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**MEMORANDUM OF LAW**

**DATE:** April 4, 2008

**TO:** Doug Enger, Revenue Auditor, City Auditor's Office

**FROM:** City Attorney

**SUBJECT:** Applicability of City's Solid Waste Collection Franchise Fee to Housing Authority

**INTRODUCTION**

The Auditor's Office recently conducted an audit of franchise fees paid by a City solid waste collection franchisee, including reviewing certain exemptions from the franchise fee claimed by the franchisee. An exemption was claimed for waste generated by residents of apartment complexes owned and managed by the San Diego Housing Commission [Housing Commission]. The Auditor's Office has asked whether waste generated in connection with housing projects of the Housing Commission is exempt from the City's solid waste collection franchise fee.

**QUESTION PRESENTED**

Is solid waste generated in connection with housing projects owned and/or managed by the Housing Commission exempt from the City's solid waste collection franchise fee?

**SHORT ANSWER**

No. Solid waste generated in connection with housing projects owned and/or managed by the Housing Commission is not exempt from the City's solid waste collection franchise fee. The State Legislature has expressly made housing projects subject to local sanitary ordinances. The City's franchise regulations constitute local sanitary ordinances. Thus, waste generated in connection with housing projects owned and/or managed by the Housing Commission is subject to the City's franchise fee, unless otherwise exempt under San Diego Municipal Code section 66.0109. The waste at issue here does not qualify for any section 66.0109 exemptions. Thus, it is not exempt from the solid waste collection franchise fee.

## BACKGROUND

The City regulates the collection, transportation, processing, recycling, and disposal of solid waste within the City. SDMC §§ 66.0101 *et seq.* These regulations include franchise regulations whose purpose is two-fold: (1) to regulate the business of collection, transportation, recycling, and disposal of solid waste for the public health, safety, welfare, and quality of life and for protection of the environment; and (2) to receive compensation for the value of the franchise. SDMC § 66.0107. Pursuant to these regulations, the City has granted a number of non-exclusive franchises to provide solid waste collection services. Franchisees are required to pay a specified franchise fee for every ton of solid waste collected within the City. SDMC § 66.0118. Certain waste or waste generating activities are statutorily exempt from the franchise fee. SDMC § 66.0109. In addition, waste generated by the State or a “State agency” acting in its sovereign capacity is not subject to local solid waste collection franchise regulations under the theory of sovereign immunity, unless that immunity expressly has been waived. *Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc.*, 43 Cal. App. 4th 630, 635-37 (1996); *Del Norte Disposal, Inc. v. Department of Corrections*, 26 Cal. App. 4th 1009, 1012-13 (1994).

The Housing Commission is a local public entity overseen by the San Diego Housing Authority [Housing Authority]. The Housing Authority is a public corporate body created by state law and first authorized to exercise its powers and to transact business by the City Council in 1969. Cal. Health & Safety Code § 34240; *Housing Authority v. Dockweiler*, 14 Cal. 2d 437, 443 (1939).<sup>1</sup> The Housing Commission was created in 1979 by ordinance of the City Council pursuant to the State Housing Authority Law and was granted all powers, rights, and duties of a Housing Authority, except for those expressly reserved to the Housing Authority. SDMC § 98.0301. The City Council sits as the Housing Authority and approves certain financial commitments, decisions by, and housing policy matters of the Housing Commission.<sup>2</sup> The purpose of the Housing Authority and Housing Commission is to provide affordable housing for low income individuals through a variety of programs including owning and managing housing units.

The waste at issue here is residential waste collected by a franchisee from apartment complexes owned and/or managed by the Housing Commission. Based on the waste description, it does not qualify for any of the San Diego Municipal Code exemptions to the franchise fee. SDMC § 66.0109. However, the waste is generated by housing projects owned and/or managed by the Housing Commission, under powers delegated to it by the Housing Authority, which is a public entity created by state law. Thus, we consider whether the waste may be exempt from the

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<sup>1</sup>1986 City Att’y MOL 240. A housing authority is a separate legal entity, distinct from the City. See Cal. Health & Safety Code § 34240; *Housing Authority v. City of Los Angeles*, 38 Cal. 2d 853, 861 (1952); *Dockweiler*, 14 Cal. 2d at 443-44.

<sup>2</sup>San Diego Housing Commission General Information, Fact Sheet: About the San Diego Housing Commission. Visited March 4, 2008. <http://www.sdhc.org/giaboutus2a.htm>

franchise fee under the doctrine of sovereign immunity.

### ANALYSIS

First, it is well-established that when the State engages in sovereign activities, such as the construction and maintenance of its buildings, it is not subject to local regulations unless the Constitution says otherwise or the Legislature has consented to such regulation. *Hall v. City of Taft*, 47 Cal. 2d 177, 183 (1956) (local building regulations not applicable to construction of public school); *Del Norte Disposal, Inc. v. Department of Corrections*, 26 Cal. App. 4th 1009, 1013 (1994) (state prison not subject to local solid waste collection franchise regulations); *Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc.*, 43 Cal. App. 4th 630, 640-41 (1996) (school district not subject to local exclusive franchise system for waste hauling). Building maintenance includes trash collection. *Laidlaw Waste*, 43 Cal. App. 4th at 637.

The State's immunity from local regulations is an extension of the concept of sovereign immunity.<sup>3</sup> *Del Norte Disposal*, 26 Cal. App. 4th at 1013; *Board of Trustees v. City of Los Angeles*, 49 Cal. App. 3d 45, 49 (1975). The State may waive immunity, but the waiver must be expressly stated in a statute. *Del Norte Disposal*, 26 Cal. App. 4th at 1013 (citations omitted). In this case, we begin by reviewing state laws governing solid waste collection and state laws governing housing authorities in order to determine whether a waiver of immunity applies here.<sup>4</sup>

Solid waste collection and disposal is governed by the California Integrated Waste Management Act of 1989 [Act]. A review of the Act reveals no clear language expressly waiving immunity with respect to local solid waste regulations. *Del Norte Disposal, Inc.*, 26 Cal. App. 4th at 1015. Thus, we examine the state statutes governing Housing Authorities, which are contained in the Housing Authority Law codified at California Health and Safety Code sections 34200 *et seq.*

A review of those statutes reveals that the State Legislature expressly has waived any immunity that housing projects may otherwise have had from local solid waste franchise regulations. Specifically, California Health and Safety Code section 34326 expressly states: "All housing projects are subject to the planning, zoning, sanitary, and building laws, ordinances,

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<sup>3</sup>In contrast, a pure revenue raising measure, such as a business tax, of general application imposed in a non-discriminatory manner on persons doing business with the State or in a State-regulated activity does not impinge on the sovereign power of the State, even though its ultimate economic burden will be passed on to the State. *City of Los Angeles v. A.E.C. Los Angeles*, 33 Cal. App. 3d 933, 940 (1973).

<sup>4</sup>We have contemporaneously opined that the San Diego Redevelopment Agency is not a "state agency" for purposes of exempting waste it generates from local franchise regulations. However, we have not analyzed the state agency question here because the statutory provision in the Housing Authority Law which expressly subjects housing projects to local sanitary ordinances is dispositive of the issue presented.

and regulations applicable in the locality in which the housing project is situated. . . .” *Housing Authority v. City of Los Angeles*, 38 Cal. 2d 853, 863 (1952); *Housing Authority v. Dockweiler*, 14 Cal. 2d 437, 444 (1939).

A housing project is very broadly defined and includes construction, reconstruction, acquisition, and provision of low-rent apartments and other dwellings as well as all public amenities (streets, sewer, water, parks, playgrounds, etc.) and all ancillary work (planning, administrative, health, educational, recreational, etc.) associated with providing low-income housing. Cal. Health & Safety Code § 34212. Thus, the apartment complexes at issue here clearly fall within the definition of housing projects, as do all other activities of the Housing Authority and Housing Commission undertaken in connection with the provision of low-income housing or related thereto.

Moreover, the City’s franchise regulations fall within the meaning of sanitary ordinances listed in section 34326. The term “sanitary” means “of or relating to health; for or relating to the preservation or restoration of health; occupied with measures or equipment for improving conditions that influence health; free from or effective in preventing or checking an agent (as filth or infection) injurious to health. . . .” Webster’s 3rd New International Dictionary of the English Language Unabridged (1971). In addition, the term “sanitary” is used in state law to describe special districts established to collect and dispose of solid waste within their boundaries. *Rodeo Sanitary District v. Board of Supervisors of Contra Costa County*, 71 Cal. App. 4th 1443, 1446-47 (1999); Cal. Health & Safety Code § 6518.5. Further, the City’s franchise regulations are part of a comprehensive statutory scheme to regulate the collection, transportation, recycling, and disposal of solid waste within the City. SDMC §§ 66.0101-66.0718. A primary purpose of the franchise regulations is to regulate the business of collecting, transporting, recycling, and disposing of solid waste for the protection of the public health, safety, welfare, and quality of life of City residents and for the protection of the environment. SDMC § 66.0107(a). Thus, these regulations are “sanitary ordinances” under section 34326.

Finally, the language in section 34326 constitutes an express waiver of immunity. First, the words used in that section are very similar to the language in Government Code section 53091(a), which states: “Each local agency shall comply with all applicable building ordinances and zoning ordinances of the county or city in which the territory of the local agency is situated.” A “local agency” means a state agency for the local performance of governmental or proprietary functions. Cal. Gov’t Code § 53090. Courts have concluded that section 53091(a) constitutes an express waiver of immunity and was enacted specifically to ensure that state agencies were subject to local zoning and building regulations. *City of Malibu v. Santa Monica Mountains Conservancy*, 98 Cal. App. 4th 1379, 1383 (2002); *City of Santa Clara v. Santa Clara Unified School District*, 22 Cal. App. 3d 152, 157-158 (1971). Second, the *City of Malibu* court also considered former section 33008 of the Public Resources Code which stated: “Nothing in this Division shall supersede or limit a local government’s exercise of the police power derived from any other provision of existing law or any law hereafter enacted.” *City of Malibu*, 98 Cal. App. 4th at 1384-85. The court concluded that section 33008 was an express waiver of immunity from local land use regulations. *Id.* Section 33008 uses very general language and yet is still sufficient

to constitute an express waiver of immunity. In comparison, section 34326 is much more precise and clearly requires that housing projects comply with local sanitary regulations. Based on the above analysis, Health and Safety Code section 34326 constitutes an express waiver of immunity from the City's franchise regulations, including the franchise fee.

### CONCLUSION

The Housing Authority, and by extension the Housing Commission, is not exempt from the City's solid waste collection franchise fee. The Housing Authority Law contains an express waiver of immunity from local sanitary ordinances. The City's franchise fee and other solid waste collection franchise regulations constitute sanitary ordinances. Thus, waste generated by the Housing Authority, the Housing Commission, and in connection with housing projects as defined under the Housing Authority Law is not exempt from the City's franchise fee, unless otherwise exempt under Municipal Code section 66.0109. The waste at issue here does not qualify for any section 66.0109 exemptions. Thus, it is subject to the franchise fee.

MICHAEL J. AGUIRRE, City Attorney

By

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cc Elmer Heap, Jr., Deputy Chief Operating Officer of Community Services  
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