LIU, J.

4

S202037

S_____

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

JOHN W. MCWILLIAMS
Plaintiff and Appellant,

v.

CITY OF LONG BEACH,
Defendant and Respondent.

PETITION FOR REVIEW

Of an Unpublished Decision of the Second Appellate District of the
Court of Appeal
Case No. B200831

Reversing a Judgment of the Superior Court of
the State of California for the County of Los Angeles, Case No. BC361469
Honorable Anthony J. Mohr, Presiding

CITY ATTORNEY'S OFFICE
ROBERT E. SHANNON (43691)
J. CHARLES PARKIN (159162)
MONTE H. MACHIT (140692)
333 West Ocean Blvd., 11th Floor
Long Beach, CA 90802-4664
(562) 570-2200
(562) 436-1579 (fax)

COLANTUONO & LEVIN, P.C.
MICHAEL G. COLANTUONO (143551)
SANDRA J. LEVIN (130690)
TIANA J. MURILLO (255259)
300 S. Grand Ave., Suite 2700
Los Angeles, CA 90071-3137
(213) 542-5700
(213) 542-5710 (fax)

S_____

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

JOHN W. MCWILLIAMS
Plaintiff and Appellant,

v.

CITY OF LONG BEACH,
Defendant and Respondent.

PETITION FOR REVIEW

Of an Unpublished Decision of the Second Appellate District of the
Court of Appeal
Case No. B200831

Reversing a Judgment of the Superior Court of
the State of California for the County of Los Angeles, Case No. BC361469
Honorable Anthony J. Mohr, Presiding

CITY ATTORNEY'S OFFICE
ROBERT E. SHANNON (43691)
J. CHARLES PARKIN (159162)
MONTE H. MACHIT (140692)
333 West Ocean Blvd., 11th Floor
Long Beach, CA 90802-4664
(562) 570-2200
(562) 436-1579 (fax)

COLANTUONO & LEVIN, P.C.
MICHAEL G. COLANTUONO (143551)
SANDRA J. LEVIN (130690)
TIANA J. MURILLO (255259)
300 S. Grand Ave., Suite 2700
Los Angeles, CA 90071-3137
(213) 542-5700
(213) 542-5710 (fax)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

The City of Long Beach respectfully petitions for review of an unpublished Opinion of the Second District Court of Appeal, Division Three, filed March 28, 2012[1] from which a Petition for Rehearing was denied April 12, 2012. Plaintiff's Request for Publication was denied April 23, 2012.

QUESTIONS PRESENTED FOR REVIEW

1. Government Code § 905(a) excepts "claims under ... [a] statute prescribing procedures for the refund ... of any tax, assessment fee or charge" from the scope of the Government Claims Act.[2] Did the Legislature use "statute" in this section to exclude local legislation and to require claims for refunds of local taxes, assessments, fees and charges to be governed by the Government Claims Act?

2. If so, does § 905(a) violate the home rule power to tax conferred on charter cities by Article XI, §§ 3, 5 and on all cities and counties by Article XI, § 7 of the California Constitution?[3]

---

[1] That opinion is attached to this Petition as required by the Rules of Court and is referenced in this Petition as "Opinion."

[2] Government Code § 810 *et seq.*

[3] All unspecified section references in this brief are to the California Government Code. Unspecified references to articles and sections of

3. Does the second sentence of California Constitution, Article XIII, § 32, which requires express legislative authorization for tax refunds, apply to local government?

WHY REVIEW SHOULD BE GRANTED

This case raises a pressing question expressly reserved in this Court's recent decision in *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241, 246 n.2 (hereinafter, "*Ardon*") — does the Government Claims Act preempt local claiming requirements stated in city charters and city and county ordinances? This question controls perhaps $50 million of tax revenues in the present action and hundreds of millions more in other pending disputes. Dozens of local governments are now defending pending class actions on the basis of such claiming requirements. An authoritative decision of the question is necessary to avoid needless effort by many trial and appellate courts, and needless uncertainty for plaintiffs, defendant local governments and the people those governments serve. Review by this Court is authorized by California Rules of Court, Rule 8.500(b)(1) to secure uniform application of the Government Claims Act and to settle the important legal question set forth above.

Despite the plain intention of the Legislature otherwise, the Court of Appeal created a void in local tax-refund claiming practice by concluding that § 905, subd. (a)'s definition of "statute" excludes local claiming ordinances. This void is one that only § 910 can fill, and, as *Ardon* recently

---

articles are to the California Constitution.

explained, § 910 permits class claims. (*Ardon, supra,* 52 Cal.4th 241 at 250–251.) Thus, the decision below effectively imposes a class action remedy on cities that no legislative body ever intended. The Legislature that adopted the Government Claims Act in 1959 intended to preserve California's long-standing practice of deferring to local charters and ordinances to provide refund claiming procedures for local taxes. By imposing an ahistorical reading on that statute to find nonexistent intent, the Court of Appeal made a sea change in the law. A change worthy of this Court's Review.

Additionally, the Court of Appeal assumed legislative power to impose § 905(a)'s policy determinations at the expense of Long Beach's home rule power to tax telephone services to fund vital local services. While the Court of Appeal's decision targeted a single City's municipal code, the statute at issue applies to all local governments in our State and this case presents an opportunity to clarify the meaning of that statute.

Finally, the second sentence of Article XIII, § 32 of the California Constitution states:

> After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature.

Although this Court determined in *Ardon* that the **first** sentence of this § 32 (forbidding injunctions against the collection of taxes pending litigation) applies by its terms only to the State, it reserved the question whether this second sentence applies to local governments. (*Ardon, supra,* 52 Cal.4th 251–52.) Given the consequences of imposing the expensive and powerful class-action remedy on local governments which have adopted contrary

procedures, and given that any attorneys fees to class counsel come at taxpayer's expense, the lower courts and local governments need this Court to determine this issue before further expense is devoted to litigating the question in multiple venues around California.

I. THESE QUESTIONS REQUIRE PROMPT DECISION

A. This is But One of Many Challenges by a Purported Taxpayer Class.

The City of Long Beach is only one of many California municipalities defending a purported class challenge to a local tax refund ordinance. Recent months have seen a wave of such challenges in California trial courts to local telephone taxes, utility rates and other fees. The examples below are illustrative.

1. Telephone Tax Litigation

McWilliams v. City of Long Beach. In the case at bar, Plaintiff / Appellant John McWilliams ("McWilliams" or "Appellant"), on behalf of himself and a purported class, sued the City of Long Beach (the "City") for a refund of phone taxes. Appellant primarily objects to the manner in which the City calculates its Telephone Users Tax ("TUT"), and claims that changes in the interpretation of the federal excise tax on telephony ("FET") (referenced in the City's tax ordinance) require reduction in the TUT tax base. The City does not concede that its tax is illegal and maintains that its ordinance does not permit class claims.

Ardon v. City of Los Angeles (2011) 52 Cal.4th 241. In *Ardon*, the plaintiff challenged a local telephone tax on behalf of himself and a purported class. Unlike the case at bar, however, Los Angeles asserted no applicable local claiming ordinance when it argued in this Court. (*Id.* at 246 n.2.)

Granados v. County of Los Angeles, 2nd District Court of Appeal Case No. B200812. (MJN at Exh. A.[4]) As in *Ardon*, the plaintiff in *Granados* challenged a local telephone tax (a tax paid to the County of Los Angeles) on behalf of himself and a purported class. *Granados*, like *Ardon*, did not involve a local ordinance barring class relief. The instant case, however, squarely presents this issue.

City of Chula Vista v. Superior Court, 4th Court of Appeal Case No. D06156.[1] (*See* Exhibit A to Letter from Plaintiff / Appellant's Counsel, Jon Tostrud, to Court of Appeal Requesting Publication of *McWilliams*, dated April 17, 2012.) The City of Chula Vista demurred to a purported class claim challenging the City's allegedly improper collection of its TUT on mobile phone services. Like the City of Long Beach in the case at bar, Chula Vista contends that its municipal code precludes the filing of class claims for tax refunds. The San Diego Superior Court recently overruled Chula Vista's demurrer to the class action by concluding, in part, that the City's ordinance was not a "statute" within the meaning of § 905, subd. (a). (*Id.*) Chula Vista has a Petition for Review and Request for Immediate Stay

---

[4] MJN refers to the Motion for Judicial Notice filed concurrently herewith.

in this same matter, currently pending before this Court. Case No. S201440. (MJN at Exh. B.)

Sipple v. Alameda, et al., Los Angeles Superior Court Case No. BC462270. (MJN at Exh. C.) A massive, class-like claim is pending against every California local government which imposes a telephone tax—115 California cities and two counties.[5] *Sipple* is based on an underlying consolidated action in the Northern District of Illinois in which customers in 46 states, Puerto Rico, and the District of Columbia filed a number of putative class claims against AT&T Mobility LLC ("AT&T") in various federal courts alleging, inter alia, that AT&T erroneously applied telephone taxes to internet access services exempt from tax under the federal Internet Tax Freedom Act. 47 U.S.C. §§ 151 et seq. (MJN at Exh. E, p. 3.) All suits were consolidated and transferred to the Northern District of Illinois, where the Court eventually approved settlement between the

---

[5] The case was originally filed against 134 defendants. Early settlements by those with small stakes have reduced the current defendant count to 117. Proposition 218, California Constitution, Article XIII C, § 2, subs. (b), (d), requires voter approval for any "increase" in a local tax. Government Code § 53750, subd. (h) defines that term to include any change in the "methodology" by which that tax is administered. (*AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747.) At the same time, changes in the telecommunications industry are profound and ongoing. Regulatory inflexibility in the face of a protean regulated industry has produced a bevy of telephone tax disputes in recent years.

plaintiff classes and the carriers —but not taxing jurisdictions, which were not parties there. (MJN at Exhs. C, ¶1; F, pp. 1-3.) Pursuant to the settlement, the Northern District of Illinois authorized AT&T and a settlement subclass to "procur[e] refunds" from California cities and counties, seeking telephone taxes allegedly overpaid. (MJN at Exhs. C, ¶2; F, pp. 12–13.) *Sipple* presents an unprecedented, lucrative source of revenue for class action counsel that — like the other class claims here discussed — comes at the expense of taxpayers. Although the California suit is not pled as a class action, the defendant local governments have a pending demurrer seeking dismissal of the suit on the basis, inter alia, that the complaint does not allege compliance with their respective ordinances. (MJN at Exh. D, pp. 23-29.)

2. Utility Rate Litigation

Borst et al. v. City of El Paso De Robles, San Luis Obispo Superior Court Case No. CV 09-8117. (MJN at Exh. G.) This is a class action challenge to water rates established by the City of Paso Robles and collected beginning in 2002, alleging the rates violate the requirements of Proposition 218, Article XIII D, § 6. The case was stayed pending this Court's decision in *Ardon*.

Shames v. City of San Diego, San Diego Superior Court Case No. GIC831539 was a class action challenge to the manner in which San Diego calculated sewer service charges. (MJN at Exh. H.) As described in *California Restaurant Management Systems v. City of San Diego* (2011) 195 Cal.App.4th 1581, the case has since been settled. However, the parties

litigated whether the class-action remedy was permissible in *Shames. California Restaurant Management Systems* was resolved on the basis of the Government Claims Act. A local claiming ordinance was not asserted.

3. Challenges To Other Fees

Hanns v. City of Chico, Butte County Superior Court Case No. 149292. (MJN at Exh. I.) The City of Chico is currently defending a purported class action challenging a fee on those arrested for driving under the influence to recover the City's emergency response costs. The case is comparable to a challenge to the California Highway Patrol's enforcement of similar fees recently addressed by the First District. (*Allende v. Department of the California Highway Patrol* (2011) 201 Cal.App.4th 1006.)

B. These Cases Urgently Require Guidance From this Court.

In the cases cited above, local governments are defending (or recently defended) class or class-like claims for refunds to local taxes and fees and most are seeking to enforce local claiming requirements. Would-be class representatives argue these ordinances and charter provisions are preempted by the Government Claims Act on the basis reasoning similar to that of the Court of Appeal here. All told, the cases involve hundreds of millions of dollars, more than 100 local governments (*Sipple* alone involves 117), nearly all Californians, and fundamental questions about the procedures applicable to public finance disputes in our state. Further, that these cases have been filed in various California jurisdictions demonstrates

that many trial courts in the State are struggling to deal with important questions unresolved by *Ardon*.

While California cities' municipal ordinances are not uniform — and while individual cities may have different legislative policies regarding class claims for refunds of taxes or fees — these differences will not reduce the utility of this Court's review of this case. Generally, local ordinances have addressed the availability of a class action remedy for tax or fee refunds in one of three ways:

- by not adopting an ordinance or charter provision to explicitly address the issue (as in *Ardon*);
- by expressly barring class claims (as in *Batt v. City & County of San Francisco* (2007) 155 Cal.App.4th 65 (class action claim for refund of hotel bed taxes barred by San Francisco Municipal Code § 6.15-1));[6] or,
- as here, where class claims are simply not authorized by claiming rules that speak only to claimants and not to their representatives.

Many cities, counties and special districts have claiming ordinances like Long Beach's. Indeed, class claims only became plainly possible in this context with the recent *Ardon* decision and it is therefore to be expected that express rejection of class claims would be a relative newcomer to local claiming ordinance drafting.

---

[6] While *Ardon* distinguished *Batt* (52 Cal.4th at 250), the 2nd District here declined to the follow the case. Opinion at 11.

Accordingly, all local governments require guidance on the important questions reserved by *Ardon* regardless of the present form of their local claiming requirements.

II. STATEMENT OF THE CASE

A. The Trial Court Action.

The underlying complaint here asserts Appellant's objections to the City calculation of its telephone tax and his claim that changes in the interpretation of the federal excise tax on telephony ("FET") required a reduction in the City's telephone tax base. Appellant contends that, when the Internal Revenue Service (IRS) changed its position with respect to the FET in July 2006 via Notice 2006-50,[7] the City was required to change its interpretation of its local tax (which cites the FET) as well. The City Council acted by ordinance to clarify that its ordinance was intended to reference the FET as the IRS has construed it from 1979 until 2006 and that it did not acquiesce in the IRS' narrowing of the federal tax with respect to the construction of its own tax. Appellant challenged the City's collection of its local tax on telephony, claiming this clarification was a tax "increase" requiring voter approval under Proposition 218, Article XIII C, § 2, subd.

---

[7] Notice 2006-50 is found at Exhibit G to the City's Request for Judicial Notice filed with its Respondent's Brief in the Court of Appeal on April 30, 2008.

(b). That issue was not resolved by the trial court, which did not reach the merits.

In November 2006, Appellant, purporting to act on behalf of a class of taxpayers, sued the City of Long Beach for a refund of phone taxes. Appellant asserted six causes of action: (1) declaratory and injunctive relief to prevent collection of the tax; (2) declaratory relief regarding the non-voter approved ordinance clarifying the intent of the tax's FET reference; (3) money had and received; (4) unjust enrichment; (5) violation of due process, and (6) a writ claim. (CT, 18-21.)[8] The complaint did not allege the individual members of the asserted class had filed administrative claims and relied only upon McWilliams' claim filed. (CT 15 at ¶ 65; CT 40-42.)

The City demurred, arguing — among other things — that the City's Municipal Code § 3.68.160 and § 3.48.060 plainly did not authorize class claims. (CT 73; *see also* Exhibit F to Respondent's Request for Judicial Notice filed with Respondent's Brief on April 30, 2008.)[9] The trial court sustained the City's demurrer to each of these causes of action. (CT 113.) McWilliams declined to amend his complaint and appealed. (CT 150, 158.)

---

[8] CT refers to the Clerk's Transcript of the trial court action.

[9] The Court of Appeal failed to address § 3.48.060, although the parties each briefed it. The City pointed out this oversight in its Petition for Rehearing, which the Court of Appeal denied without comment.

B. The Appeal.

Appellant filed his notice of appeal July 19, 2007. In August 2008 the Court of Appeal stayed the case pending resolution of *Ardon v. City of Los Angeles*, Court of Appeal Case No. B201035, which involved the same counsel and a nearly identical complaint, but different defendants and a different ordinance.[10] The Court of Appeal then issued its published opinion in *Ardon*, questioning its earlier decision in *County of Los Angeles v. Superior Court (Oronoz)* (2008), 159 Cal.App.4th 353[11] and this Court granted

---

[10] *See* Second Appellate District Order, dated August 20, 2008. Indeed, *Granados v. County of Los Angeles, Ardon v. City of Los Angeles* and this case all involved the same plaintiffs' counsel and nearly identical complaints. It can be surmised these defendants were chosen because they together account for 40% of the telecommunications market in California.

[11] Justice Joan Dempsey Klein was the swing vote as between *Oronoz* and *Ardon* and in her concurring opinion in the latter case stated:

> "In view of the confusion in this area, it would be helpful for the Supreme Court to grant review in this case in order to resolve the conflict between the *Oronoz* decision and the majority opinion herein.
>
> Review is further warranted because the question presented, *i.e.*, whether Government Code section 910 authorizes a class claim for tax refunds, is a major statewide issue with serious implications for the public fisc. Currently, this Division alone has at least two other appeals involving the same issue.

review. After this Court decided *Ardon* on July 25, 2011, the Court of Appeal asked the parties to submit supplemental briefing on the impact of that decision on the case at bar.

At oral argument, counsel for the City outlined the legislative history of the Government Claims Act as set forth in this Petition below, which had only been partially captured in the supplemental briefing, and noted that the point had been more fully stated in the City and County of San Francisco's amicus briefs in the Court of Appeal and this Court in *Ardon*. This point was partly addressed in a few paragraphs at pages 10–11 of the Opinion, a point which Plaintiff relied upon in his request for publication. The City more fully outlined its legislative history argument in its Petition for Rehearing, but the Court of Appeal denied that petition without comment, making no change to the Opinion.

On March 28, 2011, the Court of Appeal held in Appellant's favor, reversing Judge Mohr's order of dismissal of the first four causes of action and affirming his dismissal of the two remaining. Significantly, the Court concluded the City "is not authorized under the Government Claims Act

---

Ardon v. City of Los Angeles, 94 Cal. Rptr. 3d 245, 257-58 (2009) review granted and opinion superseded, 216 P.3d 522 (Cal. 2009) and rev'd, 52 Cal. 4th 241 (2011).

We cite the Court of Appeal's decision in *Ardon*, overtaken by this Court's grant of review, pursuant to Rule 8.1115, subd. (b)(1) to provide the procedural history of this dispute and not with respect to the Court's holdings.

to establish its own claims procedure for TUT refunds." (Opinion at p. 2.) The Court reasoned that a city ordinance is not a "statute" within the meaning of Government Code § 905(a) and § 811. On that basis, it concluded that city ordinances governing the refund of local taxes do not fall within § 905's exception to the Government Claims Act, and which therefore preempts local claiming requirements in the context of claims for refunds of taxes, fees, and assessments. (Opinion at pp. 7-12).

To the surprise of the parties, the Court of Appeal's Opinion was unpublished and the Court rejected McWilliams' April 17th request for publication on April 23rd.[12] The Court of Appeal decided important constitutional questions expressly reserved by this Court's decision in *Ardon*, and created a conflict in the law by declining to follow *Batt* and the line of cases of which it is a part (a line of authority this Court distinguished, but did not reject in *Ardon*). Nevertheless, the Court of Appeal did not state its reasoning for failing to designate the Opinion for publication. In light of the standards of Rule 8.1105, subd. (c) of the California Rules of Court, Appellant's request for publication would seem to have been well taken.[13]

---

[12] See Letter from McWilliams' counsel, Jon Tostrud, to Court of Appeal, dated April 17, 2012.

[13] Rule 8.1105, subd. (c), of the California Rules of Court states: "An opinion of a Court of Appeal ... should be certified for publication ... if the opinion: ... [a]ddresses or creates an apparent conflict in the law."

III. LEGAL DISCUSSION

A. Government Code § 905(a) Was Intended to Preserve Local Claiming Requirements.

The legislative history of § 905(a)'s exception for tax refund claims and of § 811.8's definition of "statute" strongly suggests that the former was not intended to employ the latter's narrow definition of "statute." Rather, the legislative history shows that § 905 was intended to except from the Government Claims Act **all** tax claims for which alternative procedures are established — whether by state or local law. Moreover, the Legislature's inclusion of new definitions in the 1963 Government Claims Act was not meant to undo this original legislative intent.

B. The 1959 and 1963 Claiming Statutes Had Fundamentally Different Objects and Each Uses "Statute" Differently.

The Court of Appeal concluded in its Opinion that the 1959 Legislature specifically rejected a Law Revision Commission proposal that used the term "other provisions of law," in favor of former Government Code § 703, which used the term "statute." (Opinion, p. 10.)[14] From this,

---

[14] The Legislature did so, but its concern was with the distinction between legislative enactments — whether state or local — and judge-made, common law. That distinction is crucial to construction of § 905, subd. (b) concerning mechanics liens, a body of law initially developed as common law, but later displaced by statute. In the interest of brevity, we do not develop the point now, but did so in oral argument below and will do so

the Opinion concludes that the 1959 Legislature used the term "statute" as it is defined in Government Code § 811.8. That definition of "statute" includes only enactments of the California Legislature or of the United States, and excludes local legislation. This reading is specious and anachronistic.

Government Code § 811.8, with its narrow definition of the term "statute," was not adopted until 1963 — four years later — and with a very different object in mind. (Stats. 1963, ch. 1681, p. 3267.)[15] The 1963 amendments to the Government Claims Act did a dangerous thing — they added definitions, after the fact, to a complex statute.[16] Those amendments were motivated by the need to address *Muskopf v. Corning Hospital District* (1961) 55 Cal.2d 211, which upended tort law by ending the ancient doctrine of sovereign immunity. Thus, a narrow definition of "statute" was appropriate when legislating that liability against government must be based in statute.[17] However, there was no intent to upend long-standing claiming rules.

---

in merits briefing if review is granted.

[15] This statute can be found at Exhibit E to the City's April 11, 2012 Motion for Judicial Notice in the Court of Appeal ("4/11/12 MJN").

[16] Aware of that risk, the Legislature provided in § 810 that the Act's definitions apply "[u]nless the provision or context otherwise requires."

[17] "[T]here is no common law tort liability for public entities in California; such liability is wholly statutory." (*In re Groundwater Cases* (2007) 154

To hold otherwise, as does the Opinion here, neglects the basic principle of statutory interpretation that "[t]he words of a statute are to be interpreted in the sense in which they would have been understood at the time of the enactment." (*People v. Cruz* (1996) 13 Cal.4th 764, 775.)

I. The 1959 Legislature and Contemporaneous Courts Understood "Statute" to Include Local Ordinances and Charter Provisions

"Statute" was not defined by the Government Claims Law enacted in 1959 to unify disparate prior laws regarding claiming requirements. However, the legislative history shows the Legislature understood the term to embrace claim presentation requirements provided in state statutes as well as local ordinances and charter provisions. Most notably, the 1959 Law Revision Commission report on which the Claims Act was based and which the Court of Appeal has previously acknowledged constitutes

---

Cal.App.4th 659, 688.) This principle is well settled, as common law claims against government entities were abolished by the Legislature in the 1963 reaction to *Muskopf's* abrogation of the medieval rule of broad government immunity. Government Code § 815 states:

> Except as otherwise provided by **statute**: (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person. (Emphasis added.)

authoritative legislative history for the Act,[18] specifically defines "claims statutes" to include local legislation:

> There seems to be no adequate generic word for referring collectively to statutes, city charters and ordinances. Since claims are governed by legal requirements of all three types, the phrases 'claims statutes' and 'claims provisions' are used interchangeably herein to refer to all forms of legal claim presentation requirements as a class.

(2 Cal. Law Revision Com. Rep. (1959) at p. A-18)[19]

Courts of the era also used the term "statute" in the claiming context to include local legislation. Those opinions used "statute" to include locally enacted claiming provisions, and used "statutes" to refer to claim provisions as a general category, regardless whether enacted by the state or a local legislature. (See *Parodi v. City & County of San Francisco* (1958) 160 Cal.App.2d 577, 580; *Cruise v. City & County of San Francisco* (1951) 101 Cal.App.2d 558, 562-563; *Germ v. City & County of San Francisco* (1950) 99 Cal.App.2d 404, 413-414.) This underscores the Law Revision Commission's observation that there was, in 1959, "no adequate generic word for referring collectively to statutes, city charters and ordinances"

---

[18] *See Pasadena Hotel Development Venture v. City of Pasadena* (1981) 119 Cal.App.3d 412, 415 n.3 (citing the 1959 Law Revision Commission Report and noting that the "intent of the commission in regard to" the meaning of subdivisions of the Government Claims Act "may be deemed to be the intent of the Legislature").

[19] 4/11/12 MJN at Exhibit A.

containing claim requirements. (2 Cal. Law Revision Com. Rep. (1959) at p. A-18.)[20]

Additionally, the Office of Legislative Counsel's Report on the Government Claims Act as adopted in 1959 stated that tax claims were entirely excluded from the scope of the statute, and not just when other state legislation so provided. (Office of Legislative Counsel's Report, at p. 1.)[21] That Report explained that the legislation regarding presentation of claims against local public entities:

> Exempts certain claims for money, including claims related to taxes, salaries and wages, workmen's compensation, unemployment insurance, public assistance, bonds and other such matters.

(*Id.* at p. 1.)

2. The 1959 Legislature Was Not Concerned with Uniform Claiming Procedures for Taxes

Unlike its 1963 successor, the 1959 Legislature **was** concerned with a uniform claiming process, but not as to taxes:

> Provisions governing claims for refund of taxes, assessments, fees, etc. ... are frequently integrated with special procedures governing the assessment, levy and collection of revenue. They are separate and independent from the tort and contract claims provisions and do not create problems of the same

---

[20] 4/11/12 MJN at Exhibit A.

[21] 4/11/12 MJN at Exhibit B.

nature and significance as the claims provisions embraced by the report.

(2 Cal. Law Revision Com. Rep. (1959), at p. A-17.)[22] Indeed, § 905, subd. (a) is itself evidence that uniformity was not desired for tax refund claims. The Government Claims Act eschewed a one-size-fits-all formula for local tax refund claims, and instead embraces a heterogeneous tax refund claim regime.

Too, various other statutes show the diversity the Legislature finds appropriate for local taxes regulated at the state level. For example, Revenue & Taxation Code §§ 5097 and 5140 outline procedures for refunds of property taxes. Similarly, Business & Professions Code § 5499.14 allows local legislative bodies to order refunds of assessments for illegal advertising displays. The state also regulates counties and school districts, both of which are distinctly local but are creatures of the state in a way that municipal governments are not. Yet, as to local taxes enacted and enforced entirely at the local level, state law is silent — not because Government Code § 910 was intended to apply, but because it was understood that local legislation controlled claiming procedures by virtue of § 905, subd. (a).

---

[22] 4/11/12 MJN at Exhibit A

3. The 1963 Legislature Did Not Intend to Preempt Local Claiming Requirements Regarding Tax Refunds

The Legislature's intent with regard to former § 703, subd. (a) – the 1959 predecessor to 1963's (and the present's) § 905, subd. (a) — was to exclude **all** tax claims from the "unified claims statute:"

> With respect to this former subdivision, the Law Revision Commission has stated that it excluded from the scope of the unified claims statute then proposed by the Commission **all** 'claims for tax exemption, cancellation or refund.' (See 2 Cal. Law Revision Com. Rep. (1959) p. A-117.)

(*Pasadena Hotel Development Venture v. City of Pasadena* (1981) 119 Cal.App.3d 412, 415 fn. 3 (emphasis supplied).)[23] When the Commission recommended re-enacting this provision as the present § 905, subd. (a), it explained "[t]his section is the same in substance as Government Code Section 703." (*See* 4 Cal. Law Revision Com. Rep. (1963), Recommendation on Sovereign Immunity, p. 1027.)[24] Likewise, the Commission explained that, with a minor exception not pertinent here, the present § 935 (empowering local governments to enact claiming requirements) was the same as former § 730. (*Id.* at p. 1040.) Thus, the 1963 enactment of the present version of these sections was not intended to change the meaning

---

[23] The Opinion also rejects this precedent. Opinion at 11.

[24] 4/11/12 MJN at Exhibit D.

of the 1959 statute as to claiming requirements; it was motivated by substantive liability concerns following *Muskopf,* as demonstrated below. That unchanged prior law excluded **all** tax claims for which there were alternative claiming procedures, whether those claiming procedures derived from state or local law. That remains the law to date and review of this case is appropriate to clarify this point.

4. The 1963 Legislation Addressed Substantive Liability, Not Claiming Procedures

When the Law Revision Commission recommended, and the Legislature adopted amendments to the Government Claims Act in 1963, these bodies were focused on the substantive laws of public agency liability, not on the unified claims procedure created four years earlier. What prompted this focus was *Muskopf v. Corning Hosp. Dist.* (1961) 55 Cal.2d 211, an earthquake in the law which abolished sovereign immunity, a doctrine of sufficient antiquity that it had a Latin label: *Rex non potest peccare* — The King can do no wrong. The Law Revision Commission stated:

> Since the decision in the *Muskopf* case, the Commission has devoted substantially all of its time during 1962 to the study of sovereign or governmental immunity.

(4 Cal. Law Revision Com. Rep. (1963), Recommendation Relating to Sovereign Immunity, at p. 803, 809.)[25]

---

[25] 4/11/12 MJN at Exhibit C.

Thus, the Commission recommended, and the Legislature enacted, most of the 1959 provisions — including former section 703 — in substantially their earlier forms, and indicated no intent to change the substance of the 1959 unified claims law. (See *Pasadena Hotel, supra,* 119 Cal.App.3d at 415 fn. 3.)

Rather, the Legislature and the Law Revision Commission focused in 1963 on the creation of unified and coherent law defining government immunities and liabilities after *Muskopf* turned then-existing law on its head. The Commission's task was formidable; even before *Muskopf,* governmental immunity and liability in California was hardly clear-cut. As noted by the Commission, the pre-*Muskopf* legislation on the topic:

> expresses a variety of conflicting policies. Some statutes create broad immunities for certain entities and others create wide areas of liability. Some apply to many public entities and others apply to but one. In some cases, statutes expressing conflicting policies overlap. Even where statutes impose liability on public entities, they do so in a variety of inconsistent ways. Some entities are liable directly for the negligence of their employees.... Where statutes are not applicable, the courts have determined liability on the basis of whether the injury was caused in the course of a governmental or proprietary activity.... Even where a public entity is immune from liability for a negligent or wrongful act or omission, the public employee who acted or failed to act is often personally liable; and many public entities have assumed the cost of insurance protection for their employees against this liability.

(4 Cal. Law Revision Com. Rep. (1963), Recommendation Relating to Sovereign Immunity, pp. 807-808.)[26]

Given the scope and complexity of the Commission's task — to create a comprehensive, unified liabilities statute out of an incoherent legal landscape (the same incoherence which motivated this Court's ground-breaking *Muskopf* decision) — it is hardly surprising that the resulting legislation was explicit about who was liable, who was immune and under what circumstances, but made no change to claiming requirements.

This historical context explains why the 1963 Legislature distinguished among "enactment," "statute," "law" and "regulation" in amending the Government Claims Act. Those terms are critical to interpreting many of the liability and immunity provisions in the new statute even as they were unnecessary to the codification of claiming rules four years earlier.

The Opinion neglects this history, declined to review all of it,[27] and reached the wrong result.

---

[26] 4/11/12 MJN at Exhibit C.

[27] The legislative history was summarized for the Court at oral argument and in the Petition for Rehearing, which it denied without comment. Petition for Rehearing at pp. 5–12.

C. Charter Cities Like Long Beach Derive Their Power to Tax Directly From the State Constitution.

All cities and counties in our state are granted taxing power under Article XI, § 7 of the California Constitution.[28] Similarly, Article XI, § 3 allows a city or county to adopt a charter, "for its own government." (Cal. Const., Art. XI, § 3, subd. (a).) Charter cities like the City of Long Beach derive their power to tax directly from the State Constitution, not from statutes of the Legislature. (*The Pines v. City of Santa Monica* (1981) 29 Cal.3d 656, 660.) A charter city has broad authority to "make and enforce all ordinances and regulations in respect to municipal affairs ... ." (Cal. Const., Art. XI, § 5, subd. (a).) Under this "home rule" authority, the City's ordinances regulating local tax refunds involve a municipal affair and therefore supersede inconsistent state laws.

Article XI, Section 5(a) of the state Constitution provides:

> It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restriction and limitations provided in their several charters and in respect to other matters they shall be subject to general laws.

---

[28] "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., Art. XI, § 7.)

(*Johnson v. Bradley* (1992) 4 Cal.4th 389, 397-398.) This authority is so sweeping that properly adopted charters supersede all inconsistent state laws regarding municipal affairs. (*Id.*) Thus, over a hundred years ago, this Court recognized that the home rule provision in the California Constitution explicitly secured to charter cities:

> the maintenance of ... charter provisions in municipal matters, and to deprive the legislature of the power ... to interfere in the government and management of the municipality.

(*Ex parte Braun* (1903) 141 Cal. 204, 209 (rejecting preemption challenge to a charter city's business license tax).)

Our courts have held repeatedly that matters of local taxation are municipal affairs. This Court observed that "the power of taxation is a power appropriate for a municipality to possess" and that such proposition was "too obvious to merit discussion." (*Id.* at p. 209.) To boot:

> [T]he power to raise revenue for local purposes is not only appropriate but, indeed, absolutely vital for a municipality. [Citations] Moreover, the power to tax for local purposes clearly is one of the privileges accorded chartered cities by the home rule provision of the California Constitution.

(*Weekes v. City of Oakland* (1978) 21 Cal.3d 386, 392 (no preemptioin of charter city's employee license fee measure based on gross receipts earned in charter city).) This Court has repeatedly held that matters of local taxation are municipal affairs and that the State cannot "decree the essentials of municipal tax policy." (*California Fed. Sav. And Loan Assoc. v. City of Los Angeles*, 54 Cal.3d 1, 14.)

While Article XI, § 12 of the state Constitution also gives the Legislature the power to establish claiming procedures,[29] historically, the Legislature has respected charter cities' home rule power to tax and he has declined to legislate claiming procedures for local tax refund claims. The Government Claims Act itself evidences the Legislature's understanding that different taxes require different refund procedures, as well as the Legislature's determination that the Act was neither sufficient nor intended to address them all (hence § 905, subd. (a)'s exemption of tax refund claims from the Act). Thus, the balance between the constitutional power of charter cities and other local governments under Article XI, §§ 3, 5 and 7 and the Legislature's power to establish claiming procedures under §12 of the same Article requires clarification by this Court.

D. The Second Sentence of Article XIII, §32 Applies to Local Governments.

In its recent decision in *Ardon,* this Court deliberately reserved the question whether the second sentence of Article XIII, § 32 of the California Constitution applies to local governments. (*Ardon, supra,* 54 Cal.4th 241, 290.) There, the Court concluded that Government Code § 910 permits class claims for tax refunds in the absence of local claiming requirements whether or not the second sentence of Article XIII, § 32 applies to local

---

[29] This provision states: "The Legislature may prescribe procedures for presentation, consideration and enforcement of claims against counties, cities, their officers, agents, or employees."

governments. Section 32 reflects a broad public policy requiring that actions for tax refunds be expressly authorized by the Legislature:

> No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, **in such manner as may be provided by the Legislature.** (Emphasis added.)

This Court has underscored the point by stating unambiguously that Article XIII, § 32 requires express legislative authorization for all tax refund claims, class or otherwise. (*Woosley v. State of California* (1992) 3 Cal.4th 758, 792 ("article XIIII, section 32 of the California Constitution precludes this court from expanding the methods for seeking tax refunds expressly provided by the legislature") ("silence did not constitute legislative authorization").) Thus, the requirement of express legislative authorization for tax refund claims derives directly and plainly from our Constitution.

The second sentence of Article XIII, § 32, unlike the first, is not limited to the State or its taxes, but addresses tax refund procedures generally. In further contrast to the first sentence, the second contains no limitation whatsoever on the types of tax refunds subject to legislative authority; reflecting a broad policy requiring legislative authority for **all** tax claims, it is stated in broad and unqualified terms. Indeed, what reason could there be to find that the State has greater need for stability in its

finances than local governments? Is prison financing more fundamental to the peace and welfare of California than the funding of law enforcement to send people to prison? Is state funding of education by our local K-12 school systems more fundamental to the common wealth than local funding for those same systems?

Applied to the case at bar, the second sentence of Article XIII, § 32 means that the relevant legislature — the Long Beach City Council or the City's people acting via initiative — must expressly authorize the class claim Appellant would pursue. The City maintains that its own municipal code does not authorize such claims, and this forms the basis of the underlying dispute. The City, and all local taxing authorities in the State, require the Court's clarification whether that code may apply.

IV. CONCLUSION

Ardon addressed an important question in the law governing tax refund procedures — whether, in the absence of a local claiming ordinance, class tax refund claims may be brought under the Government Claims Act. However, *Ardon* expressly reserved the equally important question that is of pressing concern to dozens of local governments now in litigation: do local claiming laws apply to such disputes? This question urgently requires this Court's attention not only because tens of millions of dollars are at stake here and because hundreds of millions are stake in other pending cases. This question too bears decision now so that these disputes do not multiply, need not be litigated repeatedly, and can be

efficiently and promptly resolved for the benefit of plaintiffs, dozens of defendant local governments, and the millions of Californians they serve.

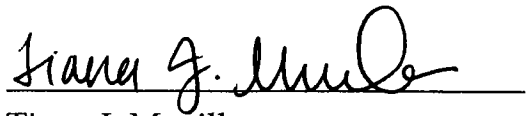
Ardon reserved these important questions for another day and another case. With respect, the City asserts that that day and that case have come.

The City respectfully urges the Court to grant this Petition for Review to clarify this procedural confusion so that the parties, litigants and trial courts can turn to efficient resolution of the merits of the underlying refund disputes without further procedural confusion.

DATED: April 27, 2012

ROBERT E. SHANNON
J. CHARLES PARKIN
MONTE H. MACHIT
LONG BEACH CITY ATTORNEY'S OFFICE
333 West Ocean Blvd., 11th Floor
Long Beach, CA 90802-4664
(562) 570-2200; (562) 436-1579 (fax)

MICHAEL G. COLANTUONO
SANDRA J. LEVIN
TIANA J. MURILLO
COLANTUONO & LEVIN, PC



Tiana J. Murillo
300 So. Grand Avenue, Ste. 2700
Los Angeles, CA 90071-3134
(213) 542-5700; (213) 542-5710 (fax)
ATTORNEYS FOR DEFENDANT/RESPONDENT

CERTIFICATION OF COMPLIANCE WITH CAL. R. CT. 8.504(d)

Pursuant to California Rules of Court, Rule 8.504(d), the foregoing **Petition for Review** by Defendant the City of Long Beach contains 6,950 words (including footnotes, but excluding the tables and this Certificate) and is within the 8,400 word limit set by Rule 8.504, subd. (d), California Rules of Court. In preparing this certificate, I relied on the word count generated by Word version 14, included in Microsoft Office Professional Plus 2010.

Executed on April 27, 2012, at Los Angeles, California.

COLANTUONO & LEVIN, PC
MICHAEL G. COLANTUONO
SANDRA J. LEVIN
TIANA J. MURILLO

Tiana J. Murillo

Attachment

Court of Appeal Decision

Filed 3/28/12 McWilliams v. City of Long Beach CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JOHN W. McWILLIAMS, Plaintiff and Appellant, v. CITY OF LONG BEACH, Defendant and Respondent	B200831 (Los Angeles County Super. Ct. No. BC361469)

APPEAL from an order of the Superior Court of Los Angeles County, Anthony J. Mohr, Judge. Reversed in part, affirmed in part.

Wolf Haldenstein Adler Freeman & Herz, Francis M. Gregorek, Rachele R. Rickert; Tostrud Law Group, Jon A. Tostrud; Chimicles & Tikellis, Timothy N. Mathews; Cuneo Gilbert & Laduca and Sandra W. Cuneo for Plaintiff and Appellant.

Colantuono & Levin, Michael G. Colantuono, Sandra J. Levin, Amy C. Sparrow, Tiana J. Murillo; Robert E. Shannon, Belinda R. Mayes, Heather Mahood and Monte H. Machit for Defendant and Respondent.

INTRODUCTION

This is a class action brought by plaintiff John W. McWilliams against defendant City of Long Beach (City) challenging the legality of the City's telephone users tax (TUT). McWilliams appeals an order of dismissal entered after the trial court sustained the City's demurrer to his complaint. We reverse in part and affirm in part.

Under the Government Claims Act, before filing a tax refund action, the plaintiff must first file a claim containing the information required by Government Code section 910.[1] The main issue on appeal is whether McWilliams is entitled to present a claim on behalf of the entire class, or whether each member of the purported class is required to file an individual claim prior to filing suit. We hold that under *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241 (*Ardon*), McWilliams can file a class claim for a TUT refund.

The City contends *Ardon* is inapplicable because McWilliams was required to comply with the City's claims procedures, which do not permit tax refund claims on behalf of a class. We reject this argument. The City is not authorized under the Government Claims Act to establish its own claims procedure for TUT refunds and, in any case, the City's claims procedures do not require McWilliams or other payers of the TUT to file a claim prior to pursuing a tax refund action.

We nonetheless hold McWilliams's complaint does not state sufficient facts to support the fifth cause of action for violation of due process and sixth cause of action for a writ of mandate. These causes of action of action are based on McWilliams's assertion that he cannot obtain a clear and certain remedy if the TUT is ultimately found unlawful. McWilliams, however, concedes that in light of *Ardon*, these causes of action are moot. Accordingly, we affirm the order of dismissal with respect to the fifth and sixth causes of action in the complaint but reverse the order with respect to the remaining causes of action.

---

[1] Unless otherwise stated, all future section references are to the Government Code.

BACKGROUND

1. *Allegations in the Complaint*

The complaint alleges the following. Pursuant to Long Beach Municipal Code section 3.68, the City imposes a 10 percent TUT on amounts paid for telephone services by persons or entities located within the City. The TUT is paid for by service users (taxpayers) and collected by service providers (telephone companies). If a service user refuses to pay the TUT, the City can impose a 25 percent penalty. McWilliams is a resident of the City who has paid and continues to pay the TUT.

Long Beach Municipal Code section 3.68.050, subdivision (d) excludes from the TUT amounts paid for telephone services exempt from the tax imposed under section 4251 of title 26 of the Internal Revenue Code (Federal Excise Tax). Under numerous federal court decisions and a 2006 Internal Revenue Service notice, the Federal Excise Tax only applies to long distance service charged by time and distance. Today, however, "most long distance telephone service is charged under a postalized fee structure where the amount of the charge depends only upon the amount of elapsed transmission time and not the distance of the call." The Federal Excise Tax and thus the TUT cannot be imposed on such services. The City has nevertheless unlawfully collected and continues to collect to the TUT from McWilliams and other class members on telephone service exempt from the Federal Excise Tax.

Long Beach Municipal Code section 3.68.160 sets forth a means of obtaining a refund of TUT improperly collected. This section provides:

"A. Whenever the amount of any tax has been overpaid or paid more than once or has been erroneously or illegally collected or received by the City Treasurer-City Tax Collector under this Chapter, it may be refunded as provided by this Section.

"B. A *service supplier* may claim a refund or take as a credit against taxes collected and remitted the amount overpaid, paid more than once, or erroneously or illegally collected or received, when it is established in a manner prescribed by the City Treasurer-City Tax Collector that the service user from whom the tax has been collected did not owe the tax; provided, however, that neither a refund nor a credit shall be allowed

unless the amount of the tax so collected has either been refunded to the *service user* or credits to charges subsequently payable by the service user to the person required to collect and remit.

"C. No refund shall be paid under the provisions of this section unless the claimant established his or her right thereto by written records showing entitlements thereto."[2] (Italics added.)

This refund provision does not provide a mechanism for an individual service user (i.e., taxpayer) to seek a refund of illegally collected TUT. Further, under section 799 of the Public Utilities Code, taxpayers cannot require service providers to seek refunds on their behalf.

On August 11, 2006, McWilliams sent a letter to the City demanding on his own behalf and on behalf of similarly situated taxpayers a refund of the TUT improperly collected and a cessation of improper collection of the TUT. The City did not respond to this claim.

In September 2006, the City purported to amend Long Beach Municipal Code section 3.68. Under the amended code, telephone charges exempt from the Federal Excise Tax are not exempt from the TUT. This amendment was enacted without electoral approval in violation of Article XIIIC of the California Constitution, commonly known as Proposition 218.

Based on these allegations, the complaint sets forth six causes of action. The first cause of action is for declaratory and injunctive relief preventing further collection of the TUT. The second cause of action is for declaratory and injunctive relief preventing the "unconstitutional" amendment to Long Beach Municipal Code regarding the TUT.

The third cause of action is for money had and received and the fourth cause of action is for unjust enrichment. In these causes of action, McWilliams seeks a refund of improperly collected TUT on his own behalf and on behalf of all members of the class.

---

[2] We quote the complaint regarding the content of Long Beach Code section 3.68.160.

The fifth cause of action is for violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The complaint alleges that because the City "provides neither adequate pre-deprivation nor post-deprivation relief" to taxpayers for unlawfully collected taxes, the City has violated the due process rights of McWilliams and all class members.

Finally, the sixth cause of action is for a writ of mandate. The complaint alleges the City "is obligated, but has failed, to provide adequate pre-deprivation or post-deprivation remedies for the illegal collection of the [TUT]." Plaintiff seeks a writ of mandate requiring the City to provide an adequate remedy.[3]

2. *Procedural History*

On November 8, 2006, McWilliams filed his complaint against the City. The City demurred to the complaint on January 2, 2007.

In its memorandum in support of the demurrer, the City argued the complaint failed to state facts sufficient to constitute a cause of action for three reasons. First, the City argued that under *Woosley v. State of California* (1992) 3 Cal.4th 758 (*Woosley*), McWilliams could not assert a pre-lawsuit claim with the City on behalf of the entire class. Because such a claim is a prerequisite to an action for a tax refund, plaintiff cannot maintain a class action seeking a tax refund as a matter of law.

The City's second argument was that McWilliams failed to file a claim with the City as required by the City's municipal code. Alternatively, the City argued that if the letter dated August 11, 2006, could be considered a "claim," it did not substantially comply with the requirements of the Long Beach Municipal Code.

Finally, the City argued that equitable relief was unwarranted because McWilliams had an adequate remedy at law, namely a tax refund.

---

[3] Except as stated *post*, we express no opinion about the merits of the first four causes of action in the complaint, including but not limited to the allegation that the TUT is unlawful and the allegation that the City unlawfully amended its municipal code.

On April 13, 2007, the trial court sustained the demurrer with 60 days leave to amend. In its minute order the trial court stated the demurrer was sustained "for the reasons stated." The transcript of the hearing on demurrer indicates the trial court found McWilliams could not file a pre-lawsuit claim on behalf of the class under *Woosley*. The court, however, rejected the City's argument that equitable relief was unavailable on the ground that declaratory relief was available if the TUT was indeed unlawful.

On May 8, 2007, the trial court held a hearing on an ex parte application filed by McWilliams. At that hearing McWilliams's counsel stated that McWilliams would not amend his complaint before the expiration of the 60-day period granted by the court. Relying on this representation, the trial court entered a minute order stating the case "is ordered dismissed."

On June 12, 2007, the trial court entered an order of dismissal prepared by the McWilliams's counsel. McWilliams filed a timely appeal of the June 12, 2007, order of dismissal.

On August 20, 2008, after the parties filed their briefs in this court, we stayed the appeal pending the resolution of the *Ardon* case in the California Supreme Court. The *Ardon* opinion was published on July 25, 2011.

On August 26, 2011, we lifted the stay and requested additional briefing regarding the affect of *Ardon*, if any, on the issues in this case. Both parties responded by filing additional briefs, which we have considered.

CONTENTIONS

McWilliams argues *Ardon* is dispositive of this appeal and mandates our reversal of the trial court's order of dismissal. He also contends the complaint states facts sufficient to support each of his first four causes of action but concedes his fifth and sixth causes of action are moot.

The City argues *Ardon* does not require reversal of the order of dismissal because McWilliams was not required to present a claim pursuant to section 910. Rather, the City contends, plaintiff was required to comply with the City's claims procedure, which does not permit tax refund claims on behalf of a class.

Additionally, the City argues McWilliams is barred from obtaining equitable relief because he has an adequate remedy at law. Finally, the City contends McWilliams' due process and writ of mandate claims fail because "post-deprivation relief" is available.

DISCUSSION

1. *Standard of Review*

We review the complaint de novo to determine whether it alleges facts stating a cause of action under any legal theory. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) We assume all of the facts alleged in the complaint are true and make all reasonable inferences from those facts in favor of plaintiff. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 883; *Kruss v. Booth* (2010) 185 Cal.App.4th 699, 714.) "However, the assumption of truth does not apply to contentions, deductions, or conclusions of law and fact." (*C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1102.)

2. *McWilliams Was Required to Present a Claim in the Manner Set Forth in the Government Claims Act, Not in the Manner Stated in the Long Beach Municipal Code*

Under the Government Claims Act, "no suit for 'money or damages' may be brought against a public entity until a written claim has been presented to the public entity and the claim either has been acted upon or is deemed to have been rejected. (Gov. Code, §§ 905, 945.4.)"[4] (*Hart v. County of Alameda* (1999) 76 Cal.App.4th 766, 778.) Section 910 provides that a claim must contain certain information, "including the name and address of the claimant; the address to which the claimant desires notices to be sent; the date, place, and other circumstances of the incident that gave rise to the claim; a general description of the obligation or loss; the names of the public employees who

[4] The parties agree that McWilliams seeks "money or damages" within the meaning of the Government Claims Act (see *City of Los Angeles v. Superior* Court (2008) 168 Cal.App.4th 422, 430) and that McWilliams's claim was deemed rejected because the City did not respond to it (see § 912.4, subd. (c)).

caused the loss; and the amount of the loss if that amount is less than $10,000." (*City of Los Angeles v. Superior Court*, *supra*, 168 Cal.App.4th at p. 427.)

"Before 1959, taxpayer and other claims against the state, local and municipal governments were governed by myriad state statutes and local ordinances. Finding this system too complex, the Legislature enacted the Government Claims Act (the Act), which established a standardized procedure for bringing claims against local governmental entities." (*Ardon*, *supra*, 52 Cal.4th at p. 246.)

The Act limited the authority of local entities to adopt their own claims procedures. As a general rule claims for money or damages against local public entities are governed by the procedures set forth in the Act unless the claim falls within specified exceptions. (§ 905). If the claim falls into one of the specified exceptions, and the claim is not "governed by any other statutes or regulations expressly relating thereto, [it] shall be governed by the procedure prescribed in any charter, ordinance or regulation adopted by the local public entity." (§ 935, subd. (a).)

Here, the only ostensible exception to the general rule is stated in section 905, subdivision (a), which permits local claims procedures for "[c]laims under the Revenue and Taxation Code or other *statute* prescribing procedures for the refund, rebate, exemption, cancellation, amendment, modification, or adjustment of any tax, assessment, fee, or charge or any portion thereof, or of any penalties, costs, or charges related thereto." (Italics added). The City contends Long Beach Municipal Code section 3.68.160 is a "statute" within the meaning of section 905, subdivision (a). We reject this argument.

The Act itself defines the term "statute" as "an act adopted by the Legislature of this State or by the Congress of the United States, or a statewide initiative act." (§ 811.8.)[5] Long Beach Municipal Code section 3.68.160 does not fall within the plain

---

[5] Section 811.8 was enacted in 1963, about four years *after* the enactment of section 703, the predecessor to section 905. (Stats. 1959, ch. 1724, pp. 4133-4134; Stats. 1963, ch. 1681, p. 3267). The City contends that when the Legislature enacted section 811.8 it did not intend to affect section 905, subdivision (a). In construing a statute, however,

language of this definition. (*Volkswagen Pacific, Inc. v. City of Los Angeles* (1972) 7 Cal.3d 48, 61-62 (*Volkswagen Pacific*) [city charter and ordinance relating to tax refund were not "statutes" within the meaning of section 905, subdivision (a)][6]; *County of Los Angeles v. Superior Court* (2008) 159 Cal.App.4th 353, 361 (*Oronoz*) [section of the county code relating to claims for money or damages was not a "statute" within the meaning of section 905, subdivision (a)]; see also *Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 463 [the term "statute" in section 811.2 does not include local ordinances or regulations].) McWilliams therefore was only required to file a pre-lawsuit claim in compliance with the Act, and was not required to comply with claims procedures of the Long Beach Municipal Code.

The City contends our conclusion is contrary to the holding in *Pasadena Hotel Development Venture v. City of Pasadena* (1981) 119 Cal.App.3d 412 (*Pasadena Hotel*), which was decided by this court. There, the issue was whether to apply the limitations period specified in Revenue and Taxation Code section 5097, subdivision (a)(2) or the limitations period stated in a city charter provision relating to tax refunds. (*Pasadena Hotel*, at pp. 413-414.) The court held the statute did not relate to the taxpayer's claim and that the limitations period of the city charter applied. (*Id.* at pp. 415-416.)

In a footnote, the court stated "[t]he reference [in section 905, subdivision (a)] to 'the Revenue and Taxation Code or other statute' is not a limitation upon the type of tax claims excepted from the coverage of the [Torts Claims Act], aside from section 935."

"we presume the Legislature has knowledge of all prior laws and enacts and amends statutes in light of those laws." (*In re Marriage of Cutler* (2000) 79 Cal.App.4th 460, 475.) Further, section 811.8 was enacted pursuant to Senate Bill No. 42 (1963-1964 Reg. Sess.) on the same day former section 703 was renumbered to section 905 pursuant to Senate Bill No. 43 (1963-1964 Reg. Sess.). We thus presume that when the Legislature enacted section 811.8, it was aware of section 905, subdivision (a).

[6] Arguably the discussion in *Volkswagen Pacific* on this issue was dicta. (See *Volkswagen Pacific*, *supra*, 7 Cal.3d at p. 63 [section 945.6 was the applicable statute of limitations "whether section 905, subdivision (a), is read to either exclude or include the instant tax refund action . . . ."].)

(*Pasadena Hotel, supra*, 119 Cal.App.3d at p. 415, fn. 3.) This conclusion was based on the court's analysis of legislative history. The Law Revision Commission (the commission) stated the predecessor to section 905, subdivision (a)—former section 703, subdivision (a)—broadly applied to "all 'claims for tax exemption, cancellation or refund.' (See 2 Cal. Law Revision Com. Rep. (1959) p. A-117.)" (*Pasadena Hotel*, at p. 415, fn. 3.) The court reasoned that because former section 703, subdivision (a) was "enacted *in the form proposed by the commission*, the intent of the commission in regard to [its] meaning may be deemed to be the intent of the Legislature." (*Pasadena Hotel*, at p. 415, fn. 3, italics added.)

This analysis of legislative history was incorrect. Former section 703, subdivision (a) was not enacted in the form proposed by the commission. Under the commission's proposal "the standardized procedures of the Act embodied in section 910 would not have applied to '[c]laims under the Revenue and Taxation Code or other *provisions of law* prescribing procedures for the refund . . . of any tax . . . .' (Recommendation and Study Relating to The Presentation of Claims Against Public Entities (Jan. 1959) 2 Cal. Law Revision Com. Rep. (1959) p. A-12, italic added [proposed former § 703, subd. (a)].) However, the Legislature specifically rejected this proposal and instead enacted former section 703, subdivision (a) (now § 905, subd. (a)), which exempted from section 910 'claims under the Revenue and Taxation Code or other *statute* prescribing procedures for the refund . . . of any tax . . . .' (Stats. 1959, ch. 1724, § 1, pp. 4133-4134, italics added.)" (*Ardon, supra*, 52 Cal.4th at p. 247.) We therefore cannot deem statements by the commission regarding former section 703, subdivision (a) to be the intent of the Legislature.

Accordingly, to the extent *Pasadena Hotel* impliedly determined that a city charter provision relating to tax refunds was a "statute" within the meaning of section 905, subdivision (a), that determination was incorrect. This conclusion is consistent with our holding in *Oronoz* and the statements made by the California Supreme Court regarding the issue in *Volkswagen Pacific*.

The City also cites *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65 (*Batt*) to support its position. *Batt*, however, relied primarily on *Pasadena Hotel* in its discussion of whether a municipal ordinance was a statute within the meaning of section 905, subdivision (a). (*Batt*, at pp. 79, 83.) We thus decline to follow *Batt* on this issue.

3. *Long Beach Municipal Code Section 3.68.160 Does Not Require Service Users Such as McWilliams to File a Claim for a Refund of TUT as a Prerequisite to Pursuing a Tax Refund Action*

Under the plain language of Long Beach Municipal Code section 3.68.160, a *service user* such as McWilliams cannot file a claim for a refund of TUT. Instead, such a claim must be filed by a *service provider*. Accordingly, even assuming Long Beach Municipal Code section 3.68.160 were permitted under the Government Claims Act, McWilliams and the class he purports to represent are not barred from pursuing their action against the City as a result of their alleged failure to comply with the City's claims procedures.[7]

4. *Under Ardon, McWilliams Can File a Section 910 Class Claim*

In *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 457 (*City of San Jose*), in a nuisance and inverse condemnation class action, the California Supreme Court held that the plaintiff could file a section 910 claim on behalf of the entire class.

---

[7] Moreover, Long Beach Municipal Code section 3.68.160 does not state a claim under that provision is a prerequisite to file a lawsuit against the City. Section 935, subdivision (b) provides that if a local claims procedure is permitted for a claim for money or damages, "[t]he procedure so prescribed *may* include a requirement that a claim be presented and acted upon as a prerequisite to suit thereon." (Italics added.) Here, Long Beach Municipal Code section 3.68.160 provides that a service provider "may" file a claim for a refund of illegally collected TUT (L.B. Mun. Code, § 3.68.160(B)) and that a refund "may" be provided under this section (L.B. Mun. Code, § 3.68.160(A)) if certain conditions are satisfied (L.B. Mun. Code, § 3.68.160(B) & (C)). It also states "[n]o refund shall be paid *under the provisions of this section* unless the claimant has submitted a claim pursuant to this section." (L.B. Mun. Code, § 3.68.160(D), italics added.) The ordinance does *not* require a service provider, much less a service user such as McWilliams, to file a claim before filing an action in court for a refund of TUT.

In *Woosley*, the plaintiff asserted a class claim for tax refunds under certain provisions of the Vehicle Code and Revenue and Taxation Code which did not expressly provide for such claims. The court held the plaintiff could not maintain class claims because article XIII, section 32 of the California Constitution[8] prevents the judiciary "from expanding the methods for seeking tax refunds expressly provided by the Legislature." (*Woosley*, *supra*, 3 Cal.4th at p. 792.) The court further stated that the holding of *City of San Jose* "should not be extended to include claims for tax refunds." (*Woosley*, at p. 789.)

In *Ardon*, the issue was whether section 910 "allows taxpayers to file a class action claim against a municipal governmental entity for the refund of local taxes." (*Ardon*, *supra*, 52 Cal.4th at p. 245.) The court held: "[N]either *Woosley*, which concerned the interpretation of statutes *other* than section 910, nor article XIII, section 32 of the California Constitution, applies to our determination of whether section 910 permits class claims that seek the refund of local taxes. We therefore conclude that the reasoning of *City of San Jose*, which permitted a class claim against a municipal government in the context of an action for nuisance under section 910, also permits taxpayers to file a class claim seeking the refund of local taxes under the same statute." (*Ardon*, at p. 245.)

Under *Ardon*, McWilliams was entitled to file a section 910 claim for a TUT refund on behalf of the class he purports to represent. The trial court's reliance on *Woosley* and its decision that McWilliams could not file such a class claim was error.

The City argues article XIII, section 32 of the California Constitution and the public policy underlying it prohibit McWilliams from seeking a refund of TUT on behalf of a class because Long Beach has not expressly authorized class claims. *Ardon*, however, rejected the same argument asserted by a plaintiff seeking a TUT refund from the City of Los Angeles. (*Ardon*, *supra*, 52 Cal.4th at pp. 251-252.)

---

[8] Article XIII, section 32 of the California Constitution provides: "After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature."

5. *The Complaint States Sufficient Facts to Support the First Four Causes of Action*

a. *First and Second Causes of Action for Declaratory and Injunctive Relief*

As stated *ante*, the first cause of action is for declaratory and injunctive relief challenging the legality of the TUT and the second cause of action is for declaratory and injunctive relief challenging the legality of the City's amendment to its municipal code relating to the TUT. The City contends McWilliams cannot maintain these two equitable causes of action because it has an adequate remedy at law, namely a tax refund. In support of its position, the City cites *Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129 (*Flying Dutchman*).

We reject the City's argument. In *Flying Dutchman*, the plaintiff failed to pay the disputed tax before filing its lawsuit. The court held that under the "pay first, litigate later" rule of article XIII, section 32 of the California Constitution, the plaintiff was prohibited from seeking injunctive and declaratory relief. (*Flying Dutchman, supra*, 93 Cal.App.4th at pp. 1132, 1136.) The present case is distinguishable from *Flying Dutchman* because McWilliams allegedly paid the TUT due before filing this action and has allegedly continued to pay the tax during the pendency of the suit. Where, as here, the plaintiff pays the challenged tax before the court adjudicates the merits of the plaintiff's claims, the plaintiff may obtain declaratory and injunctive relief upon entry of judgment. (*Ardon, supra*, 52 Cal.4th at p. 252 ["article XIII, section 32 does not purport to limit a court's authority to fashion a remedy if it determines a tax is illegal, including its authority to issue an injunction against further collection of the challenged tax"].)

b. *Third and Fourth Causes of Action for Money Had and Received and Unjust Enrichment*

Apart from the City's arguments relating to class claims, which we have rejected, the City does not make any arguments relating to the third cause of action for money had and received and fourth cause of action for unjust enrichment. We thus find no reason to affirm the trial court's order sustaining the City's demurrer to these causes of action.

6. *The Complaint Does Not State Sufficient Facts to Support the Fifth and Sixth Causes of Action*

In his supplemental brief, plaintiff concedes that his fifth cause of action for violation of due process and sixth cause of action for writ of mandate are moot because they have an adequate "post-deprivation" remedy in light of *Ardon*, namely a class claim for a tax refund.[9] The trial court therefore correctly sustained the City's demurrer to these causes of action.

DISPOSITION

The order of dismissal dated June 12, 2007, is reversed with respect to the first, second, third and fourth causes of action of the complaint, and affirmed with respect to the fifth and sixth causes of action of the complaint. In the interests of justice, both parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.

---

[9] The fifth and sixth causes of action are based on *McKesson Corp. v. Florida Alcohol & Tobacco Div.* (1990) 496 U.S. 18.

CERTIFICATE OF SERVICE

I, Kimberly Nielsen, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a part to or interested in the within action; that declarant's business address is 300 South Grand Avenue, Suite 2700, Los Angeles, California 90071.

2. That on April 26, 2012, declarant served the **PETITION FOR REVIEW** via U.S. Mail in a sealed envelope fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is regular communication between the parties.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 26th day of April, 2012, at Los Angeles, California.

COLANTUONO & LEVIN, P.C.

By: _____
Kimberly Nielsen

McWilliams v. City of Long Beach, et al.
Case No. B200831
Service List

COUNSEL FOR RESPONDENTS IN THIS ACTION AND THE RELATED ACTIONS OF **ARDON V. CITY OF LOS ANGELES** AND **GRANADOS V. COUNTY OF LOS ANGELES**:

Francis M. Gregorek
Rachele M. Rickert
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
750 B Street, Suite 2770
San Diego, CA 92101
(619) 239-4599
(619) 234-4599 (fax)

Nicholas E. Chimicles
Timothy N. Matthews
Benjamin F. Johns
CHIMICLES & TIKELLIS LLP
One Haverford Centre
361 West Lancaster Avenue
Haverford, PA 19041
(610) 641-8500
(610) 649-3633 (fax)
timothymathews@chimicles.com

Jon A. Tostrud
9254 Thrush Way
West Hollywood, CA 90069
(310) 276-9179

McWilliams v. City of Long Beach, et al.
Case No. B200831
Service List

Sandra W. Cuneo
CUNEO GILBERT & LADUCA
330 South Barrington Ave., #109
Los Angeles, CA 90049
(424) 832-3450
(424) 832-3452 (fax)

COUNSEL FOR RESPONDENTS IN THE RELATED ACTION OF **ARDON V. CITY OF LOS ANGELES:**

Carmen A. Trutanich
Noreen S. Vincent
Brian I. Cheng
OFFICE OF THE CITY ATTORNEY
200 North Main Street, Suite 920
Los Angeles, CA 90012

COUNSEL FOR RESPONDENTS IN THE RELATED ACTION OF **GRANADOS V. COUNTY OF LOS ANGELES**:

Albert Ramseyer
Office of the County Counsel
648 Hall of Administration
500 West Temple Street
Los Angeles, CA 90012-2713

Erica L. Reilley
Jones Day
555 South Flower Street, Fiftieth Floor
Los Angeles, California 90071-2300

McWilliams v. City of Long Beach, et al.
Case No. B200831
Service List

COURTESY COPIES TO:

Honorable Anthony J. Mohr
Superior Court of California
County of Los Angeles
600 S. Commonwealth Ave.
Los Angeles, CA 90005

Clerk of the Court
California Court of Appeal
Second Appellate Division
300 S. Spring Street, 2nd Floor
Los Angeles, CA 90013