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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.<sup>1</sup> 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.

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<sup>1</sup> San Diego Resolution R-283379 (Feb. 7, 1994); San Diego Environmental Services Department Regulation 0001-00 (Jan. 7, 2000).

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 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."

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