DALEY & HEFT LLP
ATTORNEYS AT LAW
462 STEVENS AVENUE, SUITE 201
SOLANA BEACH, CALIFORNIA 92075-2099

MEMORANDUM

TO: Honorable Mayor and City Councilmembers
Glen Googins, City Attorney
Bart Miesfeld, Senior Assistant City Attorney

DATE: July 25, 2014

FROM: Scott Noya, Partner, Daley & Heft, LLP

SUBJECT: Proposed Amendment to C.V.M.C. section 3.44.030(B)

INTRODUCTION

This memorandum relates to the proposed amendment to C.V.M.C. section 3.44.030(B) clarifying the original intent of that section's exclusion of "mobile telephone service" from charges subject to taxation. The issues addressed below include: 1) the legal rules for proper interpretation of original intent of a statute or ordinance's language in historical context; 2) the technological and legal distinctions between the "mobile telephone" radio system in existence at the time of original ordinance adoption in 1970 compared to modern wireless telecommunication services which rely on local public infrastructure; and 3) why modern wireless telecommunications remain constitutionally taxable under the existing ordinance.

A. 1970 ENACTMENT OF TUT ORDINANCE SECTION 3.44.030(B) "MOBILE TELEPHONE" LANGUAGE IS PROPERLY VIEWED IN HISTORICAL CONTEXT OF THEN-EXISTING TECHNOLOGY

Proper interpretation of language in a statute or ordinance requires application of the common understanding of terms contemporaneous with usage at the time of the enactment. This requires viewing the terms as used in their historical context.

The original TUT ordinance enactment of July 7, 1970 included language excluding from taxation any charges for services paid for by users of 'mobile telephone and marine telephone service'. That original exclusionary language in section 3.44.030(B) was never amended and remains part of the TUT ordinance.

In 1970, at time of City's original enactment of TUT ordinance section 3.44.030(B), the Federal Communications Act ("FCA") defined "mobile service" as "a service of radio-communication between mobile and land stations or between mobile stations."[1] (Marine or 'maritime mobile' telephone service was defined in other relevant provisions.)

This simple definition reflected the technology of the time. MTS was little more than a radio service that allowed mobile users to communicate with telephone company operators, through an antenna located up to 50 miles away. This is in stark contrast to modern cellular services of today, as discussed in more detail in sections following below.

The language of TUT section 3.44.030(B) must be viewed in the context of then-existing 1970 technology and usage of the term "mobile telephone service". This is not only due to application of rules of common sense[2]; it is the only proper interpretation under both California and Federal law.

For example, California Government Code section 9605, addressing the presumptive effect of legislative enactment of an amendment to an existing code, provides in pertinent part: "Where a section or part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form. *The portions which are not altered are to be considered as having been the law from the time when they were enacted*." (Italics added.)

According to the instructive provisions of Government Code section 9605, although other portions of the TUT ordinance were modified over time, because no changes have ever been made to section 3.44.030(B) it's language must be considered as of the time of original enactment.[3]

Federal rules of interpretation are likewise instructive on the proper context for interpreting language used in legal codes. In a very recent Ninth Circuit Court of Appeal decision, the court

[1] 47 C.F.R. 21.1 [See Appendix Exhibit 'A': 1970 then-existing version of Title 47 CFR Part 21, "Domestic Public Radio Services (Other Than Maritime Mobile)" Subpart A – Definitions, definition of "mobile service" at p. no. 8]

[2] Common sense dictates that since today's wireless telephone technology did not exist in 1970, then the City Council enacting section 3.44.030(B) of the TUT ordinance could not have intended to specifically exclude from taxation the consumption of such future, but then non-existent and unknown, wireless telephone services.

[3] California case law governing interpretation and definition of codified terms following partial amendment to other legislative provisions is consistent. The court in *In re Lance W.* (1985) 37 Cal.3d 873, at 895, said that the purpose of Government Code "Section 9605 is to avoid an implied repeal and reenactment of unchanged portions of an amended statute, ensuring that the unchanged portion operates without interruption."

held that interpretation of terms not otherwise specifically defined must "conform with the *common understanding* held *contemporaneous* with the enacting" legislative body.[4]

Under these rules for interpretation, Chula Vista's TUT ordinance section 3.44.030(B) use of the term "mobile telephone" must be viewed in the context of technology then in existence when it was enacted in 1970 – that being MTS, not today's modern wireless phone service. That proper interpretation conforms to the ordinary, contemporary and common meaning of "mobile telephone" as it existed at the time.

Any subsequent amendments over the years only affecting <u>*other*</u> portions of the TUT ordinance cannot be properly interpreted today to effectuate a change in the 1970 "mobile telephone" language of section 3.44.030(B). The language used in that section must only be viewed in the context of the then-current understanding of what was a mobile telephone in 1970. Since today's modern wireless (cellular or digital) phones did not exist at the time of enactment, the TUT ordinance's "mobile telephone and marine telephone service" language cannot be properly applied to exclude modern day wireless services from the definition of taxable charges.

B. THE TECHNOLOGICAL DIFFERENCES BETWEEN THE MOBILE TELEPHONE SYSTEM OF 1970 AND MODERN WIRELESS SERVICES

As discussed below, the Mobile Telephone System ("MTS") in existence in 1970 had little need for public infrastructure, and no such infrastructure was located in Chula Vista. Users operated with anonymity, and the only connection to a local municipality was the physical presence of the caller.

MTS activity had little or no 'nexus' with the City of Chula Vista in 1970, and was therefore not taxable.

In contrast, modern wireless services cannot exist without local infrastructure.[5] As with practically every other city in the country, Chula Vista has wireless (cellular) base stations throughout the City located within public infrastructure or on public property.[6]

---

[4] *Joffe v. Google, Inc.*, 2013 U.S. App. LEXIS 18781 (9th Cir. Cal. Sept. 10, 2013) (italics added) *slip opinion at p. 14, citing United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998) ("When a statute does not define a term, we generally interpret that term by employing the *ordinary, contemporary*, and *common* meaning of the words that Congress used") (italics added.) Also, at slip opinion p. 24-25, the *Joffe* court held that proper interpretation must be "consistent with the commonsense definition" of the terms used when considered in the "historical context" at the time of Congress's 1986 enactment of the statute there at issue.

[5] *In re U.S. for an Order Authorizing Roving Interception of Oral Commc'ns*, 349 F.3d 1132, 1138 n.12 (9th Cir. 2003) ("Despite the apparent wireless nature of cellular phones, communications using cellular phones are considered wire communications under the [Wiretap Act] statute, because cellular telephones use wire and cable connections when connecting calls.").

Modern wireless phone services are intimately involved with local activity and local public property, rights-of-way and/or infrastructure, which provide the link to directly interconnect with the "public switched network."[7] There exists a direct 'nexus' to the City through use of local public property and infrastructure in order to accommodate provision of modern wireless phone service. For this and other reasons, today's wireless phone services are taxable local activities. MTS was not then, and if it still operated today it would not now be, taxable by City as a local entity.

1. Mobile Telephone Service in 1970 Was a Radio That Could Broadcast a User's Voice to a Telephone Company Operator

In 1970 MTS was the only "mobile" telephone device in existence in California.[8] MTS referred to a specific technology that relied on radio frequencies and manual operator-assisted indirect connection to telephone lines to permit its users to make calls even though they were not physically connected to telephone wires.[9]

With MTS, there was no dial tone or number pad. An MTS user would pick up the mobile handset[10] and push one of the buttons in hope of finding an available channel. Users would manually select a radio frequency via channel selection buttons.[11] If a channel was available,

---

[6] See Appendix Exhibit 'C': City map of Wireless Transmission Facilities located on City of Chula Vista public property as of 2013. This document was prepared by City staff acting under general direction of Michael Meacham, Director of Economic Development, and contains information obtained from City building permit and building inspection records identifying locations of telecommunications equipment within the city limits.

[7] Commercial mobile services is defined as mobile service for profit that makes interconnected service available to the public. Telecommunications Act, *47 U.S.C.S. § 332*(d)(1). Interconnected service is defined as service that is directly "interconnected with the public switched network." *47 U.S.C.S. § 332*(d)(2). The Federal Communication Commission defines "public switched network" as any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services, *47 C.F.R. § 20.3*, which means the public telephone network. *47 C.F.R. § 68.2*. Also See: *Sprint Spectrum, L.P. v. Willoth,,* 176 F.3d 630, 1999 U.S. App. LEXIS 10032 (2d Cir. May 24, 1999).

[8] See Appendix Exhibit 'B': History of Mobile Telephone and Evolution of Wireless Technology, at p. 1-3.

[9] *Chastain v. Am. T. & T.* (1975) 401 F. Supp. 151, 155.

[10] MTS was only available in vehicles at the time, consisting of a radio transmitter handset device that resembled a telephone but with channel frequency selection buttons (instead of rotary dial or keypad) and connected to large trunk-mounted equipment. See Appendix Exhibit 'B': History of Mobile Telephone and Evolution of Wireless Technology, at p. 3, examples of 1970's-era MTS trunk-mounted devices; Also see Appendix Exhibit 'E': Photo of Mobile Telephone System from 1970's era.

[11] *Chastain v. Am. T. & T.* (1975) 401 F. Supp. 151, 155.

then the MTS device would send a broadcast signal to an antenna tower.[12] The tower would then route the MTS broadcast to a local central switch office, where a live operator[13] would connect the MTS user to the public switched telephone network ("PSTN"), i.e. allowing indirect access to the public landline service.[14] When an MTS channel was used in a particular base station's service area, no other MTS users could use that channel.[15]

MTS devices at the time were only available for use in vehicles, and were almost exclusively used by celebrities and the wealthy. MTS was little more than a radio resembling a corded telephone with buttons on it to be used to select channels.[16]

MTS devices were extremely expensive, costing several thousand dollars for the device, and approximately $1 .00 per minute for service. Consequently, MTS was very rare. As late as 1983, less than .08% of the country's population had the privilege of using MTS service.[17]

2. Mobile Telephone Service in 1970 Did Not Rely on Chula Vista Public Property or City Infrastructure

In 1970, there was only one MTS antenna (or "base station") in San Diego County, far from Chula Vista, and it served an area of approximately 50 miles.[18] At that time there was no Mobile Telephone Service transmission tower located in the City of Chula Vista and that MTS service had no impact on the streets, public infrastructure and rights-of-way within Chula Vista.

[12] See Appendix Exhibit 'B': History of Mobile Telephone and Evolution of Wireless Technology, at p. 2, MTS Network Diagram

[13] See news article "Del Mar entrepreneur continues to spearhead innovations that impact worldwide communication"" *Del Mar Times*, by Joe Tash, posted July 14, 2013, (Discussing Del Mar's Arlene Harris, known as the 'First Lady of Wireless' and also wife of Marty Cooper who is credited with inventing the cell phone. As a teenager she worked as a switchboard operator for her parents' mobile communications service company in Los Angeles, connecting calls for the company's 350 or so customers with "MTS" telephones mounted in their car trunks – she listened in to the conversations so she would know when to disconnect and connect calls by plugging cables into the switchboard) available at: http://www.delmartimes.net/2013/07/14/del-mar-entrepreneur-continues-to-spearhead-innovations-that-impact-worldwide-communication/

[14] *Chastain v. Am. T. & T.* (1975) 401 F. Supp. 151, 155.

[15] *Id.*

[16] See Appendix Exhibit 'E': Photo of Mobile Telephone System from 1970's era

[17] See Appendix Exhibit 'B': History of Mobile Telephone and Evolution of Wireless Technology, at p. 7, Table 1

[18] It is believed that the antenna tower serving greater San Diego was located in the eastern part of San Diego, known as Mt. San Miguel, where there were higher elevations that would facilitate the radio transmission.

"Mobile telephone" service or "MTS," as it existed in 1970 when the TUT ordinance was adopted, consisted of technology that had no "nexus" with activities within the City of Chula Vista.

The differences in technology used and in the regulatory terminology over the past forty years also supports the fact that "mobile services" or "MTS" is not akin to the wireless services of today.[19]

3. Modern Wireless Services Rely Heavily on Local Public Property Infrastructure

The historical summary at Appendix Exhibit B shows that MTS has long ago been replaced with modern wireless cellular services.[20] This technology is an obvious departure from the MTS technology in existence at the time the TUT was enacted.

Modern cellular wireless telecommunication services are functionally and technologically distinct from MTS in ways that substantially affect taxability. First, and foremost, cellular telephone services are heavily dependent on local infrastructure. Many of these sites are leased by wireless telecommunications providers directly from the City. Others are leased by private enterprises within City limits. All of these sites, whether on private or public property, require wired interconnections with trunk lines and fiber optic cable located within City rights-of-way.

The "cell" is the cornerstone of the wireless cellular telephone system. A cellular system relies on numerous interconnected base stations, each creating a "cell" of approximately .l-.5 miles.[21] There are approximately 188 wireless transmission facility sites located on City of Chula Vista public property alone.[22] More are located on private property. Each site is comprised of automatic switches and antennas that send and receive signals from wireless phones.[23] These

[19] See footnotes 2, 8 for regulatory definitions cited; Also see Appendix Exhibit 'B': History of Mobile Telephone and Evolution of Wireless Technology, generally and at p. 7-8, Table 1

[20] 47 CFR 22.99: "Cellular service" is defined as a "radio telecommunication service using a cellular system." In turn, a "cellular system" is defined as: An automated high-capacity system of one or more multichannel base stations designed to provide radio telecommunication services to mobile stations over a wide area in a spectrally efficient manner. Cellular systems employ techniques such as low transmitting power and automatic handoff between base stations of communications in progress to enable channels to be reused at relatively short distances. Cellular systems may also employ digital techniques such as voice encoding and decoding, data compression, error correction, and time or code division multiple access in order to increase system capacity.

[21] See Appendix Exhibit 'B': History of Mobile Telephone and Evolution of Wireless Technology, at p. 7, Table I, summarizing the relevant technical and service operation differences between the 1970 mobile telephone service and present day public wireless (cellular) services.

[22] See Appendix Exhibit 'C': City map of Wireless Transmission Facilities located on City of Chula Vista public property as of 2013. Based on City documents, there are approximately 188 sites on public property as of 2013.

[23] See: "base transmitter" definition in modern version of 47 CFR § 22.99.

base stations rely heavily on local infrastructure, public property and/or rights-of-way to operate. In fact, the City maintains licensing agreements with major wireless providers, which allow installation and operation of their equipment on City property, rights-of-way and infrastructure. Even cell sites located on private property require wired interconnections with trunk lines and fiber optic cable located within City rights-of-way.

Wireless telecommunications technology relies upon necessary connections between physical wireline infrastructure and facilities to wireless base stations and networks. Today, only the first and the last 500-1000 meters (the average urban and suburban wireless cell radius distance) of a wireless-to-wireless device call is actually transmitted through the air (for wireless-to-landline calls only the first portion of the call is actually transmitted through the air, and vice-versa for landline-to-wireless calls). The remainder of the telephone call connection is provided through wired infrastructure in a path of facilities that are physically located along city streets and other public places. In essence, a typical intrastate wireless call is 99% wired and 1% wireless.

These wired connections traverse all throughout Chula Vista in a system of conduits and above ground cross-connection access points that are municipally protected, accessed or maintained along public property, rights-of-way and/or local infrastructure. Some of these facilities (as well as electrical power circuits) are brought to public venues in order to co-locate cell towers or rooftop antennas at strategically located points providing optimum coverage or broadband service capacity.

Local cellular sites are the most important technological component of wireless telephone services. The local nature of these sites is the primary reason for cellular technology's success in providing reliable, clear telephone connections with the public switched network from wireless phone devices. Without local cellular sites and the connection to the local wired infrastructure in public right-of-way, wireless telephones would be unable to operate and connect calls. Industry leaders estimate that the number of these local cellular sites will only grow in the future, lending itself to an increasing reliance on City infrastructure and use of local public property.

The use of today's wireless phone service is vitally dependent on the massive network of physical facilities that for decades have been cooperatively placed along or under Chula Vista's civil infrastructure, rights-of-way and/or other public property, which is therefore critical to establish the use of telephone service within the city. In short, today's wireless telephone use continues to connect through wired infrastructure, which is a necessary resource throughout and below the city's surface infrastructure, rights-of-way and other public property.

Because modern wireless phone communications must use landline wire and cable connections to connect calls[24] and rely heavily on local infrastructure, public property and/or rights-of-way, they are intimately tied to local activity.

[24] See *In re U.S.for an Order Authorizing Roving Interception of Oral Commc'ns,* 349 F.3d 1132, 1138 n.12 (9th Cir. 2003) ("Despite the apparent wireless nature of cellular phones, communications using cellular phones are considered wire communications under the [Wiretap Act] statute, because cellular telephones use wire and cable connections when connecting calls.").

C. INTENT OF ORIGINAL ENACTMENT OF THE TUT TO TAX CONSUMPTION OF INTRASTATE TELEPHONE COMMUNICATION SERVICES IN CITY

In 1970, the City first adopted the UUT ordinance (Chula Vista Municipal Code Chapter 3.44) levying a tax based on usage of natural gas, electricity and intrastate telephone communication services.

The City's TUT levies a tax on consumption of intrastate telephone communication services in the city without regard to the particular type of technology one uses to consume these services. Thus, the particular technology or device one uses to consume the specified services does not affect taxability under the TUT.

1. The TUT is Consistent With Taxation Rules Requiring Adequate Nexus to Local Jurisdiction and Avoidance of Infringement on Interstate Commerce Matters Exclusively Under Federal Regulatory Control

In enacting the TUT, the City Council demonstrated intent to tax the consumption of telephone services in the City of Chula Vista consistent with Federal and State statutory and Constitutional limitations.

When the TUT was drafted in 1970, Congress completely occupied the field of regulating telecommunications such that municipal taxation of telecommunications which are purely *interstate* in nature would be void as an infringement on broad federal powers provided under the U.S. Constitution's Commerce Clause (U.S. Const., Art I, Sec. 8, Cl. 3), which prohibits state and local governments from interfering with Congress' plenary right to regulate interstate commerce.

The California Constitution similarly prohibits a municipality from taxing activities outside its borders. A City may tax an activity if the tax is fairly apportioned to the quantum of business actually done in the taxing jurisdiction. A municipality is free to tax a business presence in its jurisdiction by reference to taxable events occurring there.

The basic rule is that a city may not tax activities that do not have an adequate nexus with its jurisdiction or which conflict with federal government regulations on matters of national concern (such as *interstate* telecommunications).

The City Council was faced with two primary legal issues in its initial effort to tax the consumption of telecommunications services: first, the tax could not infringe on Congress' rights to regulate interstate commerce; second, the tax had to have a substantial "nexus" to activities that actually occurred in City limits. With this in mind, the City Council adopted section 3.44.030 of the Chula Vista Municipal Code, which states substantially as follows:

> A. There is imposed a tax upon **every person in the city** using **intrastate** telephone communication services **in the city**. The tax imposed by this section shall be at the rate of five percent of the charges made for such services, and shall be paid by the person paying for such services. Effective on July 1, 1979, said rate shall be increased to six percent of the charges made for such services and shall be paid by the person paying for such service.
>
> B. As used in this section, the term "charges" shall not include charges for services paid for by inserting coins in coin-operated telephones, except that where such coin-operated telephone service is furnished for a guaranteed amount, the amounts paid under such guarantee plus any fixed monthly or other periodic charge shall be included in the base for computing the amount of tax due. **The term "charges" shall not include charges for services paid for by users of mobile telephone and marine telephone service.**
>
> C. Notwithstanding the provisions of subsection (A) of this section, **the tax imposed under this section shall not be imposed upon any person for using intrastate telephone communications services to the extent that the amounts paid for such services are 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").** In the event that the federal excise tax is repealed, this reference to such law, including any related federal regulations, private letter rulings, case law and other opinions interpreting these sections shall refer to that body of law that existed immediately prior to the effective date of such repeal.

(*Emphasis added*).

The apparent intent of the highlighted language above was to keep the ordinance consistent with Federal Commerce laws and regulations and to ensure that the tax had a substantial "nexus" with activities conducted within City limits using local public infrastructure and/or other local public property or rights-of-way.

2. The TUT Levies Tax Based on Consumption and Usage of Intrastate Phone Communications

Chula Vista's UUT is based on consumption and usage by retail customers of the gas, electric and telephone utilities. The City imposes utility taxes for each type of service based solely on the use of a service, be it telephone, electric or gas, so long as the use occurs "in the City". The

ordinance is consistent across all three utilities in that it sets forth the place of service delivery as the determining condition for use tax.

The TUT ordinance states the tax shall only apply to telephone services delivered to "every person in the city using intrastate telephone communication services within the city." Plainly read, all the intrastate telephone communications delivered and used within the City are subject to the telephone utility tax. If one uses the utility service, one is taxed.

3. Modern Wireless Telephone Services are Taxable Under the TUT

For the reasons discussed in the sections above[25], MTS had little or no nexus with the City and was not taxable by Chula Vista, thus explaining the 1970 enactment's exclusion of 'mobile telephone' service from the taxable charges definition in TUT section 3.44.030 (B).

The only potential relationship between the City and MTS technology in 1970 was the possibility of the physical presence of a MTS user within City limits. This minimal connection did not provide, from a legal perspective, a permissible basis to subject such MTS communications to local taxation. Legal experts advise that at that time courts would likely have viewed local imposition of taxes on such MTS communications as an illegal tax on the "privilege" of making a telephone operator-assisted radio call within City limits. This is because there was no tangible nexus to, or use of, local public property, rights-of-way and/or the local public infrastructure.

In contrast, modern wireless telephone services are heavily dependent on local infrastructure and/or public property and, for this and other reasons, are taxable by City. Persons using intrastate wireless communications in the City are consuming those telephone services within the scope of the TUT. Consequently, intrastate wireless phone services are taxable under the TUT.

CONCLUSION

The legal rules for proper interpretation of original intent require that a statute or ordinance's language be viewed in historical context, including technology then in existence, and must conform to the ordinary, contemporary and common meaning of terms used at time of enactment. Today's modern wireless phone service did not yet exist in 1970. Because the only "mobile telephone" service that existed in 1970 at the time of original adoption of the ordinance was defined in the Federal Communications Act (at 47 C.F.R. 21.1), the rules of proper interpretation necessarily provide that was the *only* type of service excluded from charges subject to taxation as described in C.V.M.C. section 3.44.030 (B). Clarifying the original intent of the ordinance's language excluding "mobile telephone" services from taxable charges properly limits the term to its historical meaning as of 1970 consistent with legal rules of interpretation.

[25] And as demonstrated in Appendix Exhibit 'B': History of Mobile Telephone and Evolution of Wireless Technology.

Significant technological and legal distinctions exist between the "mobile telephone" radio systems in existence in 1970 compared to modern wireless telecommunication services. The 1970-era "mobile telephone service" did not rely on Chula Vista public property or City infrastructure, and therefore had no "nexus" providing a constitutional basis for local taxation. In contrast, modern wireless telecommunications services are heavily dependent on local public property, rights-of-way and/or infrastructure in order to function, providing, among others, a legal basis for permissible local taxation of intrastate telephone services consumed within Chula Vista.