

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1370

SPONSOR: Comprehensive Planning, Local and Military Affairs Committee and Senator Gutman

SUBJECT: Solid Waste

DATE: April 5, 1999

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Bowman</u>	<u>Yeatman</u>	<u>CA</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>FP</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

## I. Summary:

The bill removes the antitrust exemption granted local governments for local governments that provide solid waste services outside its jurisdiction. Local governments could not “displace” private solid waste vendors without first holding a noticed public hearing and waiting for 5 years before initiating the provision of such services by the local government or paying the private vendor an amount equal to two years worth of gross receipts. Annexing municipalities would similarly have to wait for 5 years before they could provide solid waste services to customers within the annexed area.

This bill amends s. 171.062, F.S., and creates three unspecified sections of law.

## II. Present Situation:

Counties and municipalities are authorized to provide solid waste services through their home rule authority as codified in ss. 125.01 and 166.021, F.S. Municipalities are authorized by s. 180.06(5), F.S., “to provide for the collection and disposal of garbage.” In addition, counties are granted additional responsibilities under s. 403.706, F.S., regarding the management of solid waste. For example, the governing board of a county has the responsibility to provide solid waste disposal facilities to meet the needs of all incorporated and unincorporated areas of the county, and to charge reasonable fees for the handling and disposal of solid waste. In addition, counties are required to operate a materials recycling program.

Garbage service is recognized in Florida case law as an essential government service that local governments may provide, and that local governments can completely preclude the provision of the service by private vendors. In United Sanitation Services, Inc. v. City of Tampa, 302 So.2d 435 (Fla. 2nd DCA 1974), the court upheld the City of Tampa’s denial of permits to authorize private garbage collection based on the power of a municipality to provide municipal services:

the “enterprise of” of garbage collection is one of the unique callings

which are subject to the plenary power of government. Unlike virtually every other enterprise, the “business” may not only be regulated, but in fact exclusively performed--as an essential part of a “public service”--by municipalities or other governmental subdivisions, even if such a decision results in the complete preclusion of private facilities for the same use. Id at p. 436.

Hence, under existing state law, cities and counties can elect to exclusively provide garbage collection services and prohibit private waste haulers from providing the same service within the boundaries of the local government.

### The Florida Antitrust Act

Chapter 542, F.S., known as the Florida Antitrust Act of 1980, provides remedies to persons injured by contracts, combinations or conspiracies in restraint of trade or commerce, as well as monopolization of, or attempts or conspiracies to monopolize, any part of trade or commerce. The purpose of this act is to complement the body of federal law prohibiting restraints of trade or commerce in order to foster effective competition and the Legislature intended the act be liberally construed to accomplish this purpose. Section 542.32, F.S., expressly provides that, in construing the Florida Antitrust Act, due consideration and great weight must be given to the interpretations of the federal courts relating to comparable federal antitrust statutes.

### Antitrust Immunity and Local Government

Section 542.235, F.S., exempts local governments and their officials and employees from the criminal and civil penalties, damages, interest on damages, costs or attorney’s fees awardable for violations of the prohibition on the restraint of trade or commerce and on any attempt to monopolize any part of trade or commerce in Florida. In addition, no injunctive or equitable relief shall be granted against a local government or its officials where the official conduct at issue bears a reasonable relationship to the health, safety, or welfare of the citizens of the local government, unless the court finds that the actual or potential competitive effects outweigh the public benefits of the challenged action. This immunity from antitrust liability parallels the federal Local Government Antitrust Act of 1984.

### State Action Immunity Doctrine

The state action immunity doctrine holds that federal and state antitrust liability does not attach to the state authorized actions of political subdivisions of the state. When a local government acts pursuant to a “clearly articulated and affirmatively expressed” state policy to displace competition with regulation or monopoly public service, the state action doctrine exempts the anticompetitive activity of the local government from antitrust liability. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985). The municipalities anticompetitive conduct must be a “foreseeable result” of the statutes establishing the state policy to foreclose competition.

In Bennett Electric Company v. The Village of Miami Shores, 11 F. Supp.2d 1348, (S.D. Fla 1998), the federal district court dismissed an antitrust action filed by a local business and private waste collector which alleged that the Village of Miami Shores ordinance requiring commercial establishments and residential units to use the waste collection and disposal services of the Village

violated the Sherman Antitrust Act. The court held that the Village of Miami Shores is exempt from federal antitrust laws under the state action doctrine. The court identifies ss. 180.06(5), and 180.13(2), F.S., as clearly articulating a state policy authorizing the anticompetitive behavior, and “also constitutes a ‘clearly articulated and affirmatively expressed’ state policy to displace competition in the area of waste collection.” Miami Shores at p. 1356.

### Annexation and the Provision of Municipal Services

Section 171.062, F.S., provides for the transfer of service delivery functions from a county, special district or private provider to the annexing municipality. Section 171.062(4)(a), F.S., provides that in the case of service providers who hold an exclusive franchise to provide solid waste collection services within the unincorporated area subject to the annexation, that the franchisee may continue to provide services to the annexed area for 5 years unless the annexing municipality can provide a higher level of service. The franchisee must provide the service to the annexed area at a reasonable cost. If the private vendor does not comply with the service and cost requirements of the section, the municipality may terminate the franchise within 90 days of the effective date of the annexation.

### III. Effect of Proposed Changes:

**Section 1** of the bill requires that a municipality, county or other local government that provides solid waste management services to: 1) separately account for the revenues, expenses, property, and source of investment dollars from provision of the services; and 2) comply with any local requirements imposed on any private firm that provides solid waste management services. In addition, local governments are prohibited from subsidizing the provision of solid waste management services when the local government is competing with a private company.

**Section 2** provides that a local government that provides solid waste management services outside of its jurisdiction is not exempt from antitrust liability under chapter 542. This provision attempts to remove a local government who provides solid waste management services outside of its jurisdiction from state action immunity under state antitrust law. The provision would have no effect on the application of federal antitrust law to the same activities. Under federal antitrust law, the provision of solid waste management services by a local government outside of its jurisdiction would probably be immune under the state action immunity doctrine as articulated by the federal courts.

The effect of this change under state law would be to potentially subject local governments, and local government officials to criminal and civil penalties, treble damages and costs and attorney’s fees for anticompetitive behavior that is now exempt from the act.

**Section 3** defines the term “displacement” as a local government’s provision of a service which prohibits a private company from continuing to provide the same service. The bill prohibits a local government from providing garbage, trash or refuse collection service where a private contractor is providing such service, without first:

- ▶ Holding a public hearing;
- ▶ Providing 45 days written notice of the hearing to all private companies that provide the service within the jurisdiction;

- ▶ Providing public notice of the hearing; and
- ▶ Providing 5 years notice to the private company currently providing the service or paying the private vendor an amount of money equal to the company's preceding 24 months of gross receipts.

The term displacement shall not apply to certain actions taken by a local government: to refuse to renew a contract; take actions against breach of contract; enter into a contract with another private vendor; and where at least 55 percent of the property owners in the displacement area petition the local government to take over the collection service.

**Section 4** amends s. 171.062, F.S., to require that a party that has a contract to provide solid waste collection services in an unincorporated area which is annexed, may continue to provide the services to the annexed area for a period of 5 years or the remainder of the contract term. Under current law, a party would have to have had an exclusive franchise which was in effect for at least 6 months, in order for the 5-year grace period to apply the provision of the solid waste collection services in the annexed area.

**Section 5** provides an effective date of October 1, 1999.

#### **IV. Constitutional Issues:**

##### A. Municipality/County Mandates Restrictions:

None.

##### B. Public Records/Open Meetings Issues:

None.

##### C. Trust Funds Restrictions:

None.

#### **V. Economic Impact and Fiscal Note:**

##### A. Tax/Fee Issues:

None.

##### B. Private Sector Impact:

Private vendors providing garbage, trash or refuse collections services would benefit economically from retaining customers within local governments who would otherwise provide the same services.

**C. Government Sector Impact:**

The bill limits the ability of local governments to provide garbage collection services by requiring the local government to either delay the displacement of a private waste collector for 5 years or pay them 24 months worth of the gross receipts collected in the area where the local government intends to provide service. Similarly, municipalities annexing new territory into their jurisdiction would have to wait for 5 years to provide services to the new territory if a private vendor had a contract to provide collection services in that territory prior to the annexation. This limits the local government's ability to collect revenue for the provision of solid waste services.

Local governments could incur civil and criminal penalties under the Florida Antitrust Act for operating garbage collection services that are not currently subject to monopoly and restraint of trade prohibitions.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The bill does not clearly define the term solid-waste management services.

**VIII. Amendments:**

None.