JEAN E. JORDAN
ASSISTANT CITY ATTORNEY

JEANNE L. MACKINNON
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

MARA W. ELLIOTT
CITY ATTORNEY

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

MEMORANDUM OF LAW

DATE: July 5, 2023

TO: Hagen Gregorio, Revenue Compliance Manager
Office of the City Treasurer

FROM: City Attorney

SUBJECT: Applicability of City's Solid Waste Franchise Fee to Waste Collected from San Diego Unified Port District and San Diego Metropolitan Transit System

INTRODUCTION

In October 2021, the Office of the City Treasurer (Treasurer) commenced an audit of one of the City's non-exclusive franchise waste haulers (franchisee). The franchisee claimed to be exempt from the payment of franchise fees on solid waste collected from San Diego Unified Port District (Port) and San Diego Metropolitan Transit System (MTS) facilities within the City of San Diego (City). The franchisee asserts it is not required to pay franchise fees on solid waste collected at Port and MTS facilities because these entities are State of California (State) agencies immune from local solid waste regulations and the State's immunity passes through to the contractors performing sovereign activities on behalf of the State. The Treasurer requested a legal analysis of whether solid waste collected at Port and MTS facilities is exempt from solid waste collection franchise fees payable under the San Diego Municipal Code (SDMC or Municipal Code) and the terms of the City's franchise waste hauler agreements.

QUESTIONS PRESENTED

1. Is solid waste collected by a private hauler from Port facilities exempt from the City's solid waste collection franchise fee?

2. Is solid waste collected by a private hauler from MTS facilities exempt from the City's solid waste collection franchise fee?

SHORT ANSWERS

1. No. The Port is not a "state agency." It is a local agency, subject to local regulation, and solid waste collected by a private waste hauler from Port facilities is not exempt from the City's solid waste regulations, including solid waste collection franchise fees.

2. No. While MTS is exempt from local building and zoning ordinances and land use regulation, it must comply with local health, safety and environmental ordinances enacted under the City's police power, such as the City's solid waste ordinances. Solid waste collected by a private waste hauler from MTS facilities is therefore not exempt from solid waste collection franchise fees.

BACKGROUND

The City regulates the collection, transportation, processing, and disposal of solid waste within the City's municipal boundaries under its constitutional police power authority (Cal. Const. art. XI, § 7), Charter authority (San Diego Charter §§ 103, 105), and the comprehensive California Integrated Waste Management Act (CIWMA) (Cal. Pub. Res. Code §§ 40000-49654). *See* SDMC § 66.0101-66.0135. City solid waste regulations include franchise regulations that (1) 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) require compensation for the value of the franchise. SDMC § 66.0107.

The City has granted non-exclusive franchises to private haulers to provide solid waste collection services under franchise agreements which, among other things, include the right to use public streets and rights-of-way and require franchisees to pay a specified franchise fee for every ton of solid waste collected within the City. SDMC §§ 66.0108, 66.0118. While municipal corporations and certain governmental agencies using their own vehicles engaged in the collection, transportation, disposal, or recycling of solid waste within the City are exempt from the City's franchise regulations, private haulers are not. SDMC § 66.0109(l). Because the Port and MTS are public entities created under state law, this memorandum analyzes whether solid waste collected by a private hauler from Port and MTS facilities is exempt from the franchise fee required under the Municipal Code and franchise agreements.

ANALYSIS

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 expressly consented to such regulation. *Hall v. City of Taft*, 47 Cal. 2d 177, 183 (1956); *Laidlaw Waste Sys., Inc. v. Bay Cities Servs., Inc*., 43 Cal. App. 4th 630, 636 (1996). The State's immunity from local regulations is an extension of the concept of sovereign immunity. *Del Norte Disposal, Inc. v. Dep't of Corrections*, 26 Cal. App. 4th 1009, 1013 (1994). The purpose of sovereign immunity, sometimes referred to as the immunity doctrine, is to protect the State from interference with the functions performed by state agencies and to protect the state treasury. *Lynch v. San Francisco Hous. Auth.*, 55 Cal. App. 4th 527, 533 (1997). Sovereign immunity is limited to situations where the State is acting in its governmental capacity. *Bd. of Trs. v. City of Los Angeles*, 49 Cal. App. 3d 45, 49 (1975). State activities which are proprietary in nature, such as a mere revenue producing activity, are not shielded by the immunity doctrine. *Id.* at 50. The State's immunity extends to State contractors that are acting on the State's behalf. *Bame v. City of Del Mar*, 86 Cal. App. 4th 1346, 1362 (2001).

There is no definitive 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, cases acknowledge that 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. *Lynch,* 55 Cal. App. 4th at 534, 536. The agency may be a state agency for some purposes, but not for others. *Torres v. Bd. Of Comm'rs*, 89 Cal. App. 3d 545, 549 (1979).

Furthermore, the Legislature and the courts treat regional rapid transit districts, such as MTS, differently. By statute, rapid transit districts are not local agencies subject to local building ordinances and zoning regulations. Cal. Pub. Util. Code § 120050(c); Cal. Gov't Code § 53090. Regional rapid transit districts are not subject to local land use regulation. *Rapid Transit Advocates, Inc. v. Southern Cal. Rapid Transit Dist.,*185 Cal. App. 3d 996 (1986).

Nevertheless, the courts have considered certain common factors when addressing the 'state versus local agency' question including: (1) whether the entity's purpose involves a matter of statewide concern; (2) whether the enabling legislation refers to the entity as a "state agency" or "state institution"; (3) whether the entity's governing body is appointed at the state level or at the local level; (4) whether the enabling legislation refers to the entity's officers as state officials; (5) whether the entity receives State funding and the percentage thereof; (6) whether the entity is incorporated; (7) whether the entity may sue or be sued in its own name; (8) whether the entity has power to hold property in its own name or only in the name of the State; (9) whether the State retains control over the entity and, if so, the degree of that control; and (10) the entity's geographic scope or jurisdiction.[1] The courts undertake this multi-factor analysis on a case-by-case basis and weigh the totality of the factors in deciding the 'state versus local agency' question.

I. THE PORT IS A LOCAL AGENCY THAT IS SUBJECT TO THE CITY'S SOLID WASTE REGULATIONS

A. ON BALANCE, THE MULTI-FACTOR ANALYSIS SUPPORTS A DETERMINATION THAT THE PORT IS NOT A STATE AGENCY

Determining whether the Port is a "state agency" for purposes of an exemption from local regulation necessitates a detailed, case-by-case analysis of the ten factors described above.

> Factor 1: Are the development of harbors and ports, and the purposes and uses of tidelands and submerged lands, matters of statewide concern?
>
> Yes. The Port holds port lands in trust for the uses and statewide purposes and concerns described in California Public Resources Code section 6009(e): "[t]he purposes and uses of tidelands and submerged lands is a statewide concern."

[1] *See People ex rel. Post v. San Joaquin Valley Agric. Ass'n,* 151 Cal. 797 (1907); *Hall v. City of Taft*, 47 Cal. 2d 177, 180-83 (1956); *Lynch v. San Francisco Hous. Auth.*, 55 Cal. App. 4th 527, 533, 536, 541 (1997); *Rapid Transit Advocates, Inc. v. Southern Cal. Rapid Transit Dist.,* 185 Cal. App. 3d 996 (1986); *Golden Gate Bridge, Highway & Transp. Dist. v. Superior Court,* 125 Cal. App. 4th 177, 181-182 (2004).

Factor 2: Is the Port referred to as a "state agency" or "state institution" in the enabling legislation?

No. The Port's enabling legislation describes the Port as a "specially created district" formed only after local voter petition or city council resolution by the five cities making up the Port, followed by a vote of the local electorate approving Port formation and ceding of city territory to the Port. Cal. Harb. & Nav. Code App. 1 §§ 2, 6 -13.[2]

Factor 3: Is the Port's governing body appointed at the state level or the local level?

Members of the Port's governing body are not appointed at the state level but are appointed at the local level by each of the cities which held the tidelands ultimately conveyed to the Port. Cal. Harb. & Nav. Code App. 1 §16.

Factor 4: Are the Port's governing officers referred to as state officials in the enabling legislation?

No. The enabling legislation does not refer to the members of the Port's governing body as state officials, but rather as port commissioners or officers of the district. Cal. Harb. & Nav. Code App. 1 §§ 16, 18.

Factor 5: Does the Port receive state funding and what is the percentage thereof?

The Port receives no direct funding from the State Legislature and its activities are not funded by state tax revenues. Lands held by the Port "shall be improved **without expense to the state."** Cal. Harb. & Nav. Code App. 1 § 87(c) (emphasis added).

Factor 6: Is the Port incorporated?

Yes. The Port is a public corporation. Cal. Harb. & Nav. Code App. 1 § 28.

Factor 7: May the Port sue or be sued in its own name?

Yes. The Port and the board may sue and be sued in all actions and proceedings in all courts and tribunals of competent jurisdiction. Cal. Harb. & Nav. Code App. 1 § 23.

Factor 8: Does the Port have power to hold property in its own name or only in the name of the State?

The Port has the power to hold property in its own name in trust subject to reversion to the five cities ceding territory to the Port and the County upon the Port's dissolution. Cal. Harb. & Nav. Code App. 1 §§ 25, 69.

---

[2] One case characterizes similar legislation relating to bridge and highway districts as merely permitting, not requiring their formation, and indicates a district formed by six counties under such enabling legislation was "not created by the state Legislature." *Golden Gate Bridge, Highway & Transp. Dist. v. Superior Court,* 125 Cal. App. 4th 177, 181 (2004).

Factor 9: Does the state retain control over the Port, and if so, what is the degree of that control?

State control includes State Lands Commission approval of: 1) Port capital expenditures outside of lands listed in California Harbors and Navigation Code, Appendix 1 (Port Act) section 5(b) (i.e., areas outside of and not adjacent to corporate areas conveyed and tidelands and submerged lands granted under the Port Act) in excess of two hundred fifty thousand dollars (Cal. Harb.& Nav. Code App. 1 § 30.5(c), (d)); and 2) a trust lands plan for remaining State-held lands conveyed to the Port in 2019 (Cal. Harb.& Nav. Code App. 1 § 5.7(d)). The Port, like any local trustee of public trust lands, must comply with annual financial reporting requirements to the State Lands Commission. Cal. Pub. Res. Code § 6306(e)(1). The Port also must report capital expenditures of more than one hundred thousand dollars. Cal. Harb & Nav. Code App. 1 § 30.5 (b). Aside from these areas of State Lands Commission oversight, the Port maintains control over day-to-day operations and finances.

Factor 10: What is the Port's geographic scope or jurisdiction?

The Port's jurisdiction includes the tidelands and lands lying under the inland navigable waters of San Diego Bay in the cities of San Diego, Chula Vista, Coronado, National City, and Imperial Beach, and any contiguous unincorporated territory in San Diego County. Cal. Harb. & Nav. Code App. 1 §§ 4, 5.

On balance, the factors listed above support a determination that the Port is not a state agency. The state does not provide funding to the Port and exercises limited control and oversight in the form of review and approval of extra-jurisdictional acquisitions and projects and financial reporting requirements. Port officials are locally appointed. The Port enjoys distinct independence from the state, including broad corporate powers, control over revenues, and power to hold property, sue, and be sued.

B. CASE AUTHORITY AND PORT STATUTES AND REGULATIONS SUPPORT THE CONCLUSION THAT THE PORT IS REQUIRED TO COMPLY WITH THE CITY'S SOLID WASTE REGULATIONS

Cases considering the status of other ports in the State are instructive and support the conclusion that the Port is not a "state agency." For example, in *City of Oakland ex rel. Bd. of Port Comm'rs v. Fed. Mar. Comm'n,* 724 F.3d 224 (D.C. Cir. 2013), a private contractor claimed the Oakland Port Department (Port Department) was liable for violations of the federal Shipping Act. *Id.* at 226. The Port Department argued that the public trust doctrine shielded it from liability because (i) it was a "governmental agency of the state" given that the State exercised "virtually complete control" over its administration of the tidelands; and (ii) any judgment against it would be paid with revenues from public trust lands which it claimed were State funds to be used only for "State purposes." *Id.* at 228. The court undertook a detailed analysis of both the public trust doctrine and the relationship between Oakland's Port Department and the State of California/State Lands Commission before concluding that the Port Department was not entitled to sovereign immunity because it was neither a state agency, nor were state funds at risk. *Id.* at 228-230. This holding is consistent with the conclusion reached in *People of State of Cal. By and*

Through Dept. of Pub. Works v. Italian Motorship Ilice, 534 F.2d 836, 843 (9th Cir. 1976) where the State argued, and the court agreed, that the Sacramento-Yolo Port District was not a state agency but an independent local agency.[3]

Moreover, the Port Act expressly requires the application of local regulations to fill in certain regulatory voids: "In the absence of the adoption of any police, fire and sanitary regulations by the district, the police, fire and sanitary regulations of any municipal corporation whose boundaries are adjacent to or contiguous to the territorial limits of the district shall be applicable." Cal. Harb. & Nav. Code App. 1 § 60.[4]

The Port has not enacted sanitary regulations relating to solid waste collection, transportation, processing, and disposal outside of prohibiting littering and illegal dumping. *See* San Diego Unified Port District Code (SDUPD Code) §§ 8.02(b)10., (e)11., and 8.50(a) – (c). Thus, consistent with Port Act section 60, SDUPD Code section 8.50(d) provides: "Nothing in this section shall be construed to limit the operation of any duly ordained regulation of any city whose corporate limits extend into the Bay of San Diego or over the tidelands adjacent thereto." Hence, the Port's own enabling legislation and regulations expressly authorize the application of local sanitary regulations, which include the City's solid waste regulations, in the absence of the Port's adoption of such regulations.

In summary, based on the balancing and analysis of factors above, relevant cases, and the Port's own enabling legislation and regulations, the Port is not a "state agency," is subject to local solid waste regulation, and solid waste collected within the City from Port facilities by private haulers is subject to the City's solid waste collection franchise fee.

II. ALTHOUGH MTS IS A RAPID TRANSIT DISTRICT AND REGIONAL AGENCY THAT IS NOT SUBJECT TO LOCAL LAND USE REGULATION, IT IS SUBJECT TO LOCAL HEALTH, SAFETY AND ENVIRONMENTAL ORDINANCES ENACTED PURSUANT TO THE CITY'S POLICE POWER, INCLUDING CITY SOLID WASTE REGULATIONS

The ten factors discussed above also support a finding that MTS is not a state agency. Although transit is considered a matter of statewide concern, MTS is not identified as a "state agency" or "state institution" in its enabling legislation. Unlike the Port, MTS receives state funding but also receives revenue from the City, SANDAG, the Federal government, and

---

[3]Previous legal analysis from this office supports the conclusion that the Port is a local agency. *See* 1991 City Att'y MOL 874 (91-86; Oct. 23, 1991) (Port is a "local agency" under California Government Code section 53090, and subject to local building and zoning ordinances); Memorandum from Heidi Vonblum, Deputy City Attorney, City of San Diego, to Tom Tomlinson, Facilities Financing Program Manager, City of San Diego (Mar. 21, 2011) (on file with Office of the City Attorney) (development on Port lands subject to City Developer Impact Fees and Housing Trust Fees); 2009 Op. City Att'y 1 (2009-1; Apr. 28, 2009) (City, through California Government Code section 53091, has land use authority over state created local agencies); 2008 City Att'y MOL 24 (2008-4; Apr. 4, 2008) and 2008 City Att'y MOL 30 (2008-5; Apr. 4, 2008) (City Redevelopment Agency (RDA) and Housing Authority not state agencies; waste generated from those properties not exempt from City's solid waste franchise fee).

[4] Related, complementary provisions of the Port Act specifically enumerate the appropriate scope and limits of the Port's regulatory and police power jurisdiction "to be used only as necessary or incident to the development and operation of a port". Cal. Harb. & Nav. Code App. 1 § 4(c).

operations and passengers. MTS jurisdiction includes ten cities and portions of San Diego County. Cal. Pub. Util. Code §120054. Like the Port, MTS possesses virtual autonomy in self-governance limited only by regulations of the California Public Utilities Commission. MTS has its own locally appointed board of directors (Cal. Pub. Util. Code § 120050.2) with powers to make contracts (Cal. Pub. Util. Code § 120220), acquire, construct, maintain, and operate public transit systems (Cal. Pub. Util. Code § 120264) , exercise eminent domain (Cal. Pub. Util. Code §§ 120240-120244), levy and collect taxes (Cal. Pub. Util. Code §§ 120480-120488), and establish and maintain its own police force (Cal. Pub. Util. Code § 120550). Therefore, MTS is a regional governmental body with statewide concerns, but, on balance, is not a state agency.

Amendments to California Public Utilities Code section 120050 effective in 2020 identify MTS as a "rapid transit district", not a local agency, for the purposes of California Government Code sections 53090 through 53091. As a rapid transit district, MTS is exempt from local ordinances regulating zoning, building construction, permits, inspection, or removal. In addition, case authority supports the conclusion that MTS is a regional agency not subject to local land use regulation. *Rapid Transit Advocates, Inc. v. Southern Cal. Rapid Transit Dist.,* 185 Cal. App. 3d 996 (1986). However, the City's solid waste regulations are not building or zoning ordinances or land use regulations; they are instead local health, safety and environmental ordinances enacted pursuant to the City's police power.

"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. While local regulations may be void if they conflict with general state law or infringe upon the sovereign activities of another public agency, there is no conflict with or preemption by state law in the case of the solid waste regulations at issue. *See Modesto Irrig. Dist. v. City of Modesto,* 210 Cal. App. 2d 652, 656 (1962) (local agencies are subject to local ordinances enacted under the Subdivision Map Act because such ordinances are not exempted under California Government Code section 53091); 78 Op. Cal. Atty. Gen. 31 (1995) (water district is not exempt from county enforcement actions under Safe Drinking Water Act (Act) because Act is not a building or zoning ordinance).

A regulation infringes upon a public entity's sovereign powers if it affects the entity's governmental purposes and functions. *See Johnson v. Arvin-Edison Water Storage Dist.,* 174 Cal. App. 4th 729, 738 (2009). Generally, an agency's governmental purposes and functions are outlined in its enabling legislation. MTS' enabling legislation and administrative code are silent regarding solid waste collection, transportation, recycling, and disposal. Like the Port, MTS has not adopted regulations in these areas. Therefore, the City's franchise regulations and franchise fees imposed on a private hauler do not infringe upon MTS' purpose or function as a rapid transit district.

In contrast, cities, through their traditional police power have played a dominant role in local sanitation matters, particularly solid waste disposal and regulation, and the CIWMA provides cities with authority and discretion when deciding how to comply with its terms. *Valley Vista Servs., Inc. v. City of Monterey Park*, 118 Cal. App. 4th 881, 887, 890 (2004). This includes the right to determine all "[a]spects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation,

level of services, charges and fees, and nature, location, and extent of providing solid waste handling services." Cal. Pub. Res. Code § 40059(a)(1).

Therefore, notwithstanding its status as a rapid transit district and exemption from local land use regulation, MTS is subject to City solid waste regulations enacted under the City's police power authority. Thus, waste collected by a private hauler from MTS facilities is not exempt from the City's franchise fees.

CONCLUSION

Determining whether a public agency is exempt from the City's solid waste regulations, including franchise fees, requires a case-by-case analysis. Courts have used the factors identified above in making that determination. Based upon an analysis of those factors as applied to the Port as well as Port enabling legislation, case law, and the SDUPD Code, the Port is not a state agency, and its contractors are not shielded by sovereign immunity from the City's franchise regulations. Thus, waste collected by a private hauler from Port facilities is subject to the City's solid waste collection franchise fee.

Based upon MTS' enabling legislation and its status as a rapid transit district, MTS is a regional governmental body with statewide concerns that is exempt from local land use regulations. However, based on the City's constitutional police power to enact and enforce solid waste regulations, waste collected from MTS facilities by a private hauler is not exempt from the City's franchise regulations and is subject to the City's solid waste collection franchise fee.

MARA W. ELLIOTT, CITY ATTORNEY

By */s/ Jeanne L. MacKinnon*
Jeanne L. MacKinnon
Deputy City Attorney

JLM:hm
ML-2023-3
Doc. No. 3345453

cc: Charles Modica, Independent Budget Analyst
Eric K. Dargan, Chief Operating Officer
Renee Robertson, Environmental Services Department Director