

OAKLAND CITY COUNCIL

2004 JUN -3 PM 7:48

RESOLUTION NO. _____ C.M.S

INTRODUCED BY COUNCILMEMBER _____



RESOLUTION OF THE CITY OF OAKLAND OPPOSING ASSEMBLY BILL 2290 (CHAVEZ), WHICH PROPOSES TO ELIMINATE FRANCHISE AND LOCAL AGENCY FEES COLLECTED FROM STATE AGENCIES FOR SOLID WASTE COLLECTION SERVICES

WHEREAS, the City of Oakland and/or its residents would be affected by the proposed State Legislation; and

WHEREAS, AB 2290 (Chavez) would permit a solid waste service provider to deduct Local and Franchise Fees collected from state agencies including school districts for solid waste services if the local agency does not have the legal authority to directly impose those fees on the state agency or the state agency has not paid the local fees to the solid waste service provider; and

WHEREAS, the Local and Franchise Fees are imposed on the exclusive franchise hauler pursuant to Government Code Section 41901, and the City of Oakland has based the Franchise Fee on a percentage of its exclusive franchise solid waste service provider's gross revenue; and

WHEREAS, in October 2002, the City Council adopted a 75% waste diversion goal by year 2010 in alliance with the countywide goal established by the Alameda County Source Reduction and Recycling Board, after the City met the 50% State diversion requirement through a comprehensive integrated waste management program designed to promote source reduction and recycling; and

WHEREAS, the City of Oakland uses the Local fees for implementing integrated waste management programs including recycling and household hazard waste, and the Franchise Fees are used as part of the City's General Fund revenues, and therefore, the elimination of both fees would have an adverse impact on the City's integrated waste management program; would impact the General Fund revenues; and could potentially impact Oakland residents through the garbage rate structure; now therefore, be it

RESOLVED: that the City of Oakland declares its opposition for AB 2290 (Local agency fees: state agencies: solid waste collection services) by Chavez; and be it

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FURTHER RESOLVED: that the City Council directs the City Manager and the City's legislative lobbyist to advocate for the above position in the State Legislature.

IN COUNCIL, OAKLAND, CALIFORNIA, _____, 2004

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, BRUNNER, CHANG, NADEL, QUAN, REID, WAN, and
PRESIDENT DE LA FUENTE

NOES -

ABSENT -

ABSTENTION -

ATTEST: _____

CEDA FLOYD

City Clerk and Clerk of the Council
of the City of Oakland, California

**CITY OF OAKLAND
BILL ANALYSIS**

DEPARTMENT INFORMATION

Contact: Harry Schrauth	Date: 6/2/04
Department: PWA/ESD	Telephone: 238- 6260
FAX #: 238-7286	E-mail: hschrauth@oaklandnet.com
Bill Number: AB 2290	Bill Author: Chavez
Topic: Local Agency Fees: State Agencies: Solid Waste Collection Services	

RECOMMENDED POSITION: Oppose

Summary of the Bill

Assembly Bill (AB) 2290 would exempt state agencies from paying franchise fees and certain other local fees included in garbage rates, and authorize garbage haulers to reduce payments to local agencies by the total amount of such fees that are attributable to services provided to a state agency.

Fees subject to the proposed law include local franchise fees, the fees imposed pursuant to Section 41901 of the Public Resources Code to fund programs necessary to comply with AB 939, and other similar solid waste or recycling fees imposed on the solid waste enterprises by the local agency if: (1) the local agency does not have the legal authority to impose the fees directly on the state agency, and (2) the hauler has informed the state agency of the amount of the fees and the state agency has not paid the fees to the solid waste hauler. State agencies include school districts, community college districts, the University of California, the California State University and all agencies of state government.

Background

On July 7, 1992 the City Council adopted the Source Reduction and Recycling Element and Household Hazardous Waste Element to comply with State law and establish the parameters for a comprehensive integrated waste management program. Through this program, the City successfully met the State requirement of 50% waste diversion and is now working to achieve a 75% diversion goal set by the City Council in October 2002.

Under the current franchise agreement, local fees paid by the City's exclusive franchise hauler are used to implement waste reduction and recycling programs. The franchise

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fees paid by the hauler are part of the general fund revenues. The local fees are approximately 29% and the Franchise fees are 6.5% of the solid waste hauler's gross revenue. Gross revenue is based on the total amount paid for garbage collection and disposal. Currently some state agencies located in Oakland are included in the revenues reported from the City's exclusive franchise hauler and upon which it pays local fees and franchise fees.

Positive Factors for Oakland

At this time there are no visible positive factors for the City of Oakland.

Negative Factors for Oakland

Assembly Bill 2290 if passed, would undermine the integrated waste management system implemented by the City to reduce and recycle solid waste. Eliminating the Local and Franchise fees will impact the City's waste reduction programs including recycling and household hazard waste. It also would:

- Infringe on local autonomy and right to establish franchises to provide important services within the City
- Set a dangerous precedent in eroding the City's revenue base that could be very harmful in the long run
- Would pose an administrative burden on the City to verify the validity of the garbage hauler's basis for fee reduction

Other Information:

PLEASE RATE THE EFFECT OF THIS MEASURE ON THE CITY OF OAKLAND:

- 1 Urgent (top priority for city lobbyist, city position required ASAP)
- 2 Very Important (priority for city lobbyist, city position necessary)
- 3 Somewhat Important (position desired if time and resources are available)
- 4 None (do not review with City Council, position not required)

Other known supports:

- Waste Management (Sponsor)
- Allied Waste Industries
- K-12 Education Management Group
- Los Angeles County Waste Management Association
- California State Association of Counties
- Solid Waste Association of Orange County

Other known opposition:

- City of San Jose
- City of San Diego
- League of California Cities
- Solid Waste Association of North America

Is state/federal legislative committee analysis available? (If yes, please attach)

Yes. Copy of Assembly Bill analysis attached.

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Date of Hearing: May 5, 2004

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT
Sim?n Salinas, Chair
AB 2290 (Chavez) - As Amended: April 16, 2004

SUBJECT : Local agency fees: state agencies: solid waste collection services.

SUMMARY : Authorizes a solid waste enterprise that provides solid waste collection services to a state agency to deduct from the sum of specified local fees, the total fee amount attributable to the service provided to the state agency, subject to specified conditions. Specifically, this bill :

- 1) Finds and declares that under existing law, certain public entities are exempt from various fees imposed by local agencies.
- 2) Specifies that it is the intent of the Legislature to enact legislation to ensure that state agencies are not directly or indirectly charged fees for which they are legally exempt.
- 3) Authorizes a solid waste enterprise that provides solid waste collection services to a state agency to deduct from the sum of local franchise fees, the fees imposed pursuant to Section 41901 of the Public Resources Code, and other similar solid waste or recycling fees imposed on the solid waste enterprises by the local agency that are attributable to the services provided to the state agency if both the following conditions are met:
 - a) The local agency does not have the legal authority to directly impose those fees on the state agency.
 - b) The solid waste enterprise has informed the state agency of the amount of the local fees, but the state agency has not paid the fees to the solid waste enterprise.
- 1) Defines state agency as school districts, community college districts, the University of California, the California State University, and all agencies of state government.

EXISTING LAW :

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- 1) Authorizes each county, city, district, or other local governmental agency to determine the following:
 - a) Aspects of solid waste handling that 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; and
 - b) Whether the services are to be provided by means of nonexclusive franchise, or other agreement, or if the public health, safety, and well-being so require, by partially exclusive or wholly exclusive franchise, or other agreement.

- 1) Authorizes local governments to impose fees in amounts sufficient to pay the costs of preparing, adopting, and implementing a countywide integrated waste management plan, based on the types or amounts of the solid waste.
- 2) Defines "franchise" to include an agreement, either oral or written, between two or more persons by which a franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor, the operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's commercial symbol, such as its trade name or trademark, and the franchisee is required to pay a franchise fee.
- 3) Defines "franchise fee" to mean any fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay for the right to enter into a business under a franchise agreement.
- 4) Immunizes state agencies, including school districts, from local regulation, including fees, unless the state, through statute or constitutional provision, has consented to waive such immunity.

FISCAL EFFECT : Unknown

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COMMENTS :

- 1) This bill stems from a situation in the City of San Jose where some solid waste service providers are refusing to pay the City of San Jose the franchise fee for the solid waste collected by the solid waste hauler from state agencies, including school districts, arguing that they (the haulers) are not legally able to charge the fees to these state agencies, and therefore, should not have to remit the franchise fee to the City.
- 2) The proponents refer to City of Santa Ana v. Board of Education (1967) 255 Cal. App. 2d 178, Del Norte Disposal, Inc. v. Department of Corrections (1994) 26 Cal. App. 4th 1009, 1012-1013, and Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc., 43 Cal. App. 4th 630, as cases that support their arguments for this bill. In these cases the court ruled that state agencies, including school districts, enjoy immunity from local regulation unless the state, through statute or provision of the California Constitution, has consented to waive such immunity. In the case of Laidlaw Waste Systems, Inc. v. Bay Cities Services, a city awarded the plaintiff trash hauler (Laidlaw Waste Systems, Inc.) an exclusive franchise for hauling trash in the city. An elementary school district within the city awarded defendant trash hauler (Bay City Services) a trash collection contract. The Plaintiff sought injunctive and declaratory relief and damages. The trial court entered judgment for defendant. On appeal, the court affirmed, because the school districts within the city were not bound to honor plaintiff's exclusive franchise for trash hauling awarded by the city. The school districts, as state agencies, were immune from the city's trash collection regulations and were, therefore, free to independently contract with other trash haulers pursuant to statutory competitive bidding provisions. It is clear that the local government does not have the jurisdiction to place regulations on the state agencies unless there is explicit consent to do so.
- 3) Since it is very clear that local governments may not impose fees on state agencies, the issue before the committee is really three basic questions:

- a) What is a franchise?
- b) Who are the parties in a franchise that have the legal liability to fulfil the terms of the franchise agreement?

c) What is the nature of a franchise fee?

- 1) A franchise means a contact or agreement, either expressed or implied, whether oral or written, between two or more persons by which a franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor, and for which the franchisee is required to pay a franchise fee. In the case of a franchise for solid waste disposal in a city or county the parties to the agreement would be the local government, which would be the franchisor, and the solid waste hauler, which would be the franchisee. These two parties have the legal obligation to fulfil the terms of the franchise agreement.
- 2) The franchise fee is not a fee for service, a fact that the proponents have expressly stated. The fact that the franchise fee is not a fee for service indicates that the fee cannot be classified as a "pass through fee" to the generator because the generator is not the recipient of a service from the franchisor. A franchise fee is a fee or charge that a franchisee is required to pay or agrees to pay for the right to enter into a business under a franchise agreement. The fact that it is common practice to pass on the franchise fee to the generator does not appear to give the legal basis to classify the fee as a "pass through." An example of a different type of franchise a local government may offer would be selling a franchise to a vendor to sell concessions at a city park. It is clear that the franchise fee that the vendor agreed to pay to the city would not be considered a "pass through" fee because the city is not attempting to charge a fee on a customer that buys a hot dog from the vendor.
- 3) In the City of San Jose there is no exclusive franchise for trash hauling. There are currently more than twenty different commercial solid waste haulers that have non-exclusive franchises granted by the city. When a hauler is given a grant of franchise by the city, via a contract with the city, the franchisee (hauler) acknowledges that the franchise is not

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exclusive and that during the term of the franchise the franchisee shall pay to the city fees for the privilege of engaging in the business of collecting, transporting, and disposing of commercial solid waste and recyclables kept, accumulated or generated in San Jose. The contract specifically states that the franchisee shall pay commercial solid waste franchise fees on all commercial solid waste services performed by the franchisee in the City of San Jose. The City of San Jose reports that one of its haulers owes

more than \$210,000 in unpaid franchise fees.

- 4) The proponents of this bill argue that they should not have to pay the franchise fee on waste collected from state agencies, including school districts, because the state agencies and schools are exempt from this fee. Since the hauler can't pass on the fee to the state agency the hauler should not have to pay the franchise fee to the franchisor local government. The

author's office obtained a Legislative Counsel Opinion that states that a "local agency may not impose a charge for solid waste management services, either directly upon a state agency or indirectly as a 'pass through' fee imposed on the service provider." The Counsel opinion goes on to state that "if the state agency has 'opted out' of the exclusive franchise agreement, no services would be required to be rendered to the state agency under that agreement. And, there is no provision of law authorizing a local agency to impose a charge, either directly upon a state agency or indirectly as a "pass through" fee on the franchisee, for solid waste management services not rendered." (emphasis added)

- 5) Local governments do not require that state agencies pay any fees if they are not utilizing a service (solid waste collection). Further, if a local government has a non-exclusive franchise agreement for commercial solid waste-collection, the state agencies are free to choose a service provider through the statutory competitive bidding process. Even if the local government did not have a non-exclusive contract the state agency would still be able to choose their own hauler. A state agency is only required to pay what it has contractually agreed to with the hauler.

- 6) AB 2290 also brings up a completely separate question of

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whether haulers should be exempt from paying the fees that local agencies impose on them pursuant to Section 41901 of the Public Resources Code if they are unable to collect them from state agencies. Under this section of law a local government is given the authority to impose fees in amounts sufficient to pay the costs of preparing, adopting, and implementing a countywide integrated waste management plan. The fees shall be based on the types or amounts of the solid waste. According to the Legislative Counsel Opinion the author obtained, "a state agency is not subject to the fees imposed under Section 41901 for local planning." Some local governments have chosen to place this fee on the hauler and some have chosen to place this fee on the generator, using the

hauler as a method to collect this fee. In the latter case it is very clear that the 41901 fee is a "pass through" fee. In San Jose, for example, the contract that the franchisee signs with the city states that the franchisee shall bill, collect, and remit to the city the Source Reduction and Recycling Fee (SRR) that is imposed by the city on solid waste generators for whom the franchisee collects waste from. The contract also explicitly says that in the event a generator fails or refuses to pay SRR fees to the franchisee when such fees are due and payable, the franchisee shall notify the city of the generator and their account information and the city shall not hold the hauler financially liable for the SRR fees they are unable to collect. If all AB 2290 did was codify this arrangement for dealing with unpaid 41901 fees, it would be non-controversial. However, what is true for 41901 fees is not necessarily true for franchise fees.

- 7) The proponents have provided evidence that some local agencies in the state completely exempt franchisees from paying franchise fees on revenues received from state agencies, including school districts. Some local agencies even require in their contracts with franchisees that the franchisee provide free services to school districts. On the other hand, the proponents report that the franchise fees in the City of San Jose are very high compared to other cities. These are decisions that are made at the local level dependent upon each local agency that oversees waste management services in the area. The state should not be in the business of deciding for local governments what requirements they add into contracts with franchisees. It is commendable that some localities are able to provide these services free of charge. However, it should be up to the localities to make such decisions.

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- 8) The answers to the basic questions before the committee appear to be:
- a) A franchise is a contract or agreement between two or more persons (in this case a local government and a hauler) by which a franchisee is granted the right to engage in business in a city or county and for which the franchisee is required to pay a franchise fee.
 - b) The local government and the hauler are the only parties that have a legal obligation to fulfil the terms of the contract.
 - c) A franchise fee is not a fee for service and therefore is not a "pass through fee" being ultimately assessed on to the customer. A franchise fee is a fee for doing business

and should be calculated into a company's overall business expenses when determining the costs for service. The fact that it is common practice for a hauler to pass on the franchise fee directly on to its customers does not appear to give the legal basis to classify the fee as a "pass through."

- 1) While this bill arose out of a dispute in San Jose, its provisions would not apply to that dispute, which is over the terms of an existing contract. The Committee is currently unaware of any other disputes between local governments and haulers on the payment of franchise fees. However, AB 2290 would apply statewide. This could lead to a number of jurisdictions where no problem currently exists having to renegotiate franchise fee contracts. The Committee may wish to consider whether or not the Legislature should become involved in what appears to be a contractual dispute between two parties in a way that could lead to consequences elsewhere.

REGISTERED SUPPORT / OPPOSITION :

Support

Waste Management [SPONSOR]
Allied Waster Industries
K-12 Education Management Group
Los Angeles County Waste Management Association

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Solid Waste Association of Orange County

Opposition

City of San Jose
League of CA Cities

Analysis Prepared by : Katie A. Dokken / L. GOV. / (916)
319-3958

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