Conservation Dist. (2010) 49 Cal.4th 277, 290–291 (ultimate constitutional interpretation authority belongs to the judiciary, which may consult a contemporaneous construction of the constitutional provision made by the Legislature, including the Proposition 218 Omnibus Implementation Act).)

"This statutory interpretive aid states that 'extended' means a decision by local government 'to extend the stated effective PERIOD for the tax or fee or charge, including, but not limited to, amendment or removal of a sunset provision or expiration date.' (Government Code 53750, subd. (e) (emphasis added).)

"The City Council did not extend the stated effective period of the Norwalk cell phone tax in 2007. This tax was a permanently ongoing tax when the voters approved it in 2003. So it remained in 2007. The 2007 action did not extend the period of the tax. Nor did the 2007 action extend the tax to more taxpayers or to more tax bills. As far as taxpayers paying tax bills could see in 2007, nothing changed.

"[Plaintiffs'] claims have no legal validity. . . . The demurrer is sustained without leave to amend because [plaintiffs have] made no attempt to suggest [they] can amend [their] pleading to greater effect."

The court then made the same ruling with respect to the City's demurrer in the present case: "The same analysis invalidates Sharon Yarber's case against the City of Rancho Palos Verdes. The briefs in the two case[s] are, for the most part, word-for-word identical. There are some factual differences between the two cities, of course, but they are immaterial to the legal analysis."

A judgment of dismissal was entered on April 20, 2016, and notice of entry of judgment was served on April 25, 2016. Plaintiffs timely appealed.

CONTENTIONS

Plaintiff contends that when the City Council adopted the 2006 ordinance, which deleted the reference to the federal excise tax from the Rancho Palos Verdes Municipal Code, it unlawfully "imposed, extended, or increased a local tax without voter approval" in violation of Propositions 62 and 218.

The City contends the voters approved a three percent utility user tax, and the 2006 ordinance merely made a minor change to the utility user tax provisions to ensure that the tax approved by the voters in 1996 remained the same. Accordingly, the City Council's adoption of the 2006 ordinance did not impose, extend, or increase a tax without voter approval in violation of Propositions 62 and 218.

STANDARD OF REVIEW

"On appeal from an order of dismissal after an order sustaining a demurrer, the standard of review is de novo: we exercise our independent judgment about whether the complaint states a cause of action as a matter of law." (*Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 439.) Our review of the trial court's interpretation of a statute or constitutional provision is also de novo. (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933–934 (*California Cannabis Coalition*).)

DISCUSSION

I.

The Legal Framework: Propositions 62 and 218

In 1986, California voters passed Proposition 62, which, as subsequently codified in Government Code section 53723, requires local governments to seek voter approval of all new general taxes. It provides: "No local government, or district, whether or not authorized to levy a property tax, may *impose any general tax* unless and until such general tax is submitted to the electorate of the local government, or district and approved by a majority vote of the voters voting in an election on the issue." (Gov. Code, § 53723, italics added.)

In 1996, voters passed Proposition 218, which added to the California Constitution the requirement that local governments seek voter approval of new general and special taxes. Proposition 218 provides: "No local government may *impose, extend, or increase any general tax* unless and until that tax is submitted to the electorate and approved by a majority vote. A general tax shall not be deemed to have been increased if it is imposed at a rate not higher than the maximum rate so approved. . . ." (Cal. Const., art. XIII C, § 2, subd. (b), added by initiative measure (Prop. 218, § 3, approved Nov. 5, 1996), italics added.)

"A 'general tax' is one 'imposed for general governmental purposes' ([Cal. Const., art. VIII C], § 1, subd. (a)), which courts have interpreted to mean a tax whose revenues are placed in the taxing jurisdiction's general fund, thus making them available for any and all governmental purposes. (*Weisblat v. City of San Diego* (2009) 176 Cal.App.4th 1022, 1039; *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2003) 106 Cal.App.4th 1178,

1185.)" (*Chiatello v. City and County of San Francisco* (2010) 189 Cal.App.4th 472, 479.) A "local government" is "any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity." (Cal. Const., art. XIII C, § 1, subd. (b).)

II.
What Is And Is Not in Dispute

There are several issues on which the parties agree. It is undisputed that the utility user tax is a "general tax" and the City is a "local government" within the meaning of Propositions 62 and 218. It also is undisputed that the 2006 ordinance was adopted by the City Council without voter approval. And, it is undisputed that the 2006 ordinance eliminated the exemption for telephone service not subject to the federal excise tax (26 U.S.C. § 4251 et seq.).

The crux of the parties' dispute is the effect of the 2006 ordinance—specifically, whether the elimination of the reference to IRC section 4251 had the effect of "impos[ing]" a tax within the meaning of Proposition 62, or of "impos[ing]," "extend[ing]," or "increas[ing]" a tax within the meaning of Proposition 218.

Plaintiff urges that the 2006 ordinance significantly expanded the kinds of telephone service subject to the utility user tax. She contends that when the voters approved Ordinance CC in 1996, they "specifically voted *not* to tax services that were exempt from taxation under the Federal Excise Tax." Telephone service was taxable under the federal excise tax only if it "varie[d] in amount with the distance *and* elapsed transmission time;" (italics added) and thus plaintiff urges that as adopted, the utility user tax did not apply to cellular telephone service that "provide[d] local and long distance service for either a flat

monthly fee or a charge that varie[d] with the elapsed transmission time for which the service [was] used." The 2006 ordinance applied the utility user tax to *all* telephone service, and thus it significantly expanded the tax's reach.

The City contends that the 2006 ordinance did not make any substantive change to the municipal utility user tax. It asserts that in 1996 the voters approved a three percent tax on all telephone service billed to City residents, and "the services taxed under the [telephone utility tax], and the amount paid in taxes remained the same before and after" 2006. Accordingly, the City urges that while the 2006 ordinance made technical changes to the utility user tax, it did not extend the tax to any telephone service not already subject to it.

Before we turn to a consideration of the effect of the 2006 ordinance on the City's utility user tax, we briefly address an issue to which the parties devote significant portions of their appellate briefs—the distinctions between the terms "*impose*," "*extend*," and "*increase*," as used in Proposition 218. Although these terms are not synonymous, the differences between them need not detain us here. The key issue before us is whether the 2006 ordinance subjected Palos Verdes residents to a tax to which they were not already subject under the initiative approved by the voters in 1996. If it did, we need not determine whether such tax was effectuated through an imposition, extension, or increase in order to decide that the 2006 ordinance violated Propositions 62 and 218—and if it did not, the distinctions between the terms are similarly immaterial.

We therefore now turn to the significant question before us: whether the 2006 ordinance established a *new* tax—i.e., whether it subjected telephone users or plans to a tax to which they

previously had not been subject—or instead continued an *existing* tax already approved by the voters.

III.
As Enacted by the Voters in 1996, Measure CC Imposed a User Tax on *All* Telephone Service

A. Legal Standards

" 'When interpreting a [statute or a] provision of our state Constitution, our aim is "to determine and effectuate the intent of those who enacted the [statute or] constitutional provision at issue." [Citation.] When, as here, the voters enacted the provision, their intent governs. [Citation.] . . .' " (*Paland v. Brooktrails Township Community Services Dist. Bd. of Directors* (2009) 179 Cal.App.4th 1358, 1368–1369.)

To determine the voters' intent, "we first analyze provisions' text in their relevant context, which is typically the best and most reliable indicator of purpose. (*Larkin v. Workers' Comp. Appeals Bd.* (2015) 62 Cal.4th 152, 157; *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 321 [when interpreting voter initiatives, ' "we begin with the text" '].) We start by ascribing to words their ordinary meaning, while taking account of related provisions and the structure of the relevant statutory and constitutional scheme. (*Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 293; *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 212 (*Bighorn*).) If the provisions' intended purpose nonetheless remains opaque, we may consider extrinsic sources, such as an initiative's ballot materials. (*Larkin*, at p. 158.) Moreover, when construing initiatives, we generally presume electors are aware of existing law. (*In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11

(*Lance W.*).)" (*California Cannabis Coalition*, *supra*, 3 Cal.5th at pp. 933–934.)

B. When Palos Verdes Voters Passed Ordinance CC in 1996, They Expressed a Clear Intent to Impose a Three Percent Tax on All Telephone Service

Prior to 1996, the City taxed telephone, electric, and gas utility services at the rate of three percent. In 1996, the City Council agreed to allow the voters to ratify the City's continued collection of the utility user tax. That the voters intended by passing Ordinance CC to impose a three percent tax on *all* telephone service is supported by all of the following:

(1) Between 1986 and 1996, Palos Verdes residents had been paying a user tax on all telephone service, including long distance and bundled service. The 1996 sample ballot told voters that if passed, Ordinance CC would "validate and *continue the collection of the existing 3% utility users tax*." Further, "The adoption of Chapter 3.30 of Title 3 of the Rancho Palos Verdes Municipal Code, *which imposes a tax of three percent (3%) on utility users in the City is hereby validated and approved* to the full extent permitted by law. . . . This Section . . . is intended to authorize *the continued collection of the tax*, to validate the prior adoption of the tax, and to validate taxes previously collected pursuant to Chapter 3.30 of the Rancho Palos Verdes Municipal Code." (Italics added.) Because Palos Verdes residents had been paying a user tax on all telephone service since 1986, they reasonably could have understood the language of the sample ballot in only one way: That the effect of the initiative was to allow the City to continue to collect a three percent tax on *all* telephone service.

(2) The "City Attorney's Impartial Analysis of Proposition CC" told the voters that the utility user tax "is a tax on the use of telephone, electricity, cogenerated electricity, natural gas, and water in the City. . . . [¶] . . . [¶] The City Council has proposed this ballot proposition to allow the voters the opportunity to validate and approve the City's existing utility user tax. . . . [¶] A 'yes' vote on the proposition ratifies the past collection of the utility user tax and authorizes the continued collection of the tax." Palos Verdes residents necessarily would have understood the City Attorney's analysis to mean that the effect of passing Ordinance CC was that the City would continue to enforce the utility user tax as it then was doing—i.e., by collecting a three percent tax on all telephone service.

(3) As enacted in 1996, paragraph (C) of section 3.30.040 of the Rancho Palos Verdes Municipal Code exempted telephone charges "exempt from or not subject to the tax imposed under . . . Section 4251 of Title 26 of the United States Code." "The adopting body is presumed to be aware of existing laws and judicial construction thereof." (*In re Lance W.*, *supra*, 37 Cal.3d at p. 890, fn. 11.) Thus, we are required to presume that in 1996, the voters were aware that the IRS then interpreted IRC section 4251 to apply to nearly all telephone service (with limited exemptions described above and not relevant to this discussion—see footnote 2, *ante*), and that the voters intended the utility user tax to have the same reach.

Taken together, the language of the ballot initiative, the "City Attorney's Impartial Analysis of Proposition CC," and the language of Rancho Palos Verdes Municipal Code section 3.30.040 all compel the same conclusion—that the voters who

enacted Ordinance CC intended to impose a three percent tax on *all* telephone service billed to Palos Verdes residents.

IV.

The 2006 Change in Federal Law Did Not Retroactively Change the Meaning of Rancho Palos Verdes Municipal Code Section 3.30.040

Plaintiff does not disagree that the voters who passed Ordinance CC in 1996 would have understood that it imposed a three percent tax on all telephone service billed to Palos Verdes residents. She nonetheless urges that Palos Verdes' tax of long distance and bundled (i.e., combined local and long distance) telephone services, both *before* and *after* 2006 was unlawful. We understand plaintiff's theory to be as follows: (1) When Palos Verdes voters approved a municipal telephone tax in 1996, they exempted from taxation any telephone services not taxable under section 4251 of the IRC. (2) In 2005 and 2006, five federal courts held that IRC sections 4251 and 4252 did not permit the IRS to collect federal taxes on some long distance telephone service, and the IRS revised its tax collection practices accordingly. (3) The interpretation of federal tax law announced by federal courts in 2005 and 2006 meant that the City's municipal telephone tax, passed by the voters in 1996, had *never* permitted the collection of municipal taxes on all telephone service. (4) Therefore, when the City Council deleted the reference to federal tax law in 2006, it changed City law because it *for the first time* authorized the collection of municipal taxes on all telephone service.

Plaintiff's unstated premise is that the change in the interpretation of federal law *retroactively* changed the meaning of the Rancho Palos Verdes Municipal Code. In other words, plaintiff asserts that when the federal courts in 2005 and 2006

limited the ability of the IRS to collect federal excise taxes under IRC sections 4251 and 4252, they altered the meaning of the Rancho Palos Verdes Municipal Code—and did so not only prospectively, but retrospectively as well. This appears to be the basis for plaintiff's assertion that even prior to 2006, the City had been "unlawfully collecting a telephone users tax" on all telephone service "without voter approval or legal authorization."

Although this contention is the linchpin of plaintiff's analysis, plaintiff does not cite any legal authority to support it. We therefore may deem the contention waived. (E.g., *Orange County Water District v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 383 [" ' "Appellate briefs must provide argument and legal authority for the positions taken. 'When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.' " [Citation.] "We are not bound to develop appellants' argument for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived." ' [Citations.]"].)

Even if plaintiff had not waived this argument, we would find it unpersuasive. " 'It is a well established principle of statutory law that, where a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions are incorporated in the form in which they exist *at the time of the reference and not as subsequently modified*, and that the repeal of the provisions referred to does not affect the adopting statute, in the absence of a clearly expressed intention to the contrary.' " (*Palermo v. Stockton Theatres* (1948) 32 Cal.2d 53, 58–59, italics added.) Thus, because the Rancho Palos Verdes Municipal Code specifically referenced IRC section 4251, it

incorporated that section's exemptions as they existed when the voters passed Measure A in 2003.

Further, as we have said, when interpreting a ballot initiative, our primary purpose is to ascertain and effectuate the voters' intent. (*People v. Park* (2013) 56 Cal.4th 782, 796; *People v. Briceno* (2004) 34 Cal.4th 451, 459; *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901.) Lacking clairvoyant powers, the Palos Verdes voters cannot have intended to incorporate an interpretation of a federal statute that *had not yet been promulgated*.

As discussed above, the central purpose of Ordinance CC was to effectuate the continued collection of the utility user tax to "adequately maintain roads, preserve police services and protect property values." We decline to conclude that the Palos Verdes voters intended in 1996 to incorporate federal law into Ordinance CC in a manner that would have undermined its central purpose.

Accordingly, we conclude that the 2006 change in the interpretation of federal law did not mean, as plaintiff suggests, that Palos Verdes "had unlawfully been collecting a telephone users tax on services exempt from taxation under . . . the 1996 tax ordinance passed by the City's voters." In 1996, and 2006, and every year in between, Rancho Palos Verdes Municipal Code section 3.30.040 meant precisely what the voters understood and intended it to mean—that the three percent utility user tax applied to *all* telephone service.

V.

The 2006 Ordinance Therefore Did Not Impose a New Tax on Telephone Service

Having concluded that the change in federal law did not retroactively change the meaning of Rancho Palos Verdes

Municipal Code section 3.30.040, we now reach the final question raised by this appeal: Whether the 2006 ordinance imposed, extended, or increased the utility user tax without voter approval. It did not. As we have discussed, *before* 2006, section 3.30.040, as approved by the voters in 1996, applied a three percent utility user tax to all telephone service. *After* the City Council adopted the 2006 ordinance, section 3.30.040 continued to apply a three percent utility user tax to all telephone service. Accordingly, the 2006 ordinance did not "impose," "extend," or "increase" a general tax within the meaning of Propositions 62 or 218.

VI.
Our Conclusion Is Consistent with *AB Cellular LA, LLC v. City of Los Angeles*

Plaintiff urges that *AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747 (*AB Cellular*) compels the conclusion that the 2006 ordinance constituted an unlawful increase in local taxes. We disagree.

In *AB Cellular*, the Los Angeles City Council adopted an ordinance that, as applied, including through instructions issued by the city's tax and permit division, taxed fixed monthly cell phone fees, but not "airtime" fees—i.e., fees charged for the number of minutes during the billing period that customers used their cellular service to make phone calls. (*AB Cellular*, *supra*, 150 Cal.App.4th at p. 757.) Subsequently, after the passage of Proposition 218, the city issued new instructions directing cell phone providers to collect a tax on both fixed monthly fees and airtime charges. (*Ibid.*) The city projected that the revised instructions would increase 2003 tax revenues by $1 million and 2004 tax revenues by $4 million. (*Ibid.*)

Cell phone carriers filed a petition for writ of mandate, seeking a declaratory judgment that the revised instructions violated Proposition 218. (*AB Cellular*, *supra*, 150 Cal.App.4th at p. 757.) Both the trial court and the Court of Appeal agreed that the revised instructions were not permitted by Proposition 218. (*Id.* at p. 758.) The Court of Appeal explained that Proposition 218 required voter approval of all tax "increases," which included revisions in the methodology by which a tax is calculated if the revision results in an increased tax being levied on any person. "The word 'calculated' denotes the math behind a tax. The dictionary definition of 'revision' is 'alteration.' In practical terms, a tax is increased if the math behind it is altered so that either a larger tax rate or a larger tax base is part of the calculation." (*Id.* at p. 763, fn. omitted.) Accordingly, because the revised instructions changed the taxing methodology in a manner that increased city revenue without voter approval, the instruction violated Proposition 218. (*Id.* at p. 767.)

Applying *AB Cellular*'s analysis to the present case compels the conclusion that the adoption of the 2007 ordinance did not violate Proposition 218. Under *AB Cellular*, a revision to the methodology by which a tax is calculated constitutes a tax "increase" only if it increases the amount levied on taxpayers. The *AB Cellular* approach is a practical one: It asks not simply whether a taxing agency has revised the methodology by which a tax is calculated, but also whether that revised methodology has resulted in a greater tax burden for taxpayers. In the present case, although the 2006 ordinance changed the language of section 3.30.040, it had no effect on the *amount* of the telephone tax paid by taxpayers—after 2006, as before, taxpayers paid a three percent user tax on all telephone service. Thus, under the

practical approach articulated in *AB Cellular*, the 2006 ordinance was not a tax increase.

DISPOSITION

The judgment is affirmed. The City is awarded its appellate costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

BACHNER, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.