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MEMORANDUM OF LAW

DATE: October 16, 2007

TO: Elmer L. Heap, Jr., Environmental Services Director

FROM: City Attorney

SUBJECT: Inapplicability of Proposition 218 to City's Proposed Automated Refuse Container Replacement Fee

INTRODUCTION

Since 1994, when the City began implementing automated refuse collection services City-wide, it has been the City's policy to furnish one approved automated refuse container to each City customer at the City's expense.[1] The City now proposes to modify the existing automated refuse container policy to return responsibility to the individual City customer to furnish replacement automated refuse containers at the customer's expense. Under the proposal, a City customer could acquire an approved replacement automated refuse container through a private vendor or, alternatively, from the City for a cost-recovery fee. The Environmental Services Department has requested an opinion on whether the proposed replacement automated refuse container fee, as presently structured, would be subject to Proposition 218.

QUESTION PRESENTED

Is the proposed automated refuse container replacement fee subject to Proposition 218?

SHORT ANSWER

No. As presently structured, the proposed automated refuse container replacement fee is probably not subject to Proposition 218 because it does not constitute a special tax, an assessment or a property-related fee.

BACKGROUND

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[1] San Diego Resolution R-283379 (Feb. 7, 1994); San Diego Environmental Services Department Regulation 0001-00 (Jan. 7, 2000).

Pursuant to San Diego Municipal Code section 66.0126, it is the responsibility of the owner, operator, manager, or other person responsible for a residential or commercial facility to provide containers adequate to contain the refuse ordinarily accumulated at the facility pending collection. SDMC § 66.0126(a).[2] Prior to implementation of the automated container program, all customers of City-provided refuse collection services historically had provided their own refuse containers, at their expense. However, since 1994, when the City began implementing automated refuse collection City-wide, it has been the City's policy to furnish one automated refuse container to each customer at the City's expense. City customers who require two or more refuse containers at any one time pay a one-time user fee for each additional container.

To encourage recycling, the first recycling container is provided and delivered at no charge. Subsequent recycling containers also are provided at no charge for the container, but are subject to a delivery fee, unless the customer picks up the container. To encourage greenery recycling, the first automated greenery container also is provided free of charge; the second is subject only to a delivery fee, if applicable; and the third is subject to a below cost container fee, plus a delivery fee if applicable.

The City acquires automated containers for its customers' use pursuant to a contract with a private vendor. These automated containers remain the property of the City and, when warranty work is required, the City processes the warranty claim. The automated containers have a normal life expectancy of 10 or more years and come with a limited 10-year manufacturer's warranty. The first set of containers provided to City customers will need to be replaced sometime in the near future.

At this time, the City proposes to modify its existing automated refuse container policy to return responsibility to the individual customer to furnish replacement automated refuse containers.[3] The City would continue to provide an initial automated refuse container at no charge, on a one-time basis, to a new housing unit. However, all customers would thereafter be responsible for furnishing replacement automated refuse containers at their expense when the initial automated refuse container provided to that housing unit became (i) unserviceable and out of warranty, (ii) lost, or (iii) stolen.

Customers would have the option of acquiring replacement automated refuse containers through retailers, such as Home Depot or Lowe's, or from other private vendors. The Environmental Services Department will prepare a list of container models and manufacturers who provide containers which meet City standards and publish that list to retailers, customers, and other sources.

Alternatively, the City will continue to maintain an inventory of containers, and

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[2]SDMC § 66.0127, also known as the People's Ordinance, requires the City to provide refuse collection services to eligible residents at no charge, but does not require the City to furnish refuse containers to its customers. See City Attorney Report to Council June 13, 2005.

[3]As currently proposed, the automated refuse container replacement policy and fee would not apply to recycling containers or greenery containers.

customers could obtain a replacement automated refuse container from the City for a one-time, cost-recovery, user fee. Consistent with current policy, these containers would remain City property, and the City would process any warranty claims. At the customer's request, the City also would deliver a replacement container obtained from the City for a one-time, cost-recovery delivery fee. The fee for replacement of unserviceable refuse containers still under warranty would be pro-rated based on the number of years the container had been in use.

LEGAL ANALYSIS

Proposition 218, adopted by the voters in 1996, added articles XIII C and XIII D to the California Constitution. Article XIII C essentially prohibits local governments from imposing or increasing any tax, general or special, without voter approval. Cal. Const. art. XIII C, § 2. Article XIII D restricts the manner in which local governments may levy assessments upon real property [assessments] and fees or charges on real property or on a person as an incident of property ownership [property-related fees]. Cal. Const. art. XIII D, §§ 1-6. The primary purpose of Proposition 218 was to limit and control local government's ability to impose monetary levies on real property. *Richmond v. Shasta Community Ser. Dist.,* 32 Cal. 4th 409, 414-15 (2004); *Apartment Ass'n of Los Angeles County, Inc., v. City of Los Angeles*, 24 Cal. 4th 830, 837 (2001). Proposition 218 raises three issues applicable to the proposed automated refuse container replacement fee: (1) whether the fee would constitute a special tax; (2) whether the fee would constitute an assessment; or (3) whether the fee would constitute a property-related fee.

(1) Would the proposed automated refuse container replacement fee constitute a special tax?

Government Code Section 50076 specifically excludes from the definition of "special tax" any fee which (a) does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and (b) is not levied for general revenue purposes. Cal. Gov't Code § 50076; *see Mills v. County of Trinity*, 108 Cal. App. 3d 656, 662 (1980). So, assuming the proceeds of the proposed container fee are used for the specific purpose of providing the replacement automated refuse containers and associated services, and the fee does not exceed the reasonable cost of providing those goods and services, then the fee would not constitute a "special tax."

(2) Would the proposed automated refuse container replacement fee constitute an assessment?

An assessment is a charge imposed by local government upon real property for a special benefit conferred on the property. Cal. Const. art. XIII D, § 2(b), (i); Cal. Gov't Code § 53750(b). In determining whether a fee constitutes an assessment, one factor the courts consider is whether the fee will be imposed on identifiable parcels of real property. If the parcels upon which the fee will be imposed cannot be identified in advance, the fee is not an assessment under Proposition 218. *Richmond,* 32 Cal. 4th at 418-19. Another factor is whether the fee is secured by a lien on, or other recourse against, the real property. A fee that does not operate in that way is not an assessment. *Id*. at 420; *Pajaro Valley Water Management Agency v. Amrhein*, 150 Cal. App. 4th 1364, 1382 (2007).

The proposed automated refuse container replacement fee would not be a charge upon real property because it would not be imposed on identified parcels, but only on customers who choose to acquire a replacement automated refuse container from the City rather than from another source. Moreover, the fee would not be secured by real property or by other recourse to real property. If the fee is not paid, the City simply would not provide the container, and the customer would acquire one elsewhere. Thus, the proposed automated refuse container replacement fee would not constitute an assessment under Proposition 218.

(3) Would the proposed automated refuse container replacement fee constitute a property-related fee?

A fee under Proposition 218 is defined as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." Cal. Const. art. XIII D, § 2(e). A property-related service is defined as "a public service having a direct relationship to property ownership." Cal. Const. art. XIII D, § 2(h).

While case law regarding Proposition 218 continues to evolve, recent State Supreme Court opinions imply that refuse collection services, like water and sewer services, are "property-related services" under Proposition 218. *Richmond,* 32 Cal. 4th at 426-27; *Bighorn-Desert View Water Agency v. Verjil*, 39 Cal 4th 205, 214-15 (2006). As such, some refuse collection service fees may be subject to the majority protest procedures in Proposition 218. *Richmond,* 32 Cal. 4th at 427; *Bighorn-Desert View Water Agency,* 39 Cal 4th at 215; Cal. Const. art. XIII D § 6(c). However, such fees would be subject to Proposition to 218 if, and only if, the fee is imposed upon a person as an incident of property ownership. *Id.* If the fee is imposed as a result of a property owner's voluntary decision to apply for a government service, it is not imposed as an incident of property ownership. *Id.*

Other factors the State Supreme Court has considered important to this analysis are the two described in section (2) above, i.e., whether the agency can identify in advance those parcels which would be subject to the fee, and whether the fee would be enforced by way of a lien or other recourse against the real property. *Richmond,* 32 Cal. 4th at 426-28. A negative answer to these questions supports the conclusion that the fee is not subject to Proposition 218. *Id.*

The proposed automated refuse container replacement fee is not a fee for refuse collection services. The customer would not be required to pay the proposed fee in order to obtain or maintain City-provided refuse collection services. The customer could receive those services and avoid the fee altogether by supplying their own container which meets City specifications. Customers would have the option of acquiring replacement automated refuse containers from a retailer or other private source. However, the City would still provide customers the option of using a refuse container supplied by the City for a cost recovery fee if the customer chooses to do so. Thus, the proposed fee is not a fee for refuse collection services.

Nor is the fee otherwise a property-related fee because it is not imposed on real property or as an incident of property ownership. It is charged only as a result of an individual customer's voluntary decision to acquire a container from the City rather than from another source. The conclusion that the fee is not a property-related fee is reinforced by the fact that the City cannot determine in advance which customers, and therefore which parcels, would be subject to the fee. Moreover, failure to pay the fee simply means the customer will not receive a replacement automated refuse container from the City. The fee would not be secured by the real property. Thus, the proposed automated refuse container replacement fee probably would not constitute a property-related fee under Proposition 218.

CONCLUSION

As presently structured, the proposed automated refuse container replacement fee probably would not be subject to Proposition 218. As long as the fee does not exceed the reasonable cost of providing the automated refuse container replacement services for which the fee is imposed and the proceeds of the fee are used for the specific purpose of providing the replacement automated refuse containers and associated services, the fee would not constitute a special tax under Proposition 218. The proposed fee would not constitute an assessment because it would not be imposed on identifiable parcels, but rather in response to a customer's voluntary decision to acquire an automated refuse container from the City rather than from another source, and because the fee would not be secured by real property. Finally, the fee would not be a

property-related fee subject to Proposition 218 because customers could continue receiving City-provided refuse collection services without paying the fee; the fee would be charged only to a customer who voluntarily seeks to acquire a replacement refuse container from the City; the City cannot identify those customers/parcels in advance; and the fee would not be secured by any real property.

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