

# 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 1290

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

SUBJECT: Solid Waste

DATE: April 4, 2000

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

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

## I. Summary:

The CS requires local governments providing solid waste collection services in direct competition with private companies: to be subject to the same local regulatory or fee requirements as private companies; to be subject to predatory pricing antitrust injunctive actions; where the local government is providing service outside of its jurisdiction, to comply with certain notice and public hearing requirements and to give private companies being displaced either 3 years notice, or an amount equal to 15 months' gross receipts for the displaced service; and to comply with certain requirements for the disposition of existing contracts when a new municipality is incorporated or a new area is being annexed into an existing municipality.

This CS amends sections 165.061 and 171.062 of the Florida Statutes.

## 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 anticompetitive conduct of the municipality 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.

#### Impairment of Contract

Section 10, Article I of the Florida Constitution provides that:

No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.

#### Incorporation, Merger & Dissolution of Municipalities

Section 165.061, F.S., includes standards for the incorporation, merger and dissolution of municipalities. The incorporation of a new municipality through merger of existing municipalities and associated unincorporated areas must meet the following requirements:

- ▶ The area proposed for incorporation must be compact and contiguous and susceptible to the provision of urban services.
- ▶ Any unincorporated area to be included must meet the standards provided in s. 171.042, F.S., prerequisites to annexation.
- ▶ The plan for merger and incorporation must provide for bonded indebtedness and the status and pension rights of the employees of the government unit to be merged.

#### 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 CS requires that a municipality, county or other local government that provides collection services in competition with private companies to: 1) comply with provisions of local environmental, health, and safety standards that are also applicable to a private company providing collection services; and 2) refrain from enacting or enforcing any license, permit, registration procedure or fee that does not apply to the local government and that provides the local government with a competitive advantage.

A cause of action is created for a private company against the local government with whom it is in competition to seek injunctive relief against the local government. Prior to filing a complaint, the complaining party must file a notice with the local government stating the facts on which the complaint is based and how the private company is affected, including evidence of damages. The local government must respond within 30 days of receipt of the complaint explaining any corrective action. The complaining party can proceed to file their lawsuit if no response is received within 30 days or if appropriate corrective action is not taken within a reasonable time. The court may award the prevailing party attorney's fees and costs.

The court shall not grant injunctive relief where the official action that forms the basis of the suit was taken by the local government in the exercise of its police powers, unless the court finds that the anticompetitive effects outweigh the public benefits of the challenged actions. The requirements of the section do not apply where the local government is exclusively providing the specific solid waste service itself or pursuant to an exclusive franchise.

**Section 2** essentially creates an exception to s. 542.235, F.S., The Florida Antitrust Act, by providing that a local government that provides solid waste collection services outside its jurisdiction in direct competition with private companies is subject to the same prohibitions against predatory pricing that is applicable to private companies. In order to initiate an action under this section, the complaining party must first file a notice with the local government stating the basis of the complaint. Within 30 days of receipt of the notice, the local government must respond in writing explaining any corrective action taken. After satisfying the notice requirement, the complaining party may file a lawsuit in circuit court seeking injunctive relief and the recovery of damages and court costs. The court, may in its discretion award attorney's fees. The statute of limitations for filing an action for damages under the section is 4 years.

The jurisdiction of the local government is defined for determining whether the local government has engaged in predatory pricing outside of its jurisdiction as including all of the incorporated and unincorporated areas within the county, special district or solid waste authority. If a local government is providing solid waste services pursuant to an interlocal agreement with another local government, jurisdiction is defined to include the collective jurisdiction of the participating local government.

**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 term displacement is defined to exclude:

- Competition between the public sector and private sector for individual contracts;
- Actions where a local government refuses to renew a contract with a private company;
- Actions taken by a local government against a private company because the company has materially breached its contract;
- Refusal of a private company to continue operations under its existing contract during the three-year notice period;

- Entering into a contract with a private company to provide garbage collection that is not entered into a contract that displaces another private company;
- Actions taken against a private company because the company has acted in a manner threatening to the public health or safety or resulting in a substantial public nuisance;
- Contracts entered between the local government and a private company to provide garbage, trash, or refuse collection which contract is not entered into under an ordinance that displaces or authorizes the displacement of another private company;
- Situations where at least a majority of the property owners in the displacement area petition the governing body to take over the collection service;
- Situations where private companies are licensed or permitted, under a scheme established no later than May 1, 1999, to do business within the local government for a limited period of time and such license or permit expires; and
- Annexations.

The CS prohibits a local government, or combination of local governments, from providing garbage, trash or refuse collection service where a private contractor is providing such service, without first:

- ▶ Holding a public hearing;
- ▶ Providing at least 45 days written notice of the hearing, delivered by first class mail, to all private companies that provide the service within the jurisdiction;
- ▶ Providing public notice of the hearing; and
- ▶ Providing 3-years' notice to the private company being "displaced" or, as an alternative to the 3-year notice, the local government may pay the private company an amount equal to the companys' preceding 15 months' gross receipts for the displaced service in the displacement area.

The 3-year notice period lapses as to any private company being displaced when the company ceases to provide service within the displacement area, or the local government and the company voluntarily negotiate a different notice period or compensation amount.

**Section 4** amends s. 171.062, F.S., to provide 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, whichever is shorter. 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. This requirement does not apply to contracts to provide solid waste collection services to single-family residential properties in certain enclaves.

**Section 5** amends s. 165.061, F.S., to require that a plan for the incorporation or merger of a municipality must honor existing contracts for solid-waste-management services in the affected geographic area subject to merger or incorporation. The plan for merger or incorporation, however, may provide that existing contracts for solid-waste-management services must be honored only for 5 years or the remainder of the contract term, whichever is shorter.

**Section 6** defines “in competition” to mean “the vying between a local government and a private company to provide substantially similar solid waste collection services to the same customer or market.” Private company is defined as an entity other than the local government which provides solid waste management services.

**Section 7** provides an effective date of July 1, 2000.

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

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

To the extent local governments are using the provision of solid waste services outside of their jurisdiction to raise revenue, the constraints imposed by the CS on the provision of such services reduces the authority of cities and counties, in the aggregate, to raise total aggregate revenues over the February 1, 1989 levels. Hence, the CS falls within the purview of subsection (b) of Article VII, Section 18, of the Florida Constitution.

Subsection (d) of Section 18 of Article VII of the Florida Constitution, provides exemptions from all requirements of Section 18 for various types of general laws, including those with insignificant fiscal impact. If the annual revenue loss of local governments because of the restrictions of the CS is estimated to be less than \$1.5 million, the CS would be exempt from the requirements of subsection (b) due to insignificant fiscal impact. Otherwise, the CS may only take effect if passed by two-thirds vote of the membership of each house. At this time, whether the fiscal impact of the CS exceeds or falls below the \$1.5 million threshold is unknown.

##### **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 CS 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 3 years or pay them 15 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.

**VI. Technical Deficiencies:**

The CS does not define solid waste collection services or solid waste management services. While it appears that the CS is intended to apply to solid waste collection services, there are several places in the CS where the broader term solid waste management services is used--at p. 3, lines 10 & 11 and at p. 9, line 19.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.