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OPINION	:	No. 79-824
of	:	December 5, 1979
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SUBJECT: GARBAGE COLLECTION AGREEMENT-A county may enter into an exclusive franchise agreement for the collection of garbage in the unincorporated area of the county. Such agreement may be for any period not to exceed 25 years.

The Honorable Frank J. de Marco, County Counsel of Siskiyou County, has requested an opinion on the following questions:

1. May a county enter into an exclusive franchise agreement for the collection of garbage in the unincorporated area of the county?

2. If so, may the period of the agreement be in excess of five years but less than twenty-five years?

CONCLUSIONS

1. A county may enter into an exclusive franchise agreement for the collection of garbage in the unincorporated area of the county.

2. The exclusive franchise agreement may be for any period not to exceed twenty-five years.

ANALYSIS

The questions presented for analysis concern franchise agreements entered into by a county for the collection of garbage in the unincorporated area of the county. The first question deals with whether the agreements may be exclusive, while the second question involves possible statutory restrictions on the length of such agreements.

A. Exclusivity of the Agreements

One of the traditional functions and services of local government has been the collection and disposal of garbage. (See *Reduction Company v. Sanitary Works* (1905) 199 U.S. 306, 318–325; *Matula v. Superior Court* (1956) 146 Cal. App. 2d 93,98; *In re Lyons* (1938) 27 Cal. App. 2d 183, 186.)

Section 7 of article XI of the California Constitution provides: "A county or city may make and enforce within its limits all local, police, *sanitary*, and other ordinances and regulations not in conflict with general laws." (Emphasis added.)

With regard to the collection of garbage by cities, the Court of Appeal in *Davis v. City of Santa Ana* (1952) 108 Cal. App. 2d 669, 676–677, stated:

> "The accumulation of garbage and trash within a city is deleterious to public health and safety. The collection and disposal of garbage and trash by the city constitutes a valid exercise of police power and a governmental function which the city may exercise in all reasonable ways to guard the public health. It may elect to collect and dispose of the garbage itself or it may grant exclusive collection and disposal privileges to one or more persons by contract, or it may permit private collectors to make private contracts with private citizens. The gathering of garbage and trash is considered to be a matter which public agencies are authorized to pursue by the best means in their possession to protect the public health."

Counties have the same general powers as cities with regard to the collection of garbage. (*Matula v. Superior Court, supra,* 146 Cal. App. 2d 93, 99; *In re Lyons, supra*, 27 Cal. App. 2d 182, 186; 30 Ops. Cal. Atty. Gen. 274, 274 (1957); 19 Ops. Cal. Atty. Gen. 61, 62 (1952).)

Specifically, a county may provide for garbage removal through the use of its own employees (30 Ops. Cal. Atty. Gen. 274, 274 (1957)), by contract with a private enterprise (Gov. Code §§ 25826, 54516.2; 30 Ops. Cal. Atty. Gen. 274, 274 (1957)), by licensing the business of garbage collection (19 Ops. Cal. Atty. Gen. 61, 62–63 (1952)), and by granting franchises for the collection of garbage. (Health & Safety Code § 4201;[1] *Matula v. Superior Court, supra*, 146 Cal. App. 2d 93, 99; 30 Ops. Cal. Atty. Gen. 274, 275–278 (1957); 19 Ops. Cal. Atty. Gen. 61, 61 (1952).)[2]

While garbage collection is primarily a matter of local concern, the state has specifically authorized a variety of programs (see *Matula v. Superior Court, supra*, 146 Cal. App. 2d 93, 99–101), and has become directly involved in certain aspects of the disposal problem. (See § 66771.)

With regard to a county's granting of a franchise for garbage collection, the Legislature has restricted a county's authority to grant such a franchise to "the terms and conditions" of sections 4200–4204, and no such franchise may be granted in conflict with these statutory provisions (§§ 4200; 4203).

The franchise procedure established by the Legislature is for the board of supervisors of a county to adopt a resolution, calling for sealed bids from prospective franchisees. The board then publishes a notice, setting forth all of the terms and conditions embraced in the resolution. The bids may be opened four weeks after the first publication of the notice, and "the franchise may be awarded to the lowest qualified bidder" (§ 4201), who thereupon must file a bond with the board (§ 4202). The "lowest qualified bidder" has been defined previously by our office as "the qualified bidder who undertakes to perform the services for members of the public for the least amount or at the lowest rates. (30 Ops. Cal. Atty. Gen. 274, 277 (1957).) Thus, the franchise procedure of section 4201 attempts "to secure garbage disposal at the most favorable terms and price." (19 Ops. Cal. Atty. Gen. 61, 63 (1952).)

Section 4201 authorizes "the granting of a franchise, exclusive or otherwise." (Emphasis added.) The authority of a county to grant an exclusive franchise under the terms of section 4201 has not been previously questioned. (See *Matula v. Superior Court, supra*, 146 Cal. App. 2d 93, 99; 30 Ops. Cal. Atty. Gen. 274, 275–278 (1957); 19 Ops. Cal.

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[1] All unidentified section references hereinafter are to the Health and Safety Code.

[2] Where the county collects the garbage through the use of county employees or under a contractual agreement with a private firm, the property owners would normally pay a tax or a charge to the county for the service provided. (Gov. Code § 25827.) A licensee or franchisee, on the other hand, would normally establish and collect the fee on a private basis, although subject to county approval. (30 Ops. Cal. Atty. Gen. 274, 277 (1957); 19 Ops. Cal. Atty. Gen. 61, 63 (1952).)

Atty. Gen. 61, 61–62 (1952).)

However, a recent decision by the *United States Supreme Court, Lafayette v. Louisiana Power & Light Co.* (1978) 435 U.S. 389, 394–408, now requires analysis concerning whether such an exclusive agreement would contravene federal antitrust laws.

Preliminarily, we note that section 1 of the Sherman Act (15 U.S.C. § 1) would be the most probable statute relevant to the inquiry, although section 2 of the Sherman Act (15 U.S.C. § 2), the price-discrimination prohibition in the Robinson-Patman Act (15 U.S.C. § 13 subd. (a)), the tying or exclusive dealing prohibitions in section 3 of the Clayton Act (15 U.S.C. § 14), or the stock or asset acquisition prohibition in section 7 of the Clayton Act (15 U.S.C. § 18) would also merit discussion in certain circumstances. (See Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws* (1974) 49 N.Y.U. L.Rev. 693, 694.) Section 1 of the Sherman Act provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

As was stated by the Supreme Court in *United States v. Topco Associates* (1972) 405 U.S. 596, 610:

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete-to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. . . ."

However, not all restraints of trade are prohibited under the antitrust laws. In *Natural Soc. of Professional Engineers v. U.S.* (1978) 435 U.S. 679, 687–688, the court observed:

> "One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that every contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function

effectively." (Fns. omitted.)

One area in which it had been assumed that the antitrust laws did not enter was the area of government activity. In the landmark case of *Parker v. Brown* (1943) 317 U.S. 341, 350–351, the Supreme Court held that Congress had not intended under the antitrust laws "to restrain a state or its officers or agents from activities directed by its legislature." Based on principles of federalism and preemption, the court ruled that a state could impose a restraint on competition as a sovereign act of government. (*Id*., at 352; see Handler, *Antitrust-1978* (1978) 78 Colum. L.Rev. 1374, 1378; 7 Von Kalinowski, Antitrust Laws and Trade Regulation (rev. 1979) § 46.03 [1].)

However, the Supreme Court in *Lafayette v. Louisiana Power & Light Co., supra*, 435 U.S. 389, 394–408, ruled that under certain conditions, the activities of a municipality could be subject to federal antitrust laws. Unfortunately, *Lafayette* cannot be easily summarized, since in the five-to-four decision, only a plurality could agree on a general test for determining when the antitrust laws would be applicable to the activities of a local government.

The *Lafayette* plurality opinion (four justices), written by Mr. Justice Brennan, stated that a state could use its political subdivisions[3] to administer state policy to displace competition with regulation and monopoly public service." (435 U.S. 389, 413.) As long as the state "authorized" the activities in question, the antitrust laws would be inapplicable. (*Id*., at 414, 416.) Moreover, a "specific, detailed" legislative authorization need not be shown, only that the "authority" pertains to a "particular area" and that the legislature "contemplated" the kind of action undertaken. (*Id*., at 415.)

Here, the provisions of section 4201 meet the test of the plurality opinion. The statute expressly authorizes exclusive franchise agreements, as long as the state statutory scheme is followed. (§ 4200.) Thus, such agreements are authorized, contemplated, and sanctioned by the California Legislature.

The concurring opinion of Chief Justice Burger would require a "sovereign" act rather than a "proprietary" act in order to avoid application of the antitrust laws. (435 U.S. 389, 418, 422–423.) The Chief Justice acknowledged that a specific legislative act directing the creation of a monopoly would come within the *Parker* rule. (*Id*., at 423–425.)

The distinction between "sovereign" and "proprietary" activities is at best elusive. (See Berenson, *The Antitrust Liability of Municipalities Under the Parker Doctrine* (1977)

[3] Counties in California are political subdivisions of the state. (Cal. Const. art. XI, § 1 subd. (a); *Younger v. Board of Supervisors* (1979) 93 Cal. App. 3d 864, 870.)

57 B.U.L. Rev. 368, 384–385; Note, *Antitrust Law and Municipal Corporations Are Municipalities Exempt From Sherman Act Coverage Under the Parker Doctrine?* (1978) 65 Geo. L.J. 1547, 1557 n. 63.) The activities most likely to be classified as "sovereign" are those that have traditionally been undertaken by the state or its subdivisions, including garbage collection, water service, and bus transportation. (See 1 Areeda & Turner, Antitrust Law (1978) ¶214d, p. 90; Bangasser, *Exposure of Municipal Corporations To Liability for Violations of the Antitrust Laws: Antitrust Immunity After the City of Lafayette Decision* (1979) Urb. Law., winter, vii, xvi n. 37.) Accordingly, exclusive franchise agreements for the collection of garbage under the terms of section 4201 would meet the test established by the Chief Justice.

The four dissenting justices indicated that the acts of a municipality, as a government body, would be outside the scope of the antitrust laws. (435 U.S. 389, 426.) Manifestly, the exclusive franchise agreements of section 4201 would meet the test of the dissenting justices.

We conclude, therefore, that the *City of Lafayette* decision does not foreclose the granting of exclusive franchises under the provisions of section 4201.

The state antitrust laws are embodied in the Cartwright Act (Bus. & Prof. Code § 16700 *et seq*.). The Court of Appeal has recently ruled that a suit for enforcement of the Cartwright Act may not be brought against a political subdivision of the state, since the California Legislature did not contemplate an action being brought against a political body. (*People v. City and County of San Francisco* (1979) 92 Cal. App. 3d 913, 920–921.)

The conclusion to the first question, therefore, is that a county may enter into an exclusive franchise agreement for the collection of garbage in the unincorporated area of the county.

B. Length of the Agreements

Section 4201 plainly specifies that an exclusive franchise agreement for the collection of garbage may be granted "for a period of time not to exceed 25 years." The statutory language appears unambiguous.

However, the Legislature has recently added sections 4270.4273 dealing with various solid waste enterprises in general. Specifically, section 4272 states:

> "Where a local agency has authorized, by franchise, contract, or permit, a solid waste enterprise to provide solid waste handling services and such services have been provided for more than three previous years, the

solid waste enterprise may continue to provide such services up to five years after mailed notification to such enterprise by the local agency having jurisdiction that exclusive solid waste handling services are to be provided or authorized, except *that if the solid waste enterprise has an exclusive franchise or contract then the solid waste enterprise shall continue to provide such services and shall he limited to the unexpired term of the contract or franchise or five years, whichever is less.* A solid waste enterprise providing solid waste handling services shall be subject to the provisions of this section only if:

"(a) The services of the enterprise are in substantial compliance with the terms and conditions of any such franchise, contract, or permit, and meet the quality and frequency of services required by the local agency in other areas not served by the enterprise.

"(b) The rates charged by the enterprise may be periodically reviewed and set by the local agency.

"Nothing in this chapter shall be construed to affect the right of a city following annexation to terminate for cause a franchise, contract, or permit held by a solid waste enterprise authorized by the county."[4] (Emphasis added.)

The question we must answer is whether section 4272 limits the twenty-five year period of section 4201 to five years. We conclude that it does not.

In interpreting section 4272, we are guided by several principles of statutory construction. The primary rule is to "ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Select Base Materials v. Board of Equal*. (1959) 51 Cal. 2d 640, 645.) If possible, "the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the framework as a whole." (*Moyer v. Workmen's Comp. Appeals Bd.* (1973)10 Cal. 3d 222, 230.) The legislative history of a statute is a legitimate aid "in divining the statutory purpose." (*California Mfgrs. Assn. v. Public Utilities Com*. (1979) 24 Cal. 3d 836, 844.)

Here, the legislative history of section 4272 indicates that its purpose was to encourage the *continuation* of "competent enterprises willing and financially able to furnish needed solid waste handling service." (§ 4271.) The statutory scheme was enacted

[4] A "local agency" includes a county, "solid waste" includes garbage, and "handling services" include collection. (§ 4270, subds. (b), (c), (e).)

at the same time that Government Code section 35005 was repealed (Stats. of 1976, ch. 430, p. 1101). The latter statute provided:

> "When an annexation or incorporation causes the loss of customers served by a person operating under county franchise, license or permit and engaged for more than three years in private refuse collection and disposal service, the city shall permit such person to continue service for a period of three years provided the service meets the qualified and frequency of service required by the city or provided in other areas of the city not served by such person.
>
> "Nothing in this section shall be construed to limit the right of the city or the operator to provide for a termination of business prior to the three years upon mutually satisfactory terms of settlement."

Not only is section 4272 patterned after former Government Code section 35005, but it refers to the continuation of services where an exclusive franchise is to be granted in the future. If the prior franchisee does not have an exclusive franchise but has been performing his services for more than three years, he may continue to exercise his franchise for a period up to five years. If his franchise is exclusive, he may complete the franchise term or five years, which ever is less.

Section 4272 does not purport to restrict the length of the exclusive franchise to be granted in the future by the local agency. The five year limitation only deals with past franchises where the territory is to be changed or other reasons call for the new, exclusive arrangement. It establishes a procedure for changing from a nonexclusive to an exclusive arrangement or from an exclusive to another exclusive arrangement caused by, for example, a change of territory due to a city annexing unincorporated territory.

The provisions of sections 4201 and 4272 can thus be harmonized and conflict between them can be avoided. The former statute is not a restriction upon the latter statute concerning the authority of a county to grant a garbage collection franchise for a period not to exceed twenty-five years.

Our conclusion on the second question. therefore. is that a county may enter into an exclusive franchise agreement for collection of garbage in the unincorporated area of the county for any period not to exceed twenty-five years.

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