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April 7, 2011

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

REINSTATING REFUSE COLLECTION SERVICES AND GIFT OF PUBLIC FUNDS

INTRODUCTION

In connection with efforts to reduce the projected General Fund deficit and in light of the failure of the proposed sales tax increase on the November 2010 ballot, City Departments were asked to propose options for reducing General Fund expenditures. These proposals were requested in order to minimize deeper cuts in certain services such as library, park and recreation, police, and fire/rescue services. The Environmental Services Department proposed terminating residential refuse collection services provided by the City at no charge to a select group of residents located on private streets, pursuant to agreements commonly referred to as "hold harmless agreements." On February 4, 2011, after notifying the City Council of his intentions, the Mayor issued notices of termination of all the hold harmless agreements, advising that the City would no longer provide refuse, recycling, and yard waste collection services to those residents, effective July 1, 2011. At the Natural Resources and Culture Committee hearing on March 2, 2011, Committee members considered reinstating those services and asked the City Attorney to advise whether doing so would constitute a gift of public funds.

QUESTION PRESENTED

Whether reinstating residential refuse collection services provided by the City pursuant to hold harmless agreements would constitute a gift of public funds?

SHORT ANSWER

Reinstating residential refuse collection services provided pursuant to hold harmless agreements probably would not constitute a gift of public funds, so long as the City Council's action becomes effective before the effective date of the Mayor's termination of those agreements.

FACTUAL BACKGROUND

From 1964 through 1986, the City entered into agreements with property owners or managers to provide City refuse collection services at no charge to certain residential properties.¹ These properties were situated such that it was impractical for the residents to place their refuse adjacent to a public street for collection. This meant that, in order to provide collection services to these residents, City trash trucks would have to travel over private property to access the refuse containers.² These agreements were entered into as a courtesy to residents at their request and on a case-by-case basis, after City staff was satisfied that collection operations could be performed safely if certain service requirements were followed.³ Typically, the agreements were recorded with the San Diego County Recorder's Office.

Under the agreements, the property owner or manager agreed to permit the City to enter onto the described private property for purposes of collecting refuse; agreed to abide by service requirements such as pickup locations, routing, and scheduling established by the City Manager; agreed to give seven days advance written notice of its intent to terminate the agreement; and expressly agreed to hold the City harmless, and in some cases to also indemnify and defend the City, in the event of personal injury or property damage resulting directly or indirectly from the City's collection and removal of refuse from the owner's property. The agreements do not contain an express requirement that the City actually collect refuse from these properties.⁴

As we explained in City Attorney Memorandum of Law No. 2009-17, dated October 23, 2009, these services are entirely discretionary and may be terminated by the Mayor on seven days written notice. The People's Ordinance does not guarantee the continuation of service under the hold harmless agreements. SDMC § 66.0127(c)(3). There is no vested right to the continuation of these services. And, under state law, it is every resident's duty to lawfully dispose of household waste at the resident's expense.⁵ The expense to the General Fund of this non-core, discretionary, and select service is approximately \$880,000 per year.

The 1986 amendment to the People's Ordinance prohibits the City from entering into any new hold harmless agreements. *Id.* Thus, once terminated, the hold harmless agreements may not be resurrected.

Given the above facts and the significant General Fund deficit facing the City, the Mayor decided to terminate the hold harmless agreements. The Mayor issued written notices of termination of all of the hold harmless agreements on February 4, 2011, stating that refuse, recycling, and yard waste collection services provided under these agreements would be discontinued effective July 1, 2011. The savings from the elimination of this non-core, discretionary, and select service is included in the Mayor's proposed Fiscal Year 2012 budget.

¹ See attached Exhibits A and B for samples of the hold harmless agreements.

² The practice of routinely entering onto private property to collect refuse had been discontinued in 1941. City Manager Report No. 86-293 dated June 13, 1986, p.2.

³ See, e.g., Memorandum from Deputy Director Rich Hays to Councilmember Bill Mitchell re Refuse Collection in Fairway Vista dated November 27, 1985; Memorandum from Deputy City Attorney P. Rosenbaum to Councilmember Dick Murphy re: Tierrasanta Trash Pick-Up dated June 22, 1981.

⁴ See attached Exhibits A and B.

⁵ City Att'y MOL No. 2009-17 (Oct. 23, 2009) and authorities cited therein.

ANALYSIS

We begin our analysis with article XVI, section 6 of the California Constitution, which prohibits the legislature from making or authorizing a gift of public funds or other thing of value to any individual, association or corporation. Cal. Const. art. XVI, § 6; *County of Alameda v. Janssen*, 16 Cal. 2d 276, 281 (1940). This provision is not applicable to charter cities. *Tevis v. City & County of San Francisco*, 43 Cal. 2d 190, 197 (1954). However, the San Diego City Charter (Charter) contains a similar provision derived from article XVI, section 6. Specifically, Charter section 93 provides in relevant part: “The credit of the City shall not be given or loaned to or in aid of any individual, association or corporation; except that suitable provision may be made for the aid and support of the poor.” Thus, cases interpreting the constitutional prohibition against gifts of public funds are instructive in interpreting Charter section 93.

An expenditure of public funds that benefits a private party constitutes an impermissible gift if the public agency does not receive adequate consideration in exchange or if the expenditure does not serve a public purpose.⁶ *People v. City of Long Beach*, 51 Cal. 2d 875, 881-83 (1959); *California School Employees Assn. v. Sunnyvale Elementary School District*, 36 Cal. App. 3d 46, 59 (1973); *Allen v. Hussey*, 101 Cal. App. 2d 457, 473-74 (1950).

To constitute a gift of public funds . . . payment of public funds must be without adequate consideration Consideration is simply the conferring of a benefit upon the promisor or some other person or the suffering of a detriment by the promisee or some other person Consideration, if it consists of a benefit, must have some value.

California School Employees Assn., 36 Cal. App. 3d at 59.

[I]n order for a transfer [of public funds] to avoid being classified as a gift, the consideration given in exchange must be “adequate,” so as to evidence a bona fide contract The consideration cannot be merely “nominal” The law, however, does not require a weighing of the quantum of benefit received by a promisor or the detriment suffered by a promisee where the consideration is plainly substantial.

Winkelman v. City of Tiburon, 32 Cal. App. 3d 834, 845 (1973).

We believe the hold harmless agreements satisfy the requirement of adequate consideration. In each case, the private party to the agreement agreed to restrictions on the right to terminate the agreement,⁷ and more importantly, expressly agreed to hold the City harmless, and in some cases indemnify and defend the City, from losses the City may suffer in the event of

⁶ The benefit to the public agency from an expenditure for a public purpose of the agency is in the nature of consideration, and funds expended for that purpose are not a gift of public funds even though private persons may incidentally benefit. *County of Alameda v. Carleson*, 5 Cal. 3d 730, 745-46 (1971); *Board of Supervisors v. Dolan*, 45 Cal. App. 3d 237, 243 (1975).

⁷ Since courts do not favor arbitrary cancellation clauses, even a minor restriction on the right to terminate an agreement will constitute adequate consideration. *County of Alameda v. Ross*, 32 Cal. App. 2d 135, 144-45 (1939).

injuries to persons or damage to property resulting directly or indirectly from the City's collection and removal of refuse from the property. An agreement to hold harmless is a promise by one party to assume the risk inherent in a situation and relieve the other of responsibility. *Queen Villas Homeowners Assn. v. TCB Property Management*, 149 Cal. App. 4th 1, 9-10 (2007). A promise to indemnify is an obligation to make good on a loss or other legal consequence suffered by another. Cal. Civ. Code § 2772; *Id.*; *Roos v. Kimmel*, 55 Cal. App. 4th 573, 582 (1997). One is offensive, the other is defensive. Both apply in third party liability situations. *Queen Villas Homeowners Assn.*, 149 Cal. App. 4th at 9. Thus, the consideration given in exchange for the service is sufficient; it is not merely nominal. *See, e.g., Roos*, 55 Cal. App. 4th at 586 (Court upheld hold harmless agreement in case where service was rendered *as a favor* to plaintiff and only because plaintiff agreed to exonerate service provider from liability; court concluded that, to hold otherwise, would deprive service provider of the benefit of its bargain and violate principle that contracts should be interpreted in a manner that makes them reasonable and enforceable.). Accordingly, reinstating refuse collection services under the hold harmless agreements probably would not constitute a gift of public funds, so long as the City Council's action becomes effective prior to the effective date of the Mayor's termination.

The timing of the City Council's action is important because the People's Ordinance prohibits the City from entering into any new hold harmless agreements. Thus, once terminated, a hold harmless agreement may not be resurrected. SDMC § 66.0127(c)(3).

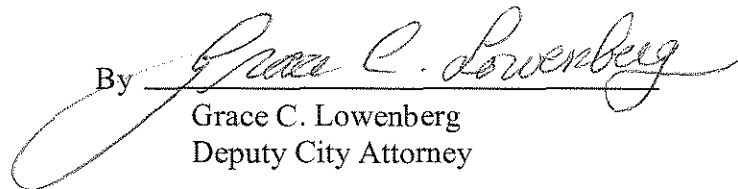
CONCLUSION

Reinstating residential refuse collection services provided pursuant to hold harmless agreements probably would not constitute a gift of public funds, so long as the City Council's action becomes effective before the effective date of the Mayor's termination of the agreements.

Respectfully submitted,

JAN I. GOLDSMITH
City Attorney

By



Grace C. Lowenberg
Deputy City Attorney

GCL:cla:mb
Attachments
cc: Andrea Tevlin,
Independent Budget Analyst
RC-2011-17

EXHIBIT A

221174

FILE/PAGE NO.
RECORDED REQUEST BY
CITY CLERK

DEC 7 9 01 AM '64 532

SERIES 5 BOOK 1964
OFFICIAL RECORDS
SAN DIEGO COUNTY, CALIF.
A. S. GRAY, RECORDER
NO FEE

After recording, mail to:

AGREEMENT FOR REFUSE COLLECTION

WHEREAS, the owner(s) of the following described property located in the City of San Diego has (have) requested that said City collect and dispose of refuse from said property as part of the City's refuse collection program; and

WHEREAS, circumstances exist which make it impractical for said owner(s) to deposit said refuse adjacent to a public street for collection; and

WHEREAS, said owner(s) agrees (agree) to have the refuse placed in such containers that shall conform to municipal code requirements, and in a location acceptable to the Sanitation Division of the Department of Public Works of said City; NOW, THEREFORE,

IN CONSIDERATION OF THE PREMISES AND FOR MUTUAL BENEFITS AND OTHER GOOD AND VALUABLE CONSIDERATION, the parties hereto agree as follows:

(1) The address and legal description of the property affected by this agreement is:

2799 Kearny Villa Road, San Diego 23, California
Lot 1, Door of Hope Subdivision according to map 5244
filed in the office of county recorder 8-22-63

(2) Upon execution and recordation of this Agreement, the Sanitation Division of the Public Works Department of the City of San Diego is hereby given permission to enter upon said property for the purpose of collecting refuse.

X (3) Said owner(s) hereby holds (hold) the City of San Diego and its agents, servants, employees and those acting thereunder, harmless from any loss or damage arising out of injury to persons or damage to property resulting directly or indirectly from the operation of the City's equipment, and its agents, servants, employees, or those acting thereunder in collecting and removing said refuse while on the streets, roads, walkways, sidewalks, driveways surrounding, or leading to or from, or in or adjacent to said owner's (owners') property.

EXHIBIT B

2342

84-480324

RECORDED IN
OFFICIAL RECORDS
OF SAN DIEGO COUNTY, CA.

1984 DEC 27 AM 10:51

VERA L. LYLE
COUNTY RECORDER

57
32 F4

NO FEE

RECORDING REQUESTED BY

After recording, conform one copy and mail to:

City of San Diego
Refuse Collection Division
2781 Caminito Chollas MS #40
San Diego, CA 92105-5098

PERMIT AND AGREEMENT TO HOLD CITY HARMLESS

(corporation)

THIS AGREEMENT is made by THE CITY OF SAN DIEGO, a municipal corporation, herein called "City", and LADERA BERNARDO HOMEOWNERS ASSOCIATION, herein called "Owner".

R E C I T A L S

A. Owner of the following described property located in the City of San Diego has requested that City collect and dispose of refuse from said property as part of City's refuse collection program.

B. Circumstances exist which make it impractical for owner to deposit said refuse adjacent to a public street for collection.

C. Owner agrees to have the refuse placed in such container that shall conform to the San Diego Municipal Code requirements and in a location acceptable to the Refuse Collection Division of the General Services Department of City.

NOW, THEREFORE, in consideration of the recitals and mutual obligations, and other good and valuable consideration, the parties hereto agree as follows:

1. The address and legal description of the property affected by this agreement are: Lot 58 of Bernardo Heights Unit No. 25 in the County of San Diego, State of California, as per Map No. 10796 recorded on December 16, 1983, of the Official Records of said County.

2. Upon execution and recordation of this agreement, the Refuse Collection Division of the General Services Department of the City of San Diego is hereby given permission to enter upon said property for the purpose of collecting refuse.

(continued)

(2) 2343

3. Owner hereby agrees to indemnify, defend and hold City, its agents, servants, employees and those acting thereunder free and harmless from any and all liabilities, claims, demands, actions, losses or damages arising out of injury to persons or damage to property resulting directly or indirectly from the operation of City's equipment or property of owner or while traversing any other property (except City streets, sidewalks or alleys) required to be traversed in order to collect Owner's refuse, provided that this Hold Harmless Agreement shall not apply in any case where City's agents, servants or employees were negligent in such operation of City's equipment and such negligence was the sole cause of any such injury or damage.

4. This agreement may be terminated at any time upon the giving of seven (7) days written notice of such intent.

5. City does not waive any rights, regulations or enforcements of its ordinances hereby.

6. Attachment(s) A, B are hereby incorporated into the body of this agreement.

Dated: November 13, 1984

Ladera Bernardo Homeowners' Association
(name of corporation)

By 
Marquis L. Cummings, President

By _____

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ATTACHMENT A

PERMIT AND AGREEMENT TO HOLD CITY HARMLESS

OWNER LADERA BERNARDO HOMEOWNERS ASSOCIATION

LEGAL DESCRIPTION OF: Lot 58 of Bernardo Heights Unit No. 25 in the County of
(Name of Property)
San Diego, State of California, as per Map No. 10796 recorded on December 16, 1983,
of the Official Records of said County.

2346

ATTACHMENT B

PERMIT AND AGREEMENT TO HOLD CITY HARMLESS

REFUSE COLLECTION REQUIREMENTS TO PROVIDE COLLECTION

Residents are subject to the same rules/regulations as residents of dedicated City streets unless additional rules are imposed by the homeowners association.