GRACE C. LOWENBERG
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Michael J. Aguirre
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

# 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 Redevelopment Agency

## INTRODUCTION

The City 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 tenants of a mixed use (residential and commercial) property owned by the City of San Diego Redevelopment Agency [RDA] and commonly known as the Sanctuary Suites & Retail property. The RDA states the property consists of several apartments currently leased to students and a fast food establishment.[1] Thus, the waste appears to be typical municipal solid waste. The Auditor's Office has asked whether waste generated by the RDA, including the above-described waste, is entitled to an exemption from the franchise fee.

## QUESTION PRESENTED

Is waste generated by the RDA including, but not limited to, waste generated by private party tenants of property owned by the RDA [hereinafter collectively referred to as "RDA waste"], exempt from the City's solid waste collection franchise fee by virtue of state sovereign immunity?

## SHORT ANSWER

No. RDA waste is not exempt from the City's solid waste collection franchise fee. The RDA does not constitute a "state agency" cloaked with state sovereign immunity from the City's franchise regulations. The RDA is a separate legal entity, distinct from the State and the City.

---

[1]Telephone call with Maureen Ostrye, Redevelopment Coordinator, February 13, 2008; Cash Depository Agreement, City Clerk No. D-03873/R-03873 Filed March 4, 2005. The property is not student only housing.

Thus, RDA waste is subject to the City's franchise fee, unless it is otherwise exempt under Municipal Code section 66.0109. The waste at issue here does not qualify for any exemption.

## BACKGROUND

The City regulates the collection, transportation, processing, 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 exempt from the franchise fee. SDMC § 66.0109. Based on the above description, the waste does not qualify for any of the Municipal Code exemptions to the franchise fee. However, because the waste is generated at property owned by the RDA, which is a public entity created by state law, we consider whether it may be exempt from the 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.[2] *Del Norte Disposal*, 26 Cal. App. 4th at 1013; *Board of Trustees v. City of Los Angeles*, 49 Cal. App. 3d 45, 49 (1975). Thus, the Legislature's consent to waive immunity must be expressly stated in a statute.[3] *Del Norte Disposal*, 26 Cal. App. 4th at 1013 (citations omitted).

---

[2]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).

[3] Solid waste collection and disposal is governed by the California Integrated Waste Management Act of 1989 [Act]. The Act contains no clear language expressly waiving immunity with respect to local solid waste regulations. *Del Norte Disposal, Inc*., 26 Cal. App. 4th at 1015. Moreover, a comprehensive review of the Community Redevelopment Law revealed no express waiver of immunity from local regulations. Cal. Health & Safety Code §§ 33000 et seq.

The purpose of sovereign immunity is to protect the State from interference with the functions performed by state agencies and to protect the state treasury. *See Hall,* 47 Cal. 2d at 183; *City of Santa Cruz v. Santa Cruz City School Board of Education*, 210 Cal. App. 3d 1, 6 (1989); *see also Lynch v. San Francisco Housing Authority*, 55 Cal. App. 4th 527, 533 (1997).

Sovereign immunity is limited to situations where the State is acting in its governmental capacity. *Board of Trustees*, 49 Cal. App. 3d at 49. State activities which are proprietary in nature, such as a mere revenue producing activity, are not shielded by the immunity doctrine. *Id*. (contractor leasing property owned by state university for purposes of conducting a circus was subject to city permit and fee requirements)

The immunity extends to contractors of the State acting in its governmental capacity. *Bame v. City of Del Mar*, 86 Cal. App. 4th 1346, 1351 (2001) (private entity under contract with agricultural district to operate consumer exhibitions and demonstrations at Del Mar Fairgrounds not subject to city license fees and admissions taxes). It also extends to "state agencies" and their contractors acting in their governmental capacity. *Id*. at 1356.

There is no clear guidance in the relevant case law as to what constitutes a "state agency" for purposes of determining whether the entity is immune from local regulation. In fact, recent cases have acknowledged that the current state of the law on this question is a "tangle of prohibitions and exceptions, lacking a single articulable organizing principle." *City of Malibu v. Santa Monica Mountains Conservancy*, 98 Cal. App. 4th 1379, 1384 (2002). Moreover, labeling an entity as a state agency in one context does not compel its treatment as a "state agency" in all contexts. *Id*.; *Lynch*, 55 Cal. App. 4th at 534. It may be a state agency for some purposes, but not for others. *Torres v. Board of Commissioners*, 89 Cal. App. 3d 545, 549 (1979).

That said, there are some factors the courts have considered in wrestling with this determination. They include: (1) whether the entity's purpose involves a matter of statewide concern; (2) whether the State retains control over the entity and, if so, the degree of that control, i.e., the autonomy enjoyed by the entity; (3) whether the entity is referred to as a "state agency" or "state institution" in the enabling legislation; (4) whether a money judgment against the entity would be satisfied out of State funds; (5) whether the entity may sue or be sued in its own name; (6) whether the entity has power to hold property in its own name or only in the name of the State; (7) whether the entity is incorporated; (8) whether the entity receives state funding and the percentage thereof; (9) the independent authority of the entity to raise funds and the State's control over its fiscal affairs; (10) the geographic jurisdiction of the entity; (11) whether the entity's governing body is appointed at the state level or at the local level; and (12) whether the entity's officers are referred to as state officials in the enabling legislation. *Hall*, 47 Cal. 2d at 181 (court focused on facts that public school system is of statewide concern, education of children is exclusively a state function, and system is exclusively under Legislature's control); *Bame*, 86 Cal. App. 4th at 1351 (court noted that Agricultural District is defined as a "state institution" created under state law); *Lynch*, 55 Cal. App. 4th at 533-34, 536 (various factors listed above considered in determining state agency status for purposes of 11th Amendment immunity analysis); *People ex rel. Post v. San Joaquin Valley Agricultural Ass'n*, 151 Cal. 797, 801-805 (1907) (comparison of structure, operation, and funding of state agricultural districts

before and after legislative reorganization compels finding of state agency status). So, determining whether any given public entity constitutes a "state agency" will require an examination of these factors on a case-by-case basis.

As far as the RDA, those cases which have touched on the state agency issue have reached different conclusions. For example, the California Supreme Court described redevelopment agencies as arms of local legislative bodies which act on a local level to eradicate blight. *Huntington Park Redevelopment Agency v. Martin*, 38 Cal. 3d 100,104 (1985). In contrast, two prior appellate court cases had characterized them as state agencies, albeit without analysis of any of the factors listed above. *Kehoe v. City of Berkeley*, 67 Cal. App. 3d 666, 673 (1977); *Gibbs v. City of Napa*, 59 Cal. App. 3d 148, 154 (1976). So, as is typical in this area of law, different courts have reached different conclusions regarding the status of a redevelopment agency in different contexts.

On balance, however, an analysis of the factors listed above weighs against a "state agency" finding. To begin with, the RDA owes its creation to state legislation found in the Community Redevelopment Law [CRL] §§33000 *et seq*., which expressly states that a redevelopment agency exists in each community as "a public body, corporate and politic." Cal. Health & Safety Code § 33100. In addition, the CRL specifically states that it is "the policy of the State: (a) To protect and promote the sound . . . redevelopment of blighted areas . . . (c) That the redevelopment of blighted areas . . . are governmental functions of state concern in the interest of health, safety, and welfare of the people of the State and of the communities in which the areas exist." Cal. Health & Safety Code § 33037. These factors suggest that redevelopment agencies are state creatures intended to address a statewide concern.

Secondly, the CRL refers to a redevelopment agency as a "public body." Cal. Health & Safety Code § 33100. A public body means the State or any other public body of the State, and the State includes a state agency or instrumentality. Cal. Health & Safety Code §§ 33004, 33005. This definition is somewhat circular, but suggests that the Legislature intended to label a redevelopment agency as a state agency. These factors support a state agency finding for purposes of determining sovereign immunity from local franchise regulations.

However, all of the remaining factors weigh against a state agency finding. First, the CRL merely creates redevelopment agencies in an incorporeal sense. It is up to each local government to give life to such an agency when the local body determines by ordinance that there is a need for the agency. Cal. Health & Safety Code § 33101.[4] Accordingly, the RDA was established by the City Council.[5] The City Council appointed Councilmembers to serve as the Board of Directors of the RDA.[6] The Mayor chairs the RDA, and the City Attorney serves as its

---

[4]Redevelopment Agencies established prior to 9/15/61 were authorized by resolution. Cal. Health & Safety Code § 33104.

[5] Cal. Health & Safety Code § 33200; Redevelopment Agency Overview p.1. Visited February 22, 2008. <http://www.sandiego.gov/redevelopment-agency/overview>

[6] Alternatively, the Mayor may appoint the members of the agency subject to City Council approval. Cal. Health & Safety Code § 33110.

general counsel. The City Planning and Community Investment Department, Redevelopment Division, serves as staff to the RDA.[7] The powers of the agency are vested in the members. Cal. Health & Safety Code § 33121. Thus, the governing body is not appointed by the Governor or other state official, and there is no requirement that one or more RDA members be state officeholders. Moreover, the CRL does not refer to the members of the agency as state officers, but simply as members of the agency. Both the governance and staffing functions of the RDA are performed by local officials and employees.[8]

Its jurisdiction extends only to the City limits. Cal. Health & Safety Code § 33120. The CRL states that the RDA performs a public function *of the community.* Cal. Health & Safety Code § 33123 (emphasis added). In this case, "community" means the City. Cal. Health & Safety Code § 33002; *Pacific State Enterprises, Inc. v. City of Coachella*, 13 Cal. App. 4th 1414, 1425 n.7 (1993). Thus, the RDA operates only on a local level.

In addition, the RDA reports to the City Council. Cal. Health & Safety Code §§ 33080.1, 33615. The City Council oversees the RDA. For example, the Council has authority to appropriate monies for administrative expenses of the agency, select survey areas, adopt redevelopment plans, provide for expenditure of funds to implement the plans, approve redevelopment agency contracts, approve the agency's budget, approve the agency's issuance of bonds, etc. Cal. Health & Safety Code §§ 33610, 33310, 33365, 33369, 33371, 33606, 33611, 33612, 33640. The City Council has the discretion to dissolve the RDA. Cal. Health & Safety Code § 33140. Thus, oversight, control, and the very existence of the RDA rests in local government, not the State.

Further, the RDA is a corporate body, a distinct legal entity. It may sue and be sued; have a seal; make and execute contracts; and make, amend, and repeal bylaws and regulations. Cal. Health & Safety Code § 33125; *see Pacific State Enterprises, Inc.*, 13 Cal. App. 4th at 1425. It is liable for its own debts. *County of Solano v. Vallejo Redevelopment Agency*, 75 Cal. App. 4th 1262, 1267 (1999). The RDA has authority to adopt personnel rules and regulations applicable to its employees. Cal. Health & Safety Code § 33126. It may acquire property by various means, including by eminent domain, in its own name. Cal. Health & Safety Code § 33391. It may borrow money from public or private sources and issue bonds. Cal. Health & Safety Code §§ 33601, 33640. The CRL does not provide for any state funding of redevelopment agencies. According to the FY 2008 Budget for the RDA, it receives no funding from the State, but rather generates revenue primarily from tax increments, bonds and other financing, rents, and interest.[09] Thus, while the RDA is governed by state law, it functions independently of the State.

---

[7]Redevelopment Agency Overview p.1. Visited February 22, 2008. < http://www.sandiego.gov/redevelopment-agency/overview>

[8]A redevelopment agency is also a separate and distinct legal entity from the City. *Pacific State Enterprises, Inc. v. City of Coachella*, 13 Cal. App. 4th 1414, 1425 (1993).

[09]Redevelopment Agency FY 2008 Budget Summary. Visited February 22, 2008. < http://www.sandiego.gov/redevelopment-agency/pdf/redev2008budgetsummary.pdf>.

In addition, other considerations support the conclusion that the RDA is not a "state agency." For example, in 1985 the California Supreme Court described redevelopment agencies as arms of local legislative bodies which act on a local level to eradicate blight. *Huntington Park Redevelopment Agency v. Martin*, 38 Cal. 3d 100, 101 (1985). It stated that the redevelopment scheme envisions an ongoing transfer of responsibility for eradicating blight, a governmental function, from the *City* to the redevelopment agency. The Court also pointed out that the City can create and dissolve the agency, and has continuing oversight of the agency. *Id*. at 109. Thus, the Court recognized the exceedingly local nature of redevelopment activities.

Moreover, a redevelopment agency is a local agency for purposes of Government Code section 53090. *Kehoe*, 67 Cal. App. 3d at 673. Section 53090 was enacted as a direct response to the sweeping immunity recognized in the *Taft* case*, supra. City of Santa Cruz*, 210 Cal. App. 3d at 5. It was designed to ensure that local agencies which are not subject to such thorough state control as school districts are not exempt from local building and zoning regulations. *City of Santa Clara v. Santa Clara Unified School District,* 22 Cal. App. 3d 152, 158 n.3 (1971). This characterization as a local agency provides further support for the conclusion reached here.

Finally, numerous other state statutes expressly distinguish between the term "state agency" and "redevelopment agency." *See* Cal. Gov't Code § 65930; Cal. Health & Safety Code §§ 50079, 51600(e); Cal. Labor Code § 1720(c)(1); Cal. Pub. Res. Code § 21062. Thus, the Legislature itself seems to have acknowledged on various occasions that these entities are not "state agencies."

Based on the above analysis, the RDA does not appear to be a state agency cloaked with sovereign immunity. Thus, RDA waste is subject to the City's solid waste collection franchise regulations, and waste generated by the RDA, as well as by private party tenants of properties owned by the RDA, is not exempt from the City's franchise fee.

## CONCLUSION

In sum, determining whether a particular public entity is a "state agency" which is exempt from the City's solid waste collection franchise regulations, including the franchise fee, requires a case-by-case analysis. Courts have used the factors listed above in making that determination. Based on an analysis of those factors relative to the RDA, it is not a state agency for purposes of sovereign immunity from the City's franchise regulations. It is a distinct legal entity separate from the State and the City. Thus, RDA waste is subject to the City's solid waste collection franchise fee, unless it meets one of the exemptions in Municipal Code section 66.0109. The waste at issue does not qualify for any of those exemptions. Thus, it is not exempt from the franchise fee.

MICHAEL J. AGUIRRE, City Attorney

By

Grace C. Lowenberg
Deputy City Attorney

GCL:mb
ML-2008-5
cc Elmer Heap, Jr., Deputy Chief Operating Officer of Community Services
Chris Gonaver, Environmental Services Department Director
Kip Sturdevan, Environmental Services Department Deputy Director
Sam Merrill, Environmental Services Department Franchise Administrator