



Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL
FROM: RICHARD DOYLE
City Attorney
SUBJECT: Amendment of Definition of "Cover Material" for the Disposal Facility Tax
DATE: August 5, 2005

COUNCIL DISTRICT: City-Wide

RECOMMENDATION

Approval of an ordinance amending Section 4.78.020 of the San José Municipal Code to revise the definition of "cover material" for purposes of the Disposal Facility Tax.

BACKGROUND

Since 1992, the City of San José has imposed a Disposal Facility Tax on operators of landfills located in San José. This tax is in lieu of the Business Tax imposed on other businesses, is based on the tonnage of material disposed at the landfill facility, and is \$13 per ton. Certain materials are exempt from the tax: materials that are processed at a certified recycling processing area, salvaged recyclable materials, cover material, and inert construction material used on-site. In 2002, the City Council approved ordinances revising the definition of cover material that is exempt from the Disposal Facility Tax.

Two of the landfill operators, International Disposal Corporation and Waste Management, objected to the revisions claiming that the City was required to submit the change to the voters pursuant to Proposition 218. The City entered into tolling agreements with both companies whereby the companies did not pay the disputed portion of the Disposal Facility Tax pending a resolution of the dispute. A settlement has been reached that includes revising the definition of cover material as set out in the proposed ordinance.

ANALYSIS

Originally, disposal facility operators paid the Business Tax based on the number of employees. In the 1980's the Business Tax was changed so the tax was based on the tonnage of material disposed of on-site. When the Disposal Facility Tax enacted in 1992, the ordinance carried over certain exemptions from the Business Tax that had applied to disposal facility operators. One of the exemptions was for "cover material"

which was defined as “soils or other material suitable for use in covering compacted solid wastes in a solid waste disposal facility which the facility operator uses onsite for cover purposes.” At the time, the definition was originally enacted, cover material was generally limited to soils and other earthen materials. Subsequently, the California Integrated Waste Management Board approved other materials such as green waste and construction/demolition debris that could be used as alternate daily cover.

In 2002, the Council approved amendments to the definition of cover material to narrow the scope of materials to earthen material, certain sewage sludge, and contaminated sediment and exclude green wastes and construction/demolition debris. The amendments were designed to make the definition more closely match the original concept of cover material that was exempt from the tax, and recapture tax revenue that was lost when the State allowed alternate daily cover to be used.

Some of the disposal facility operators challenged the amendments claiming that this resulted in a tax increase that was subject to the voting requirements of Proposition 218. The City Attorney’s Office has, with the assistance of the Department of Environmental Services, been working with the facility operators to resolve the matter. Part of the resolution is to revise the definition of cover material.

One of the operators’ main issues was the exclusion of construction/demolition debris from the definition of cover material. The proposed ordinance would amend the definition to include construction and demolition materials so they would be exempt from the Disposal Facility Tax, but would impose a cap so that only the first 33,500 tons of such materials that would be exempt from the tax. For the purposes of the proposed ordinance, construction and demolition materials are defined as “waste building materials and rubble generated in the construction, remodel, repair or demolition of residential or commercial buildings and other structures.”

The proposed ordinance also contains a provision that makes it retroactive to July 1, 2002, so that the operators would not be required to make payments on 33,500 tons of construction/ demolition materials used in each year of the tolling agreements and so that if payments have been made for that tonnage, the operators can request a refund.

PUBLIC OUTREACH

N/A.

OUTCOME

Council approval of the proposed ordinance will implement a key element of the settlement of the matter.

COST IMPLICATIONS

The proposed ordinance would permit each disposal facility operator to exempt from the tax the first 33,500 tons of construction/demolition debris used as cover material in any fiscal year. The total amount of Disposal Facility Tax for FY2005-2006 is estimated at \$14.3 million. The amount subject to a credit towards future Disposal Facility Tax for amounts already paid by Waste Management is \$1,256,486.18. If each of the four landfills (Guadalupe, Kirby Canyon, Newby Island, and Zanker Road) used the full exemption tonnage, there would be maximum uncollected tax revenues of \$1,742,000 per year.

RICHARD DOYLE
City Attorney