July 17, 2002

Dear Commissioner:

You have the following question: Can the city increase its garbage collection fees from $13 per month to $17.50 per month, and use the increase for purposes other than garbage collection? Under the facts related to me, the city operates its garbage collection system under its general fund.

In my opinion, the answer is no, for at least one, and possibly, two reasons. The first reason is that the Solid Waste Management Act requires that the financial activities for municipal garbage services be accounted for in a special revenue or enterprise fund. The second reason is that municipal garbage services are probably performed under a municipality's police powers, and generally a municipality providing a service under its police powers may charge only a fee that bears a reasonable relationship to the service. If the City by ordinance or resolution raises its garbage fee from $13 per month to $17.50 per month and in the same ordinance provides that the increase will be used to fund a community center or some other non-garbage collection function, it appears to me that it may have almost made a prima facie case against itself that the garbage collection fee is excessive.

Analysis of first reason

The Solid Waste Management Act of 1991, codified at Tennessee Code Annotated, ' 68-211-801 et seq., generally regulates how solid waste is disposed in Tennessee. At first glance that act appears to regulate only landfills and other disposal sites and functions. However, Tennessee Code Annotated, ' 68-211-874(a) provides that:

> Each county, solid waste authority, and municipality shall account for financial activities related to the management of solid waste in either a special revenue fund or an enterprise fund established expressly for that purpose. Any county, solid waste authority or municipality that operates a landfill and/or incinerator shall account for financial activities related specifically to that landfill and/or incinerator in an enterprise fund. Each county, solid waste authority and municipality shall use a uniform solid waste financial accounting system and chart of accounts developed by the comptroller of the treasury.

It is important to note that the first sentence and the second sentence of that provision are talking about two different garbage functions, and contain two different accounting systems, one system for each function: The first sentence requires that each county, solid waste authority and

municipality establish a "*special revenue fund or an enterprise fund*" for financial activities "related to the *management of solid waste*." The second sentence requires that each county, solid waste authority and *municipality* that operates a *landfill and/or incinerator* to establish an "*enterprise fund*" for financial activities "related specifically to that landfill and/or incinerator."

It appears clear from that language that if a municipality engages in activities related to the management of solid waste, it must establish either an enterprise fund or special revenue fund to account for those activities, but if it also has a landfill, it must establish an enterprise fund to account "specifically" for that activity.

Nowhere in the Solid Waste Management Act of 1991 is the phrase "management of solid waste" defined, let alone defined as the collection of solid waste. Indeed, an argument can be made that the Act contemplates that the phrase include only solid waste disposal. Tennessee Code Annotated, ' 68-211-803 expresses the public policies of the state with respect to the Act. Subsection (a) provides that:

> (a) It is declared to be the policy of this state in furtherance of its responsibility to protect the public health, safety and well-being of its citizens and to protect and enhance the quality of the environment, to institute and maintain a comprehensive, integrated, state-wide program for *solid waste management*, which will assure that solid waste facilities, whether publically or privately operated, do not adversely affect the health, safety and well-being of the public and do not degrade the quality of the environment by reason of their location, design, method of operation or other means, and which, to the extent feasible and practical, makes maximum utilization of the resources contained in solid waste.

Subsection (a) appears to tie "solid waste management" and solid waste management facilities together. Indeed, anyone reading that Act will immediately conclude that the regulation of solid waste disposal facilities is a primary purpose of the Act. However, subsections (b) and (c) express two other public policies of the state:

> (b) ....to educate and encourage *generators and handlers* of solid waste to reduce and minimize to the greatest extent possible the amount of solid waste which requires *collection*, treatment, incineration or disposal though source reduction, reuse, composting, recycling and other methods.
>
> (c) ....to promote markets for, and engage in the purchase of goods made from *recovered* materials and goods which are *recyclable*.

It is difficult not to conclude that subsection (b) is concerned with the part of the solid waste stream which involves its generation and collection. The promotion of recovered and recycled goods are the subject of subsection (c), and while I do not pretend to be an expert in solid waste at any level of its collection or disposal, I am given to understand that much of the garbage and recycling and recovery effort occurs at the collection, and even the re-collection, level. In addition, under Tennessee Code Annotated, ' 68-211-804, the Solid Waste Disposal Act is to be given a liberal construction "to effect its purpose of providing for a systematic and efficient means of solid waste disposal and encouraging the best utilization and conservation of energy and natural resources." In that context, I cannot see how it is possible to separate the garbage "disposal" function into a collections function, and a landfill function.

Indeed, in City of Tullahoma v. Bedford County, 938 S.W.2d 408 (Tenn. 1997), the Tennessee Supreme Court appears to have defined "solid waste management." It points out that the General Assembly has enacted comprehensive state regulation regarding the control of solid waste, including the Tennessee Solid Waste Planning Recovery Act, the Solid Waste Management Act of 1991, and the Solid Waste Authority Act of 1991. Then it turns to the state policies reflected in those acts, all of which are similar, and says this about those policies and those acts:

> Several policy principles are set forth in these several acts: the disposal of solid waste will be accomplished at the local, regional and state level pursuant to comprehensive planning; the development of a comprehensive, integrated statewide program for solid waste management will assure that solid waste facilities whether publically or privately operated do not adversely affect the health, safety and well-being of the public; and public spending for the control and disposal of solid waste is to be accomplished by appropriations by the legislature and the imposition of tipping fees by local operators. *These statutes regulate all aspects of solid waste management, they control facilities operated by private persons and public agencies, they mandate uniformity, they specifically limit the means of generating revenue, and they require that all revenue received by the state and local governments be used only for solid waste management purposes. The Solid Waste Management Act expressly regulates the imposition, collection, and use of fees and surcharges by the state and local governments; it limits the use of proceeds collected by local governments; and it requires the comprehensive plan for the management of solid waste include a uniform accounting system developed by the state comptroller*. [At 413-14] [Emphasis is mine.]

The Court obviously sees solid waste management as a comprehensive scheme governing the solid waste stream from *collection* to disposition.

Even if the Solid Waste Management Act is read without the benefit of City of Tullahoma v. Bedford County, the same conclusion can be reached:

- Tennessee Code Annotated, ' 68-211-811, provides that the solid waste planning district needs assessment required to be completed by 1992, included the "Characterization of the solid waste stream," and "Projections of waste generation."

- Tennessee Code Annotated, ' 68-211-813(b)(1), declares that "Municipalities that provide solid waste collection services or provide solid waste disposal services, directly or by contract, shall be represented on the [solid waste] board."

- Tennessee Code Annotated, ' 68-211-814(b)(1)(A), provides that "If the commissioner [of environment and conservation] approves the [regional solid waste] plan....by resolution and subsequent adoption of ordinances by counties and municipalities in the region, may also regulate the flow of collected municipal solid waste generated within the region...."

- Tennessee Code Annotated, ' 68-211-815, provides that the municipal solid waste plan must include, among other things:

> "Waste streams, including data concerning types and mounts generated...." [subsection (b)(2)(A)].
>
> "collection capability, including data detailing the different types of collection systems and the population and areas which receive and do not receive such services and amount...."[subsection (b)(2)(B).]

- Tennessee Code Annotated, ' 68-211-851 provides that:

> Each county has the responsibility of assuring that "one (1) or more municipal solid waste *collection* and disposal systems are available to meet the needs of the residents of the county. Such systems shall complement and supplement those provided by a municipality...." [subsection (a)(1)]
>
> "As part of the local plan required by ' 68-211-814, each county or multi-county municipal solid waste disposal region shall submit a plan for the *adequate provision of collection services* to the department [of environment and conservation]...." [subsection (b)].

- Tennessee Code Annotated, ' 68-211-871(a)(1), "provides that each solid waste region is required to submit an annual report to the commissioner [of environment and conservation] a

report, containing data on the following: (1) Collection...."

- Tennessee Code Annotated, '68-211-871(c), provides that "The region may require each person actively and regularly engaged in the *collection, transportation* and disposal of municipal solid waste, or the recovery or recycling of materials...to provide any information necessary for the region to comply with the reporting requirements of this section."

- Tennessee Code Annotated, ' 68-211-872, provides that "The commissioner [of environment and conservation] shall establish and maintain a statewide solid waste planning and management data base which can aggregate and analyze county reports on *waste generation, collection, recycling, transportation*, disposal and costs."

Read all together the above provisions (and others I did not even list) strongly point to the conclusion that the term "solid waste management" contained in Tennessee Code Annotated, ' 68-211-874, includes solid waste collection functions.

Analysis of second reason

When a municipality through its police powers provides a municipal service, the charges it imposes for the service must bear a reasonable relationship to the cost of providing the service. [See City of Tullahoma v. Bedford County, 938 S.W.2d 408 (Tenn. 1997); Bristol Tennessee Housing Authority v. Bristol Gas Corp., 407 S.W.2d 681 (Tenn. 1966); City of Paris v. Paris-Henry Utility District, 340 S.W.2d 885 (Tenn. 1960); Porter v. City of Paris, 201 S.W.2d 688 (Tenn. 1940).]

Charges for the cost of providing a service or a regulation under a municipality's police powers that bear a reasonable relationship to the cost of the service or regulation are fees; costs that are excessive are a tax, and the purpose of a tax is to raise revenue. It is said in City of Tullahoma, above, that:

> Whether a charge for depositing waste in a landfill is a tax or a fee, even though denominated a tax, is determined by its purpose. A tax is a revenue raising measure levied for the purpose of paying the governments general debts and liabilities. [Citations omitted.] A fee is imposed for the purpose of regulating a specific activity or defraying the cost of providing a service or benefit to the party paying the fee. Memphis Retail Liquor/Dealers' Ass'n v. City of Memphis, 547 S.W.2d at 246 [Remainder of citations omitted.]. [At 412]

There is no fine line between a fee and a tax in cases involving services or regulations under a municipality's police powers. In Memphis Retail Liquor Dealer's Association, above, the court declared that a regulatory license could produce more income than is required for its administration and enforcement, and upheld a license "fee" that was approximately 200 times the

cost of the regulation. However, the Court specifically noted that the reason was that the liquor business was a highly regulated business, and that the high license fee itself had a regulatory effect. [At 246] I am not sure how much revenue a garbage collection charge could raise beyond the cost of providing garbage service before it became a tax rather than a fee. But I have not attempted to make that determination in the City's case because that question probably needs no answer. If the city had simply raised the garbage collection charge from $13 to $17.50 per month, I doubt it would have been possible to show that the increase was so excessive as to constitute a tax, but where the city explicitly tied the increase to the funding of a community building or other city activity totally unrelated to the garbage collection service, it is difficult for me to see how the increase could be shown to be anything but a tax.

Of the two questions, the first one is the primary one. One need not even reach the police power question to conclude that Tennessee Code Annotated, ' 68-211-875 requires that municipal garbage collection services be operated as a special revenue or enterprise fund, either of which require that garbage collection charges be spent only on garbage collection services.

I have consulted with Dick Phebus, one of the MTAS financial consultants, and have read the provisions governing special revenue and enterprise funds in Government Finance Officer Association, Governmental Accounting, Auditing, and Financial Reporting Manual, 2001 edition, and from that consultation and reading, conclude that expenditures from those funds are limited to the purpose for which those funds were established.

Sincerely,

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Senior Law Consultant

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