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MEMORANDUM

TO: Jared Blumenfeld
Director, Department of the Environment

FROM: Thomas J. Owen
Deputy City Attorney

DATE: May 21, 2007

RE: Use of Impound Account Monies for Environmental Justice Programs

QUESTION PRESENTED

May the City expend monies in the Solid Waste Impound Account to fund "environmental justice" programs?

SHORT ANSWER

The City may expend monies in the Solid Waste Impound Account to fund "environmental justice" programs that are reasonably calculated to remediate or reduce environmental harms caused or aggravated by solid waste disposal and recycling activities conducted in the community. The City may use the monies for direct program costs and for personnel expenses associated with management and operation of the programs.

BACKGROUND

The Solid Waste Impound Account. As part of the residential garbage rates set pursuant to the 1932 Refuse Collection and Disposal Initiative Ordinance, codified as Appendix 1 to the San Francisco Administrative Code, the City's refuse companies pay the City approximately \$7 million a year through the Solid Waste Impound Account. The City expends monies from the Impound Account, mostly through the Department of the Environment and the Department of Public Works, to run the City's programs related to solid waste collection, disposal, and diversion.

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Environmental Justice. According to the Department of the Environment's website, "Environmental justice is the fair treatment and meaningful involvement of all people, regardless of race, ethnicity, income, or education level, in environmental decision-making." ([Http://www.sfenvironment.org/our_programs/overview.html?ssi=1](http://www.sfenvironment.org/our_programs/overview.html?ssi=1); last checked May 10, 2007.)

The Department of the Environment's environmental justice program grants funding to nonprofit organizations and community groups to address pollution, energy, and public health concerns, focusing especially on the southeast neighborhoods of San Francisco—home to a power plant, wastewater treatment plant, industrial facilities, two nearby freeways, and a Superfund site. (http://www.sfenvironment.org/our_programs/program_info.html?ssi=1&ti=; last checked May 10, 2007.) To date, the department has allocated over \$9 million in grant funding to reduce the environmental burdens of impacted communities and to promote a healthier environment for local residents and businesses. (*Id.*)

As noted in the Director of Public Works' 2006 Garbage Rate Order, part of the Department of the Environment's funding for those activities has come from the Impound Account. (Director's 2006 Rate Order, at p. 33.) The Department of the Environment expends Impound Account monies to pay for recycling, toxics reduction, green building, environmental justice, and long-term planning for disposal capacity, diversion, and regulatory requirements, in order to remediate the environmental harm that refuse collection activities generate in the southeast sector of the City. (*Id.* at p. 34.)

Environmental Justice. There is a direct nexus between environmental justice and the location of virtually the entire city's recycling and solid waste infrastructure in the southeast sector of the city. The primary facilities that process municipal wastes and recyclable materials are located in the southeast sector: (a) the San Francisco Solid Waste Transfer and Recycling Center (SFSWTRC) located at 501 Tunnel Avenue, and (b) Recycle Central at Pier 96, located near Evans Avenue in the Bayview neighborhood of San Francisco. Together, these facilities are permitted to handle up to 7,100 tons of materials and 1,733 vehicles per day. Additionally, the collection trucks operated by Sunset Scavenger start their daily routes at SFSWTRC.

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Trucks using fossil fuels, especially diesel fuel, generate toxic air contaminants and particulate matter (PM emissions) as well as contribute to congestion and noise pollution that disproportionately affects the residents in the southeast sector. According to data from the US EPA, the SFSWTRC was responsible for 5 percent of the PM-2.5 and PM-10 emissions in the city.

In order to help mitigate these impacts, SF Environment has included funding for air quality monitoring, projects to convert refuse and recycling vehicles to cleaner fuel, tree planting to mitigate air pollution and environmental education programs in the southeast sector of the city.

(Exh. 31 to Director's 2006 Rate Order, at p. 3; see also Memorandum Re: Use of Impound Account Funds, dated October 16, 2003, from David Assmann, Deputy Director of the Department of the Environment, to Jared Blumenfeld, Director, at pp. 3-4, further detailing the impacts of solid waste disposal and recycling activities on air quality in the southeast sector of the City.) Some of the adverse effects of refuse collection and recycling activities, such as noise and air pollution generated by the operation of refuse trucks, impact all City neighborhoods to some degree, although the effects are more concentrated in the southeast sector of the City.

ANALYSIS

The 1932 Initiative Ordinance grants the City authority to set refuse rates for residential taxpayers. Section 6 of the Initiative Ordinance requires that the rates be "just and reasonable." (See also Cal. Const. Art. XIII B, § 8(c), Art. XIII D, § 6(b)(1) [fees that exceed the costs of the service provided are taxes requiring voter approval].)

In addition to offsetting the cost of actually providing the service in question, a public agency may use the proceeds of a regulatory fee, such as refuse rates, to pay for the costs of administration, investigation and inspection, maintenance of a system of supervision and enforcement, and, where appropriate, issuance of licenses and permits. (*Cal. Assn. of Professional Scientists v. Dept. of Fish & Game* (2000) 79 Cal.App.4th 935, 945, citing *United Business Comm'n v. City of San Diego* (1979) 91 Cal.App.3d 156, 165; *City of Oakland v. Superior Court* (1996) 45 Cal.App.4th 740, 762.) Accordingly, the City may properly expend refuse rate proceeds and Impound Account funds to pay for the costs of the operating and administering the City's various solid waste management programs. Because the fee is intended to cover the cost of

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disposing of solid waste generated in the City, the City may also use refuse rate proceeds and Impound Account funds to pay for programs such as recycling and public education that reduce the amount of solid waste generated in the City.

In *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, the court held that a public agency may expend regulatory fees to mitigate the adverse health effects created in the community by the activities subject to the fee, "comparable in character to similar police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations." (15 Cal.4th at p. 877.) In that case, the court upheld the imposition of industry-wide "remediation fees" on manufacturers of lead or containing lead, which fees were to be used to screen and treat children for lead poisoning. (*Id.* at pp. 871-72.)

In the event that a particular use of the Impound Account funds was challenged, a court would look to see whether the cost of the service bears "a fair and reasonable relationship to the payer's burdens on or benefits from the regulatory activity." (*Sinclair Paint Co. v. State Board of Equalization, supra*, 15 Cal.4th at p. 878, citing *San Diego Gas & Elec. Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1146.) The public entity's determination and/or allocation of the costs of the program, however, need not be exact. The entity "need only apply sound judgment and consider 'probabilities according to the best honest viewpoint of informed officials' in determining the amount of the fee" that could be used for funding purposes." (*United Business Comm'n v. City of San Diego, supra*, 91 Cal.App.3d at p. 166, quoting *Watson v. County of Merced* (1969) 274 Cal.App.2d 263, 268.)

In the instant case, the Department of the Environment and the Director of Public Works, through the Rate Order, have determined that solid waste disposal and recycling activities, although both valuable and necessary in general, have a particular adverse impact on the portions of the community where those activities are most concentrated. Rate-payers as a whole benefit from these activities and to a lesser extent from having them concentrated primarily in other neighborhoods, and it is "just and reasonable" to include the societal costs of addressing those negative impacts as an element of the overall rate structure, through the Impound Account.

Therefore, under *Sinclair*, the City may lawfully expend a reasonably proportionate amount of the monies in the Impound Account, generated in part by solid waste disposal and recycling activities concentrated in the southeast sector of the City, to fund programs aimed at reducing or otherwise mitigating the adverse public health

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impacts of those activities within that community. (*Id.* at pp. 877-78 ["[T]he policy power is broad enough to include mandatory remedial measures to mitigate the past, present, or future adverse impacts of the fee payer's operations, at least where, as here, the measure requires a causal connection or nexus between the product and its adverse effects."].)

CONCLUSION

The City may expend monies in the Solid Waste Impound Account to fund "environmental justice" programs that are reasonably calculated to remediate or reduce environmental harms caused or aggravated by solid waste disposal and recycling activities conducted in the community. The City may use the monies for direct program costs and for personnel expenses associated with management and operation of the programs.