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June 13, 2005

REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

POTENTIAL TRASH FEE, RECYCLING FEE,  
TRASH CONTAINER FEE, AND EQUIPMENT FEE

**INTRODUCTION**

At the Council Hearing of May 23, 2005, the City Attorney was asked to report to the Mayor and Council on the following questions:

Issues:

1. What steps are necessary for the City to lawfully impose a fee on customers who receive City refuse collection, transportation, and disposal services [trash fee]?
2. What steps are necessary for the City to lawfully impose a fee for curbside recycling and greenery services provided to customers who receive City refuse collection, transportation, and disposal services [recycling fee]?
3. May the City impose a fee for use of City-provided automated containers [container fee]?
4. May the City impose a combined fee for collection equipment, containers, and infrastructure, such as the Miramar Operations Center and future transfer stations, associated with City-provided refuse collection services [equipment fee]?

**SHORT ANSWERS**

1. Imposing a trash fee will involve a two-step process. First, it will require an amendment to the People's Ordinance to allow the City to impose a trash fee. An amendment to the People's Ordinance requires a majority vote of the electorate. Second, assuming the amendment passes, imposition of the fee is subject to the majority protest procedures set forth in California Constitution article XIII D, section 6 [Proposition 218]. This involves a public hearing after at least forty-five days' notice and an opportunity for the impacted property owners to file written protests against the fee. If less than a majority of those property owners file a written protest, the fee passes. Otherwise, it fails.

2. The People's Ordinance requires that the City collect, transport, and dispose of residential refuse at no charge. Residential refuse is waste material of any nature or description normally generated from a single-family or multi-family residential facility, excluding hazardous or toxic wastes. Thus, the residential refuse, which the People's Ordinance requires the City to collect for free, includes wastes which are now considered recyclables. Accordingly, the imposition of a recycling fee also requires an amendment to the People's Ordinance and requires compliance with Proposition 218 as described above.
3. Yes. A container fee would not violate the People's Ordinance. As contemplated, the proposed short-term container fee would not be subject to Proposition 218. A permanent container fee, if properly structured, would not be subject to Proposition 218. However, requiring that customers use City-provided containers in order to receive City refuse collection services may make the permanent container fee vulnerable to a Proposition 218 challenge.
4. The imposition of a combined fee for collection equipment, containers, and infrastructure would require an amendment to the People's Ordinance to allow for the imposition of a fee and compliance with the majority protest procedures of Proposition 218 because these fees constitute fees for refuse collection services.

### LEGAL ANALYSIS

1. What steps are necessary for the City to lawfully impose a trash fee?

#### A. The People's Ordinance

The People's Ordinance of 1919, codified at section 66.0127 of the San Diego Municipal Code, provides that residential refuse shall be collected, transported, and disposed of by City forces at least once each week at no charge. San Diego Municipal Code § 66.0127(c)(1). Certain small businesses also may, and by prior Council authorization do, receive free City refuse collection services pursuant to the People's Ordinance. San Diego Municipal Code § 66.0127(c)(2). In order to be eligible for City refuse collection services, residential and small business refuse must be placed at the curb line of a public street at the designated collection time in approved containers. San Diego Municipal Code § 66.0127(a)(2).

The People's Ordinance originally was enacted by initiative of the people in 1919. As such, it may be amended only by a vote of the people. *Rossi v. Brown*, 9 Cal. 4th 688, 714-15 (1995); San Diego Municipal Code § 27.1049. The People's Ordinance does not contain any provisions specifying the number of votes required for the passage of an amendment. San Diego Municipal Code § 66.0127. Therefore, amendments to the People's Ordinance are governed by San Diego Municipal Code sections 27.1043 and 27.1049, which require a majority vote of the electorate to amend the People's Ordinance. Indeed, prior amendments to the People's Ordinance, most recently in 1981 and again in 1986, were approved by a majority vote of the people.

The City Council has the authority to submit an initiative proposing a legislative act or an amendment or repeal of an existing legislative act to the electorate for a vote. San Diego Municipal Code § 27.1001. Hence, the Council may exercise its initiative powers to place a measure on the ballot amending the People's Ordinance. A draft amendment to the People's Ordinance to allow imposition of a fee for collection services is attached as Exhibit "A."

B. Proposition 218

Proposition 218 governs the imposition of property-related fees. It generally requires voter approval of all property-related fees. However, California Constitution article XIII D, section 6(c) specifically exempts fees for "refuse collection services" from the voter requirements of Proposition 218. Those fees, like similar fees for water and sewer services, are subject to the majority protest procedures set forth in section 6(a). Cal. Const. art. XIII D, § 6(a); *Richmond v. Shasta Community Services District*, 32 Cal. 4th 409, 427 (2004). The majority protest procedures require the City to identify all parcels upon which the fee will be imposed, notify the record owners and provide an opportunity for them to protest the fee, and conduct a public hearing not less than forty-five days after the notice was mailed. If less than a majority of the impacted property owners file a written protest, the fee passes. Cal. Const. art. XIII D, § 6(a).

In addition, the fee must meet the following requirements:

- (a) revenues from the fee must not exceed the costs of service;
- (b) revenues from the fee must not be used for any purpose other than to provide the service;
- (c) the amount of the fee must not exceed the proportional cost of the service attributable to the parcel; and
- (d) the fee may not be imposed unless the service is actually used by the owner of the property.

Cal. Const. art. XIII D, § 6(b).

2. What steps are necessary for the City to lawfully impose a recycling fee?

A. The People's Ordinance

The People's Ordinance requires that the City collect, transport, and dispose of residential refuse at no charge. Residential refuse is waste material of any nature or description normally generated from a single-family or multi-family residential facility, excluding hazardous or toxic wastes. San Diego Municipal Code § 66.0127(a)(1), (2), (4). Waste materials presently considered "recyclables" include, among other things, glass, paper, cardboard, plastic, metal cans, and yard waste. However, waste materials considered as "recyclables" today, historically were encompassed within the definition of "waste matter" in the People's Ordinance.

Until the 1986 amendment, the People's Ordinance defined refuse eligible for free pick-up to include "waste matter," which was defined as "broken crockery, broken bottles, glass, tin vessels, trimmings from lawns, flower gardens, shrubs, and trees, berry boxes, pasteboard boxes, paper, rags, packing materials, shavings, ashes and all non-combustible waste matter." Former San Diego Municipal Code § 66.0123, section 2; City Manager Report No. 81-0284 (July 1, 1981). The 1986 amendment to the People's Ordinance added or revised the definitions of "refuse," "residential refuse," "residential facility," and "nonresidential refuse" to eliminate antiquated language and provisions. But, the available historical records discussing this amendment do not reveal any intent to change the types of residential waste covered by the People's Ordinance. On the contrary, according to those records, one key purpose of the 1986 amendment was to confirm that residents would continue to receive the weekly refuse collection services they were currently receiving by City forces at no charge. November 4, 1986 Ballot Pamphlet; San Diego Ordinance No. O-16692 (July 29, 1986); City Manager's Report No. 86-293 (June 13, 1986).

Thus, the residential refuse which the People's Ordinance requires the City to collect for free includes wastes which are now considered recyclables. Accordingly, the imposition of a recycling fee also would require an amendment to the People's Ordinance to allow the establishment of such a fee.

#### B. Proposition 218

Proposition 218 does not distinguish between the collection of "refuse" and the collection of discarded "recyclables," nor does it define "refuse collection services." Cal. Const. art. XIII D. Moreover, the implementing legislation does not define "refuse collection services." See Cal. Gov't Code § 53750(b) *et seq.* However, discarded recyclables are waste materials which historically have been considered refuse. Settled rules of constitutional interpretation require construing constitutional phrases liberally and practically. *Richmond v. Shasta Community Services District*, 32 Cal. 4th 409, 419 (2004) (citations omitted). Excluding the collection of discarded recyclables from the meaning of "refuse collection services" under Proposition 218 would result in a very restrictive interpretation of the constitutional phrase "refuse collection services." Hence, a fee for the collection of discarded recyclables would require compliance with Proposition 218 as described above.<sup>1</sup>

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<sup>1</sup> Curbside recycling services are a component of the City's Integrated Waste Management Plan Fees for implementing plan components generally are governed by California Public Resources Code section 41901. However, that statute does not govern here because curbside recycling services are encompassed within the "refuse collection services" governed by Proposition 218.

3. May the City impose a container fee?

Currently, the City provides the first refuse container to all customers at no charge. The second and any subsequent refuse containers are provided upon a customer's request for a fee of \$50.00 each. To encourage recycling, the City provides recycling containers at no charge. The City provides up to two greenery containers per automated greenery customer at no charge. The third and subsequent greenery containers are provided for a fee of \$25.00 each. If the customer requests delivery of the containers, the City charges a \$25.00 delivery fee. The fees for additional containers were imposed prior to the passage of Proposition 218 in 1996 and have not been increased since that time.

The proposed short-term container fee would be imposed on: (1) new service requests; and (2) requests for new containers to replace non-serviceable containers which are no longer under warranty and stolen containers. The container fee would be charged to the individual customer requesting the new container. The short-term fee would be in place for about one year, while options for a permanent container fee are evaluated.

A. The People's Ordinance

A container fee does not violate the People's Ordinance for several reasons. First, the People's Ordinance does not expressly require the City to provide the approved containers necessary to be eligible for City refuse collection services. It simply requires the City to, without a fee, take physical possession of it at the point at which it is placed at the curb line on the designated day in an approved container. San Diego Municipal Code §§ 66.0102, 66.0127((a)(2)). It does not encompass the obligation to provide for storage of the waste pending collection. Second, the People's Ordinance repeatedly characterizes the collection obligation as an obligation to provide a "service." In other words, it does not contemplate the provision of goods to customers, only services. Third, companion provisions of the Municipal Code specifically place the burden to provide refuse containers on owners or occupants of residential facilities and businesses. San Diego Municipal Code § 66.0126(a). Indeed, prior to automation, customers historically had provided approved containers at their own expense. Fourth, companion provisions give the City Manager the authority to set collection service standards. San Diego Municipal Code § 66.0124. This authority includes setting standards and specifications for appropriate refuse storage containers. Finally, neither the People's Ordinance nor its companion provisions preclude the City from charging customers for the use of approved containers supplied by the City.

B. Proposition 218

Proposition 218 raises three issues applicable to a proposed container fee: (1) whether the fee would constitute a special tax; (2) whether the fee would constitute a special assessment; and (3) whether the fee would constitute a property-related fee.

- (i) Would the container fee constitute a special tax?

Government Code Section 50076 specifically excludes from the definition of “special tax” any fee which (a) does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and (b) is not levied for general revenue purposes. Cal. Gov’t Code § 50076; *see Mills v. Trinity*, 108 Cal. App. 3d 656, 662 (1980). So, assuming the proceeds of the container fee are used for the specific purpose of providing the automated containers and associated services, and the fee does not exceed the reasonable cost of providing those goods and services, then the fee would not constitute a “special tax.”

- (ii) Would the container fee constitute a special assessment?

An assessment is a charge upon real property. Cal. Const. art. XIII D, § 2(b), (i); Cal. Gov’t Code § 53750(b). The proposed short-term container fee would not be a charge upon real property, but rather on individuals who seek new containers. *See Richmond v. Shasta Community Services District*, 32 Cal. 4th 409, 419 (2004). Thus, the proposed short-term container fee would not constitute a special assessment.

- (iii) Would a container fee constitute a property-related fee?

a. Permanent Container Fee

Assuming the fee is not a tax or an assessment, the last category of charges to which Proposition 218 applies are “property-related” fees. Whether a permanent container fee, in general, might constitute a “property-related” fee subject to Proposition 218 will depend in large part on how the fee is structured. It will depend on factors such as: who will be charged the fee; how the fee will be charged; the basis for computing the fee; the components of the fee; the allocation of the charges among those subject to the fee; and the manner in which the fee is collected. Following certain general guidelines in establishing the fee may help avoid a Proposition 218 challenge:

1. tying the fee to the number and size of containers used;
2. allowing property owners to avoid the fee by purchasing containers elsewhere, as long as the containers meet all City specifications for approved containers;
3. refraining from charging a fixed minimum fee or similar fee regardless of use during a given billing cycle;
4. imposing the fee on the user of the good or service rather than on the property owner, on a per parcel basis or in reference to a parcel map;
5. avoiding the use of the property tax rolls to collect the fee;
6. clarifying that liening property in order to collect unpaid fees is merely a debt collection device and not an essential component of the fee; and

7. relying on the discontinuance of service, rather than a property lien, to enforce payment.

One feature of a permanent container fee under consideration is a requirement that customers must obtain City-provided containers, and hence pay the container fee, in order to receive City refuse collection services. Because fees for “refuse collection services” are subject to Proposition 218, a requirement that a customer must pay the container fee in order to receive the refuse collection services may, in effect, convert the container fee into a fee for “refuse collection services” subject to Proposition 218.

- b. Short-Term Container Fee

In analyzing the proposed short-term container fee, we look to the California Supreme Court’s recent decision in *Richmond v. Shasta Community Services District*, 32 Cal. 4th 409 (2004). In *Richmond*, the Court stated that fees occurred as a result of a property owner’s voluntary request for new government benefits (as contrasted with new fees for existing benefits provided to the property) are not property-related fees. The Court reasoned that such fees are not imposed as a result of mere normal ownership and use of the property, but rather, are imposed as a result of the property owner’s voluntary request for new benefits. Because a local government is unable to identify in advance which properties will request new government benefits, it cannot comply with California Constitution article XIII D, section 6(a), which requires notice to all impacted property owners. Hence, fees for new service do not trigger Proposition 218. *Id.* at 427-28.

Following the reasoning in *Richmond*, the short-term container fee proposed for new City collection service requests is not a property-related fee for two reasons: (1) the fee will result, not from mere property ownership, but rather from a voluntary request by a property owner for new City collection service; and (2) the City is unable to identify in advance which property owners will request new service. As in *Richmond*, the City is unable to comply with the California Constitution article XIII D, section 6(a) requirements. Hence, these fees would not trigger Proposition 218. Similarly, the short-term fee to replace containers which are no longer serviceable and no longer under warranty or were stolen, as currently proposed, probably would not be subject to Proposition 218 either because: (1) the fee will result from the voluntary request by the property owner for a new container; and (2) the City cannot predict in advance which property owners will request new containers during the period the short-term fee is imposed.

While we do not believe the proposed short-term container fee would be subject to Proposition 218, the safest course would be to comply with the majority protest procedures of Proposition 218 in establishing this fee.

4. May the City impose an equipment fee?

The “service” required by the People’s Ordinance is the *collection, transportation, and disposal* of refuse. San Diego Municipal Code § 66.1027(c)(1) (emphasis added). Collection

equipment and infrastructure such as: (a) the Miramar Operations Center, where collection vehicles are stored, fueled, repaired, maintained, and dispatched; and (b) future transfer stations, where waste is temporarily stored for future shipping to a disposal facility, are essential tools for providing the services mandated by the People's Ordinance. Without these tools, the City would be unable to provide the refuse collection, transportation, and disposal services the People's Ordinance requires the City to provide for free. Consequently, an equipment fee, as defined herein, may not be imposed without an amendment to the People's Ordinance allowing for the imposition of such a fee. If such an amendment were passed, imposition of the equipment fee is subject to the majority protest procedures set forth in Proposition 218 because the fee would constitute, at least in part, a fee for refuse collection services.

### CONCLUSION

Imposing a trash fee, a recycling fee, or an equipment fee will require an amendment to the People's Ordinance to allow the City to impose such a fee. An amendment to the People's Ordinance requires a majority vote of the electorate. Assuming the amendment passes, imposition of a trash fee, a recycling fee, or an equipment fee is subject to the majority protest procedures set forth in Proposition 218. This procedure involves a public hearing after at least forty-five days' notice and an opportunity for the impacted property owners to file written protests against the fee. If less than a majority of those property owners file a written protest, the fee passes.

An automated container fee would not violate the People's Ordinance. As contemplated, the proposed short-term container fee would not be subject to Proposition 218. A permanent container fee, if properly structured, probably would not be subject to Proposition 218. However, requiring that customers use City-provided containers in order to receive City refuse collection services may make the fee vulnerable to a Proposition 218 challenge.

Respectfully submitted,

MICHAEL J. AGUIRRE  
City Attorney

GCL:mb  
Attachment:1  
Exhibit A  
RC-2005-13

ORDINANCE NUMBER \_\_\_\_ (NEW SERIES)

ADOPTED ON \_\_\_\_\_, 2005

AN ORDINANCE SUBMITTING TO THE QUALIFIED VOTERS OF THE CITY OF SAN DIEGO AT THE MUNICIPAL SPECIAL ELECTION TO BE HELD ON JULY 26, 2005, ONE PROPOSITION AMENDING PEOPLE'S ORDINANCE NO. 7691 AND AMENDING CHAPTER 6, ARTICLE 6, DIVISION 1 OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTION 66.0127, ALL RELATING TO AUTHORIZING THE CITY COUNCIL TO IMPOSE A FEE FOR THE COLLECTION, TRANSPORTATION, AND DISPOSAL OF RESIDENTIAL AND NONRESIDENTIAL REFUSE BY CITY FORCES

WHEREAS, pursuant to Section 9222 of the California Elections Code, and Section 27.1001 of the San Diego Municipal Code, the City Council has authority to place propositions on the ballot to be considered at a Municipal Election; and

WHEREAS, by Ordinance No. O-\_\_\_\_\_, adopted on \_\_\_\_\_, the Council of the City of San Diego is calling a Municipal Special Election to be held on July 26, 2005, for the purpose of submitting to the qualified voters of the City one or more ballot propositions; and

WHEREAS, the City of San Diego, by the enactment of the People's Ordinance of 1919 (Ordinance No. O-7691), and subsequent amendments thereto, and by the codification of that ordinance in Chapter 6, Article 6, Division 1 of the San Diego Municipal Code, is presently prohibited from imposing a fee for the collection, transportation, or disposal of residential and nonresidential refuse by City forces.

WHEREAS, the City Council desires to eliminate such prohibitions and have the authority to impose a fee, in an amount not to exceed that which is allowed by law, for the

collection, transportation, and disposal of residential and nonresidential refuse by City Forces;  
and

WHEREAS, the City Council desires to submit to the voters at the Municipal Special Election to be held on July 26, 2005, one ballot proposition, entitled “Authority to Impose Refuse Fee”; NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. One ballot proposition amending the People’s Ordinance of 1919, as amended, and the San Diego Municipal Code is hereby submitted to the qualified voters of the City at the Municipal Special Election to be held July 26, 2005, the proposition to read as follows:

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**PROPOSITION**

That the provisions of the People’s Ordinance, Ordinance No. 7691, adopted and ratified on April 18, 1919, and as amended and codified in the San Diego Municipal Code at section 66.0127, are all hereby amended to read as follows:

**§ 66.0127 Refuse Collection**

(a) As used in this People’s Ordinance:

- (1) “Refuse” means waste material of any nature or description generated within the City limits, excluding hazardous or toxic chemicals, wastes, materials or substances as defined now or hereafter by federal or state law or regulation;
- (2) “Residential Refuse” means refuse, as defined herein, normally generated from a Residential Facility and which is placed at the curb line of public streets at designated times in approved containers;

- (3) “Nonresidential Refuse” means all refuse that is not Residential Refuse, as defined herein;
  - (4) “Residential Facility” means a single family or multi-family residential structure used and occupied for Nontransient Occupancy;
  - (5) “Nontransient Occupancy” means occupancy through ownership, lease or rental for periods of one month or more.
  - (6) “Small business enterprise” means a commercial establishment providing sales and services to the public and licensed or taxed by the City.
- (b) No person shall collect, transport or dispose of any refuse except as provided herein.
- (c) The City Council shall by ordinance regulate and control the collection, transportation and disposal of all refuse provided that:
- (1) Residential Refuse shall be collected, transported and disposed of by the City at least once each week. The City may impose a fee, as allowed by law, for the performance of such services by City Forces.
  - (2) The City shall not collect Nonresidential Refuse, except that Nonresidential Refuse from a small business enterprise may be collected by City Forces if authorized by the City Council and limited to once a week service in an amount no greater than one hundred fifty percent (150%) of the refuse generated by an average City residential dwelling unit. The City may impose a fee, as allowed by law, for the performance of such services by City Forces.

- (3) The City shall not enter upon any private property to collect any refuse except in the case of public emergency or pursuant to a hold harmless agreement in effect as of the date of adoption of this ordinance.
- (4) Fees established by ordinance of the City Council for disposal of Nonresidential Refuse shall not exceed the full ascertainable cost to the City for such disposal.
- (d) Pursuant to the ordinance duly adopted by the City Council, the City Manager may then duly promulgate such rules and regulations as are appropriate to provide for the collection, transportation and disposal of refuse.

**END OF PROPOSITION**

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Section 2. The proposition shall be presented and printed upon the ballot and submitted to the voters in the manner and form set out in Section 3 of this ordinance.

Section 3. On the ballot to be used at this Municipal Special Election, in addition to any other matters required by law, there shall be printed substantially the following:

<b>PROPOSITION ____.</b> <b>AUTHORITY TO IMPOSE REFUSE FEE</b>	YES	
Shall the People’s Ordinance of 1919, as amended, and San Diego Municipal Code section 66.0127 be amended to allow the City to impose a fee for the collection, transportation, and disposal of residential and nonresidential refuse by City forces, provided that such fee does not exceed the amount allowed by law?	NO	

Section 4. An appropriate mark placed in the voting square after the word “Yes” shall be counted in favor of the adoption of this proposition. An appropriate mark placed in the voting square after the word “No” shall be counted against the adoption of the proposition.

Section 5. Passage of this proposition requires the affirmative vote of a majority of those qualified electors voting on the matter at the Municipal Special Election.

Section 6. The City Clerk shall cause this ordinance or a digest of this ordinance to be published once in the official newspaper following this ordinance adoption by the City Council.

Section 7. Pursuant to Section 9295 of the California Elections Code, this measure will be available for public examination for no fewer than ten calendar days prior to being submitted for printing in the sample ballot. During the examination period, any voter registered in the City may seek a writ of mandate or an injunction requiring any or all of the measure to be amended or deleted. The examination period will end on the day that is 75 days prior to the date set for the election. The Clerk shall post notice in his Office the specific dates that the examination period will run.

Section 8. That a full reading of this ordinance is dispensed with prior to its final passage, a written or printed copy having been available to the City Council and the public a day prior to its final passage.

Section 9. Pursuant to Section 17 of the Charter of the City of San Diego, this ordinance relating to elections shall take effect on \_\_\_\_\_, 2005 which is the day of its introduction and passage.

APPROVED: MICHAEL J. AGUIRRE, City Attorney

By \_\_\_\_\_  
Catherine M. Bradley  
Deputy City Attorney

CMB:jab  
05/11/2005  
Or.Dept:\_\_\_  
O-2005-134