

STORAGE NAME: h0361s1.ca

DATE: February 10, 2000

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
COMMITTEE ON COMMUNITY AFFAIRS
ANALYSIS**

BILL #: CS/HB 361

RELATING TO: Recovered Materials Dealers

SPONSOR(S): Committee on Community Affairs and Representative Tullis

TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) COMMUNITY AFFAIRS (PRC) YEAS 8 NAYS 1
 - (2) ENVIRONMENTAL PROTECTION (RLC)
 - (3) GENERAL GOVERNMENT APPROPRIATIONS (FRC)
 - (4)
 - (5)
-

I. SUMMARY:

The bill clarifies that the registration fee charged to a recovered materials dealer by a local government must be commensurate with and no greater than costs incurred by a local government that are associated with the local government's registration program. The bill also prohibits a local government from requiring a certified recovery dealer to enter into a franchise agreement in order to enter into a contract with a commercial establishment within the local government's jurisdiction.

This bill has no impact on the state's general revenue fund. Potentially, local government revenues may be reduced by limiting franchise agreements.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

Lower Taxes: As discussed in the "Effects of Proposed Changes" section, this bill places a set limit, the amount DEP charges, on the amount of the registration fee a local government may charge a recovered materials dealer.

Individual Freedom: As discussed in the "Effects of Proposed Changes" section, this bill prohibits a local government from requiring a certified recovery dealer to enter into a franchise agreement in order to enter into a contract with a commercial establishment within the local government's jurisdiction.

B. PRESENT SITUATION:

Regulation of Recovered Materials

Section 403.703(7), F.S., defines "recovered materials" to mean:

"metal, paper, glass, plastic, textile, or rubber materials that have known recycling potential, can be feasibly recycled, and have been diverted and source separated or have been removed from the solid waste stream for sale, use, or reuse as raw materials, whether or not the materials require subsequent processing or separation from each other, but does not include materials destined for any use that constitutes disposal. Recovered materials as described above are not solid waste."

Section 403.7045, F.S., provides that recovered materials or recovered materials processing facilities shall not be regulated pursuant to Part IV, except as provided in section 403.7046, F.S., if:

- A majority of the recovered materials at the facility are demonstrated to be sold, used, or reused within 1 year.
- The recovered materials handled by the facility or the products or byproducts of operations that process recovered materials are not discharged, deposited, injected, dumped, spilled, leaked, or placed into or upon any land or water by the owner or operator of such facility so that such recovered materials, products or byproducts, or any constituent thereof may enter other lands or be emitted into the air or discharged into any waters, including groundwaters, or otherwise enter the environment such that a threat of contamination in excess of applicable department standards and criteria is caused.

- The recovered materials handled by the facility are not hazardous wastes as defined under s. 403.703, F.S., and rules promulgated pursuant thereto.
- The facility is registered as required in s. 403.7046, F.S.

State Regulation

Section 403.7046(1), F.S., provides that after January 1, 1994, any person who handles, purchases, receives, recovers, sells, or is an end user of recovered materials shall annually certify to DEP on forms provided by the department. DEP may by rule exempt from this requirement generators of recovered materials, persons who handle or sell recovered materials as an activity which is incidental to the normal primary business activities of that person, or persons who handle, purchase, receive, recover, sell, or are end users of recovered materials in small quantities as defined by the department.

DEP must adopt rules for the certification of and reporting by such persons and must establish criteria for revocation of such certification. Such rules must be designed to elicit, at a minimum, the amount and types of recovered materials handled by registrants, and the amount and disposal site, or name of person with whom such disposal was arranged, of any solid waste generated by such facility. Such rules may provide for the department to conduct periodic inspections. DEP may charge a fee of up to \$50 for each registration, which must be deposited into the Solid Waste Management Trust Fund for implementation of the program. DEP has adopted Chapter 62-722, F.A.C, to implement this section.

Local Government Regulation

Section 403.7046(3), F.S., outlines the authority of local governments to regulate the commercial collection and processing of certain recovered materials. The statute states:

"Except as otherwise provided in this section or pursuant to a special act in effect on or before January 1, 1993, a local government may not require a commercial establishment that generates source-separated recovered materials to sell or otherwise convey its recovered materials to the local government or to a facility designed by the local government, nor may the local government restrict such a generator's right to sell or otherwise convey such recovered materials to any properly certified recovered materials dealer who has satisfied the requirements of this section. A local government may not enact any ordinance that prevents such a dealer from entering into a contract with a commercial establishment to purchase, collect, transport, process, or receive source-separated recovered materials."

The term "commercial establishment" is defined to mean:

"a property or properties zoned or used for commercial or industrial uses, or used by an entity exempt from taxation under s. 501(c)(3) of the Internal Revenue Code, and excludes property or properties zoned or used for single family residential or multifamily residential uses."

This section provides that local governments may require that recovered materials generated at such a commercial establishment be source-separated at the business premises.

Section 403.7046(3)(b), F.S., allows local governments to establish a registration procedure:

"[T]he local government may establish a registration process whereby a recovered materials dealer must register with the local government prior to engaging in business within the jurisdiction of the local government. Such registration process is limited to requiring the dealer to register its name, including the owner or operator of the dealer, and, if the dealer is a business entity, its general or limited partners, its corporate officers and directors, its permanent place of business, evidence of its certification under this section, and a certification that the recovered materials will be processed at a recovered materials processing facility satisfying the requirements of this section. All counties, and municipalities whose population exceeds 35,000 . . . may establish a reporting process which shall be limited to the regulations, reporting format, and reporting frequency established by the department pursuant to this section, which shall, at a minimum, include requiring the dealer to identify the types and approximate amount of recovered materials collected, recycled, or reused during the reporting period; the approximate percentage of recovered materials reused, stored, or delivered to a recovered materials processing facility or disposed of in a solid waste disposal facility; and the locations where any recovered materials were disposed of as solid waste. . . . The local government may charge the dealer a registration fee commensurate with and no greater than the cost incurred by the local government in operating its registration program. Any reporting or registration process established by a local government with regard to recovered materials shall be governed by the provisions of this section and department rules promulgated pursuant thereto."

As stated, the subsection authorizes local governments to impose a registration fee on recovered materials dealers that is "commensurate with and no greater than the cost incurred by the local government in operating its registration program."

Section 403.7046(3)(c), F.S., authorizes a local government to create a system for revoking the authority of recovered materials dealers to do business within the jurisdiction of the local government if it is found that the dealer has "consistently and repeatedly violated state or local laws, ordinances, rules, and regulations."

Section 403.7046(3)(c), F.S., authorizes a local government to enter into a non-exclusive franchise or to otherwise provide for the collection, transportation, and processing of recovered materials at commercial establishments, but such an agreement may not prohibit a certified recovered materials dealer from entering into a contract with a commercial establishment. A local government may also prohibit a person or entity who is not certified under the statute from doing business within its jurisdiction. Specifically, the paragraph states:

"In addition to any other authority provided by law, a local government is hereby expressly authorized to prohibit a person or entity not certified under this section from doing business within the jurisdiction of the local government; to enter into a nonexclusive franchise or to otherwise provide for the collection, transportation, and processing of recovered materials at commercial establishments provided that such franchise or provision does not prohibit a certified recovered materials dealer from entering into a contract with a commercial establishment to purchase, collect, transport, process, or receive source-separated recovered materials; and to enter into an exclusive franchise or to otherwise provide for the exclusive collection, transportation, and processing of recovered materials at single-family or multifamily residential properties."

Finally, s. 403.7046(3)(e), F.S., provides: "Nothing in this section shall prohibit a local government from enacting ordinances designed to protect the public's general health, safety, and welfare."

Local Government Ordinances

An ordinance passed by the City of Coral Springs is illustrative of legislation that has been passed by a few other municipalities. This ordinance established a registration fee of \$250 and a franchise fee of 15% of the franchisee's annual gross receipts for all customers located within the city. Implementation of the ordinance has been delayed due to pending litigation challenging the City's authority to require a certified recovered materials dealer to enter into a franchise agreement with the city to operate within the city.

Department of Environmental Protection

DEP Secretary David Struhs wrote a December 17, 1999, letter to the Mayor of the City of Coral Springs opposing this ordinance in which he said:

"Like you, we are concerned with the illegal disposal (which often violates local solid waste franchises) of solid waste, under the guise of recycling -- so-called 'sham recycling.' It is for that reason that a state certification system was put in place for recovered materials dealers, and a similar registration program is authorized at the local level.

However, we are not clear why you are requiring a franchise for Certified Recovered Materials Dealers to contract for the collection of commercially generated recovered materials. The Department is concerned that the implementation of such a franchise system will impede legitimate recycling of recovered materials. We intend to support proposed House Bill 361 in the 2000 Legislative Session, which would prohibit such franchises, and urge you and the Commission to reconsider the portion of Ordinance 99-129 which requires franchises."

In a subsequent letter, Secretary Struhs stated that DEP continues to agree with the DEP Policy Memorandum dated April 13, 1995, regarding local regulation of recovered materials dealers. This memorandum provides in part:

"All franchises involving the collection, transportation, and processing of recovered materials at commercial establishments must be truly non-exclusive. This means that if a business wishes to contract with a non-franchised recovered materials dealer, it must be allowed to do so. Furthermore, the local government must not restrict a dealer's ability to pursue contracts with commercial establishments. Local governments may not require recovered materials dealers to enter into franchise agreements in order to do business."

City of Coral Springs

In response to Secretary Struhs December 17, 1999, letter, the City Manger of the City of Coral Springs responded to the Secretary in a February 3, 2000, letter stating in part:

"The City administrator and professional staff carefully and considerately studied this issue prior to incorporating a franchise requirement in the Ordinance. The first issue addressed was whether a franchise would be allowable, since our franchised waste

hauler and our solid waste franchise revenues are directly impacted by non-franchise waste handlers encroaching under the guise of recycling. Our attorneys researched and reviewed existing State law which allows local government to require a franchise, and you apparently agree since you are supporting legislation in the Year 2000 Legislative Session to prohibit such franchises by local government . . . ”

“The City’s experience has been that registration alone is not sufficient to discourage ‘sham recycling’. Active enforcement is necessary, and is provided at significant personnel costs, which can be offset to some extent by franchise revenues. Franchise conditions will also assure the City that franchised operators are adequately insured while operating in the City.”

Attorney General’s Advisory Legal Opinion

In AGO 99-60, the Attorney General was asked the following question:

“Is the City of Pompano Beach authorized by Part IV, Chapter 403, Florida Statutes (1998 Supplement), to adopt and enforce an ordinance requiring recovered materials dealers to enter into a non-exclusive franchise and pay a fee to the municipality in order to conduct business within the municipality?”

The Attorney General responded in sum:

“Section 403.7046(3), Florida Statutes, authorizes the City of Pompano Beach to adopt an ordinance requiring recovered materials dealers to enter into a non-exclusive franchise for the collection, transportation, and processing of recovered materials at commercial establishments and to pay a registration fee to the municipality for the privilege of doing business within the municipality. The registration fee permitted by the statute may not exceed the cost of administering the program.”

After summarizing relevant statutory provisions, the Attorney General concluded:

“Thus, it is my opinion that section 403.7046(3), Florida Statutes, authorizes the City of Pompano Beach to adopt an ordinance requiring recovered materials dealers to enter into a non-exclusive franchise for the collection, transportation, and processing of recovered materials at commercial establishments within the city and to pay a registration fee to the municipality for the privilege of doing business within the municipality. The registration fee authorized by the statute is one that is commensurate with but no greater than the costs incurred to operate the program. However, any ordinance adopted by the municipality may not prohibit such a dealer from entering into an independent contract with a commercial establishment for source-separated recovered materials.”

C. EFFECT OF PROPOSED CHANGES:

The bill clarifies that the registration fee charged to a recovered materials dealer by a local government must be commensurate with and no greater than costs incurred by a local government that are associated with the local government’s registration program.

The bill also prohibits a local government from requiring a certified recovery dealer to enter into a franchise agreement in order to enter into a contract with a commercial establishment within the local government’s jurisdiction. The bill deletes current language providing that a local government nonexclusive franchise or provision to provide for the collection,

transportation, and processing of recovered materials at commercial establishments may not prohibit a certified recovered materials dealer from entering into a contract with a commercial establishment.

D. SECTION-BY-SECTION ANALYSIS:

Section 1 -- This section amends paragraph (b) of s. 403.7046(3), F.S., to provide that the registration program costs are limited to those costs associated with the activities described in s. 407.7046(3)(b), F.S. The bill amends paragraph (d) to prohibit a local government from requiring a certified recovery dealer to enter into a franchise agreement in order to enter into a contract with a commercial establishment within the local government's jurisdiction.

Section 2 -- An effective date of upon becoming law is provided.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill has no direct effect on state revenues.

2. Expenditures:

This bill has no direct effect on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill prohibits a local government from requiring a certified recovery dealer to enter into a franchise agreement in order to enter into a contract with a commercial establishment within the local government's jurisdiction. Franchise agreements can involve franchise fees which are a source of local government revenue. The exact amount of franchise fees derived from such agreements, however, is unknown.

2. Expenditures:

This bill has no direct effect on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The direct economic impact on the private sector is difficult to quantify. The prohibition that a local government may not require a franchise agreement in order to enter into a contract with a commercial establishment within the local government's jurisdiction could reduce the costs of doing business for recovered materials dealers.

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D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take any actions requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

Whether this bill reduces the authority of counties or municipalities to raise revenues in the aggregate, as such authority existed on February 1, 1989, depends on whether s. 403.7046, F.S., currently prohibits local governments from requiring certified recovered materials dealers to enter into franchise agreements in order to do business in their jurisdiction. As discussed in the "Present Situation" section, this question is in dispute. At this time, the question has not been addressed by a Florida court.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties and municipalities as an aggregate, as such existed on February 1, 1989.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

Department of Environmental Protection

DEP indicates the department supports this bill.

Florida League of Cities

A representative of the Florida League of Cities stated the League recognizes the bill constitutes a clarification of existing law. The League remains concerned about the ability of municipalities to recover costs incurred regulating health, safety, and welfare aspects of recovered materials.

Florida Association of Counties

A representative of the Florida Association of Counties stated the Association does not oppose HB 361.

Proponents of HB 361

Supporters of the bill believe this legislation is necessary to clarify the intent of the Legislature with respect to recovered materials dealers. Specifically they argue that:

- 1) The intent of the Legislature is for "recovered materials" to be distinguished from "solid waste."
- 2) The current legislative scheme is designed to encourage commercial establishments to contract with certified recovered materials dealers rather than disposing of those materials as solid waste.
- 3) The trend by local governments in imposing additional regulatory, reporting, and economic burdens on recovered materials dealers, beyond those contemplated by statute, frustrates the intent of the Legislature and will lead to "an uncontrolled checkerboard of varying and potentially conflicting local regulatory and reporting obligations."

Amendments to Section 403.7046, Florida Statutes, Since 1993

- Chapter 93-207, section 12, created section 403.7046, Florida Statutes.
- Chapter 95-311, section 5, limited the reporting process certain counties and municipalities could implement to the regulations, reporting format, and reporting frequency established by the department.
- Chapter 95-366, section 2, reenacted subsection (2) and subsection (3), and subsection (3)(b) of section 403.7046, Florida Statutes which were repealed as specified at the time in section 119.07(3)(a).
- Chapter 96-406 deleted the provision which made exempted information subject to review under the Open Government in the Sunshine Review Act.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The CS/HB 361 does not, as did HB 361, limit the registration fee a local government may charge a recovered materials dealer to that DEP is authorized to charge, \$50. Rather, the CS/HB 361 clarifies that the registration fee charged to a recovered materials dealer by a local government must be commensurate with and no greater than costs incurred by a local government that are associated with the registration program.

VII. SIGNATURES:

COMMITTEE ON COMMITTEE ON COMMUNITY AFFAIRS:

Prepared by:

Staff Director:

Thomas L. Hamby

Joan Highsmith-Smith