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OPINION NUMBER LO-2014-1

DATE: June 20, 2014

SUBJECT: Establishing a Fee for and Mandatory Use of Approved Refuse Containers

REQUESTED BY: Chris Gonaver, Environmental Services Department Director

PREPARED BY: City Attorney

INTRODUCTION

The Environmental Services Department (ESD) manages the City's automated refuse container program through which the City provides automated trash, recycling, and greenery containers (collectively refuse containers) to residents eligible for free, City refuse collection services. Although the City now charges for replacement trash containers, the City still furnishes initial trash containers and recycling and greenery containers at no charge. Much of the City's inventory of refuse containers is at or beyond its ten-year useful life. The costs to continue furnishing free containers are expected to increase significantly over the next several years as containers will need replacement. This anticipated expense will place a significant burden on the General Fund, which pays for trash containers, and the Recycling Enterprise Fund, which pays for recycling and greenery containers. Moreover the current policy, which allows customers to purchase replacement trash containers from the City or any other legal source, has proved problematic for a variety of reasons. Thus, in lieu of the existing refuse container policy, ESD is considering a new policy which would require customers to obtain refuse containers only from the City, for a fee which would cover the City's costs of furnishing the containers. The fee would be imposed on all properties that receive free, City refuse collection services. This Office has been asked to analyze whether the City may enact the proposed new policy and levy the fee using the Proposition 218 (Prop. 218) majority protest procedure.

QUESTIONS PRESENTED

1. May the City require its refuse collection customers to use only refuse containers provided by the City in order to receive free, City refuse collection services?

2. May the City require its refuse collection customers to pay a fee to use the City's refuse containers without violating the People's Ordinance?

3. May the City use the Prop. 218 majority protest procedure to establish a fee for refuse containers to be imposed on all properties that receive free, City refuse collection services?

SHORT ANSWERS

1. Yes. The City has the power to decide which containers constitute "approved containers" for purposes of receiving the benefit of free, City refuse collection services under the People's Ordinance. So, the City could require its customers to use only refuse containers provided by the City.

2. Yes. The People's Ordinance does not require the City to provide free "approved containers." An "approved container" fee would not constitute a fee for refuse collection services so long as the fee were limited to the recovery of costs for providing "approved containers."

3. Probably. Although there is no case on point, the proposed refuse container fee most likely constitutes a property-related fee for "refuse collection services" for purposes of Prop. 218. Fees for refuse collection services are exempt from the voter approval requirements of Prop. 218 and may be established using the majority protest procedures provided that the fee satisfies all of the other requirements for property-related fees under Prop. 218.

BACKGROUND

The City purchases automated trash (black bin), recycling (blue bin), and greenery (green bin) containers from a private vendor under a long-term contract and makes those refuse containers available for use by City refuse collection customers. All City-provided refuse containers remain City property even after the customer takes possession of the container.

Effective January 1, 2008, the City established a cost-recovery, user fee for replacement trash containers (black bins) which is charged to customers who choose to obtain a replacement trash container from the City. The City also charges a cost-recovery, user fee for each extra black bin a resident requests. Customers can obtain black bins from the City or acquire them from any other legal source, provided that the container is an "approved container." The City continues to provide the initial black bin to newly-constructed housing units, as well as blue bins and up to two green bins, at no charge to its customers.[1]

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[1] Automated Container Policy DR No. ESD-001 Revised; *see* City Att'y Memorandum MS 2014-4 p. 9-10 (Sept. 7, 2012) for a more detailed discussion of the current automated container program and container fees.

City containers are stamped as property of the City of San Diego, have distinctive colors (black, blue, green) to easily distinguish what refuse goes in which container, and have bar-codes that are associated with each customer's propertyaddress. Since the City does not bill for services, it does not have a customer billing system. So, its customer database is built around the assignment of containers to specific property addresses via the bar-code. In contrast, containers purchased from other sources are not identified as City containers, may not be the correct color, and are not bar-coded, resulting in confusion over what type of waste is in the container, whether the City should collect waste from those containers, and whether the waste is froman eligible service recipient.

ESD believes it is more cost effective, efficient, and beneficial to customers and taxpayers for the City to be the exclusive source of refuse containers for City customers, but funding has become a significant challenge. Thus, ESD envisions a fee structured as a cost-recovery, user fee paid in installments over a ten-year period through the property tax bill of each customer eligible for free, City refuse collection services. The fee would reimburse the City for the costs of providing the refuse containers to its customers. ESD is considering a flat rate fee, a tiered rate fee based on number or type of refuse containers provided to a given property, or some combination thereof. Refuse container fee revenue would be segregated and used only to defraythe City's costs of furnishing the refuse containers.

ANALYSIS

I. The City May Require Its Customers to Use City Refuse Containers in Order to Receive City Refuse Collection Services.

It is well-established that, under its police power, a city has the authorityto enact laws regulating the collection and disposal of refuse. Cal. Const.art. XI, § 7; *City of Dublin v. County of Alameda*, 14 Cal. App. 4th 264, 275 (1993); *Valley Vista Services, Inc. v. City of Monterey Park*, 118 Cal. App. 4th 881, 888 (2004). That power includes the right to regulate the receptacles in which refuse must be placed for collection and to regulate the manner of collection. 45 Cal Jur 3d § 267, p. 424-425 (2008); *In re Santos*, 88 Cal. App. 691, 697 (1928). Local governments:

> are empowered to regulate the handling, transportation and disposition of garbage within the areas over which their jurisdiction extends, and . . . may, in pursuance of such powers, require the disposition of garbage in some recognized method and prohibit its disposition in any other way, and that the particular method adopted is ordinarily within the discretion of the governing board or body and the reasonable exercise of such discretion will not be interfered with by the courts.

In re Lyons, 27 Cal. App. 2d 182, 186 (1938). That authoritywas reaffirmed with the enactment of the Integrated Waste Management Act of 1989 (IWMA), which provides that cities may

determine all aspects of local solid waste handling including the means of collection. Cal. Pub. Res. Code § 40059(a)(1).

The City provides refuse collection services, primarily to single family residences, at no charge under the "People's Ordinance" (Ordinance). San Diego Municipal Code (SDMC) § 66.0127. The Ordinance was originally enacted by the voters in 1919 and was twice amended by the voters, once in 1981 and again in 1986. In order to receive refuse collection services under the Ordinance, a resident must: (a) place "residential refuse"; (b) at the curb line of a public street; (c) at the designated time; (d) in *approved* containers. SDMC § 66.0127(a)(2), (c)(1) (emphasis added).

The People's Ordinance is silent with respect to the definition of "approved containers." SDMC § 66.0127. However, it expressly gives the City Council the right to regulate and control all aspects of refuse collection, transportation, and disposal in the City consistent with the Ordinance. SDMC § 66.0127(c). Although the 1919 and 1981 versions of the Ordinance contained some standards for "garbage" containers, the City historically has regulated containers for all types of refuse since at least 1952.[2] Moreover, removing container standards from the Ordinance was one of the express purposes of the 1986 amendment, specifically so that the City would have flexibility in setting container standards to adjust to new technology.[3]

In *Silver v. City of Los Angeles*, 217 Cal. App. 2d 134 (1963), the court considered an ordinance very similar to the People's Ordinance. The ordinance provided for municipal refuse collection services at no direct charge to householders, which they were free to use or not. *Id.* at 138-140. Even though householders would have to buy new containers as a condition to receiving city collection services, the court concluded the ordinance was a valid exercise of the police power. *Id.* Similarly, City residents do not have to use City refuse collection services; acceptance of those services is not mandatory. SDMC § 66.0127. However, if a resident chooses to use the City's service, the resident must comply with reasonable conditions of that service, including using "approved containers." Thus, the City has the power to specify the containers a resident must use in order to receive City service and can require its customers to use only City-furnished containers.

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[2] See 1919 and 1981 People's Ordinance §§ 3, 14; SDMC § 66.1026, first enacted in 1952 as Ord. No. 5249 N.S.

[3] The ballot materials accompanying the 1986 People's Ordinance amendment explained that the amendment would allow the City Manager to establish rules and regulations for the efficient operation of the refuse collection system. (See Sample Ballot for November 4, 1986 General Election, Proposition C.) The 1986 amendment ushered in the term "approved container." The 1986 City Manager's Report recommending the amendment explained that: "Another benefit of revising the ordinance is that rules and regulations involving day to day collection and disposal methods could be adjusted by the City Manager. *This would enable the Manager to adjust to modern technology and/or emergencies as they evolve.*" (See City Manager's Report No. 86-293 (June 13, 1986) at 3 (emphasis added) and attached draft ordinance at 3.) In fact, during the July 14, 1986 Council hearing on the matter, then Deputy City Manager Coleman Conrad pointed out that one reason for the amendment was to clean-up antiquated language such as that requiring the use of 16-gallon containers which no longer conformed to the standard 30-gallon containers commonly in use at the time. (Transcript of 7/14/1986 City Council hearing item #S-402) For a more detailed discussion of the Manager's authority under the 1986 People's Ordinance amendment see 2006 City Att'y MOL 317 (2006-13; July 19, 2006).

II. A Fee for Use of Approved Containers Does Not Violate the People's Ordinance.

A. The People's Ordinance Does Not Require the City to Provide Free Containers.

The People's Ordinance describes the services to be provided as the *collection*, *transportation*, and *disposal* of residential refuse. SDMC § 66.0127(c)(1). Nowhere in the Ordinance does it say that customers are also entitled to free refuse containers in which to store their refuse pending collection. To our knowledge, the Ordinance has never been interpreted in that manner.[4]

Moreover, no such interpretation can be implied from the definition of "collect" or "collection." "Collect" or "collection" means "to take physical possession and transport solid waste within the City." SDMC § 66.0102.[5] The words "storage," "containment," or similar descriptors are not found in that definition. Nowhere does it say that "collection" includes furnishing of containers. The Ordinance simply requires the City to take *possession* of the refuse if it's in an "approved container." *Id.*; SDMC § 66.0127(a)(2). It does not encompass the obligation to provide for *storage* of refuse in-between collection dates.

Further, companion provisions of the Municipal Code expressly place the burden of providing refuse containers on the owners and occupants of residential facilities. Specifically, section 66.0126(a) states in relevant part: "It is unlawful for any Responsible Person in lawful possession, charge, or control of any . . . residence, or any other dwelling, . . . to fail to provide containers which are adequate to contain the amount of refuse ordinarily accumulated at such place during the intervals between collection." SDMC § 66.0126(a). The term "Responsible Person" includes a property owner, tenant, person with an interest in real property or person in possession of real property. SDMC § 11.0210. Section 66.0126 also mandates all manner of container features designed to protect public health and safety and optimize collection services. SDMC § 66.0126(b)-(k). Thus, owners and occupants of real property - whether they are serviced by the City or hire a private refuse collector or self-haul their refuse - are responsible for furnishing refuse containers in number, size, and type sufficient to safely store and properly place out for collection the refuse generated on their property in-between weekly collection dates.[6]

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[4] In fact, this Office has previously advised that the City has no obligation under the Ordinance to furnish refuse containers to customers at no charge. *See* 2007 City Att'y MOL 172 (2007-17; Oct. 16, 2007); 2005 City Att'y Report 435 (2005-13; June 13, 2005).

[5] As the People's Ordinance plainly states, the regulation and control of refuse collection, transportation and disposal is the responsibility of the City Council. SDMC § 66.0127(c). Pursuant to that authority, the City Council enacted definitions applicable to the People's Ordinance and implementing regulations which are referenced throughout this opinion.

[6] State law requires the person in control of the premises to provide weekly trash collection of residential refuse. Namely, "[t]he owner or tenant of any premises, business establishment or industry shall be responsible for the satisfactory removal of all refuse accumulated by him on his property or his premises. To prevent propagation, harborage, or attraction of flies, rodents or other vectors and the creation of nuisances, refuse, except for inert materials, shall not be allowed to remain on the premises for more than seven days . . . [with limited exceptions]." Cal. Code Regs., title 14, § 17331.

Indeed, for over 75 years from 1919 to the mid-1990s, City customers provided their own containers of the type specified by the City at their expense. The City did not begin to furnish containers until it began converting its refuse collection fleet to automated collection vehicles in the mid-1990s. Automated collection was designed to significantly reduce costs to the General Fund, and the City reasoned that issuing all customers a free, initial container compatible with the new refuse trucks would expedite the City's ability to put the new vehicles to use and realize the anticipated savings.[7] That policy decision does not create a legal obligation to provide free refuse containers.[8]

Finally, it is well-established that "[n]o householder has a vested right in the initiation or continuation of a municipal service for disposal of waste. It is the householders' duty to dispose of household waste in a manner not violative of laws and ordinances prohibiting the maintenance of nuisances and safeguarding public health." *Silver*, 217 Cal. App. 2d at 139; Cal. Code Regs., title 14, § 17331 (providing that property owner or tenant is responsible for removal of refuse from property at least once per week). The mere fact that the People's Ordinance places a duty on the City to collect and dispose of waste does not mean the City is legally responsible for providing ancillary goods, such as refuse containers. That responsibility falls to the owner or occupant, both under the Municipal Code and State law.

B. <u>The City Can Require Payment of a Fee to Use City Containers.</u>

As mentioned above, under the IWMA, a city may determine all aspects of local solid waste handling. This right includes the power to establish charges and fees. Cal. Pub. Res. Code § 40059(a)(1). Neither the People's Ordinance nor its companion provisions expressly preclude the City from charging customers for the use of "approved containers" supplied by the City. Thus, the question becomes whether compelling customers to pay to use City refuse containers is a proper exercise of the City's police power.

Exercise of the police power must be reasonably related to a legitimate governmental purpose. *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 159 (1976). The power is broad and extends to everything expedient for preservation of the public peace, health, safety, morals, and welfare including promotion of the economic welfare, public convenience and general prosperity of the community. *Birkenfeld,* 17 Cal. 3d at 160; *Goodall v. Brite*, 11 Cal. App. 2d 540, 546 (1936). Despite its breadth and flexibility, the police power may not be unreasonably or arbitrarily invoked and applied. *Goodall,* 11 Cal. App. 2d at 545. Nevertheless, so long as a rational basis exists for the legislative determination, a court will not substitute its judgment for that of the local governing body. *Birkenfeld,* 17 Cal. 3d at 159, 161; *Silver,* 217 Cal. App. 2d at 139.

The police power includes the authority to impose fees, rates, and charges. For example, in *City of Glendale v. Tronsden*, 48 Cal. 2d 93 (1957), the court concluded that a charter city

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[7] City Manager Report No. 93-313 (Nov. 3, 1993).

[8] It may be argued that the City should no longer incur the costs of providing refuse containers free of charge. *See Goodall v. Brite*, 11 Cal. App. 2d 540, 547-548 (1936)(free hospitalization of county residents at county hospital who had access to private medical care and the means to pay for it was a gift of public funds).

ordinance requiring propertyowners to pay for rubbish collection furnished by the city was a proper exercise of the police power, similar to charges for the availability of city water and sewer systems. *Id.* at 101-102. Likewise, in *In re Zhizhuzza*, 147 Cal. 328 (1905), the court found that a charter city ordinance giving the city the exclusive right to collect trash in the city and exact a fee fromresidents for the service was a valid exercise of the police power. *Id.* at 335.

In this case, ESD has articulated a number of legal, policy, and operational reasons for requiring City refuse collection customers to use City containers at the customer's expense. According to ESD, the recommended proposal would: (1) allow the City to verifyand ensure that only those eligible and approved for service are receiving it, avoiding inadvertently servicing small businesses and others not entitled to it; (2) allow the City to maintain an accurate customer mailing list to communicate necessaryor desirable information such as changes in collection days or additions to acceptable recyclables; (3) expedite expansion of services, such as adding recycling and greenery collection routes, by reducing costs and allowing the City to deploy containers all at once rather than waiting for customers to acquire them individually; (4) save taxpayer dollars by requiring customers who receive free refuse collection services (approximately 50% of City residents) to pay for their own containers thereby freeing up General Fund and Recycling Fund monies for programs that benefit the community; (5) allow the City to manage warrantyclaims for damaged or defective containers, relieving the customers of that burden and making for more efficient claims processing; (6) make all container types available to customers at a lower price than typicallyoffered by home improvement stores; (7) ensure maintenance of a consistent look and size of containers throughout a neighborhood for aesthetic and operational reasons; (8) avoid the time and expense to taxpayers of City staffdealing with customers who refuse to acquire and use proper containers or replace damaged containers and instead pile waste at the curb; (9) enforce and increase recycling and reduce contamination of recyclables by ensuring all customers have proper recycling containers; (10) allow the City to control the number and size of containers to ensure adequate set-out space in the street; (11) allow the City to replace container parts to extend the life and maintain the appearance of the containers; and (12) ensure the use of proper containers for a given waste type that are compatible with City refuse vehicles. Further, ESD reports thatthe current practice of funding recycling and greenery containers from the Recycling Fund (RF) is simply not sustainable because a key source of RF revenue - the City's AB 939 Fee[9] revenue - continues to decline. And, from both policy and equityperspectives, increasing the AB 939 Fee is undesirable.

Furnishing and regulating refuse collection services are unquestionably proper governmental objectives. Based on the foregoing, requiring customers to use City refuse containers exclusivelyand exacting a cost-recovery "approved container" fee as a condition of receiving free, City refuse collection services appears reasonably designed to achieve the City's

[9] Pursuant to California Public Resources Code section 41901, San Diego Municipal Code section 66.0134, and City Council Resolutions No. R-304849 and R-307834, the City charges a $10 per ton AB 939 Fee on all solid waste generated in the City that is disposed, regardless of the location of the disposal site, and all solid waste disposed to the Miramar Landfill regardless of the location of origin of the waste. This fee is deposited to the RF and used to fund the City's IWMA plan, which includes City furnished curbside recycling and greenerywaste collection.

objective of delivering those services in an economical, efficient, and effective manner. Therefore, it is most likely a proper exercise of the police power.

So long as the "approved container" fee is limited to the recovery of the direct and indirect costs of providing the containers, it would not violate the People's Ordinance. A fee in excess of cost-recovery could be vulnerable to a challenge that it is a fee for refuse collection services contrary to the People's Ordinance. The legally appropriate and allowable method(s) for establishing an "approved container" fee will depend on how the fee is structured.[10]

III. The Fee Probably Can Be Imposed By the Prop. 218 Majority Protest Procedure

A. The Proposed Container Services Fee is a Property-Related Fee.

A "fee" or "charge" subject to Proposition 218 is defined as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service." Cal. Const. art. XIII D, § 2(e).[11] "Property ownership" includes "tenancies of real property where tenants are directly liable to pay the . . . fee. . . ." Cal. Const. art. XIII D, § 2(g). A "property-related service" is "a public service having a direct relationship to property ownership." Cal. Const. art. XIII D, § 2(h). Fees that fit the above definition are commonly referred to as "property-related fees."[12]

The fee structure envisioned by ESD does not fall into any of the first three categories of monetary levies listed in Section 2(e). First, it would not be an ad valorem tax because an ad valorem tax is a general tax calculated by applying a given rate to the assessed value of real property. *San Marcos Water Dist. v. San Marcos Unified School Dist.*, 42 Cal.3d 154, 162 (1986). The proposed fee would not be calculated in that manner. Second, it is not a special tax because a "special tax" specifically excludes any "fee which does not exceed the reasonable cost of providing the service . . . for which the fee is charged and which is not levied for general revenue purposes." Cal. Gov't Code § 50076; *Bay Area Cellular Telephone Co. v. City of Union City*, 162 Cal. App. 4th 686, 694 (2008). The proposed fee would have both of those attributes. Third, an assessment is typically a one-time charge imposed on particular real property for a local public improvement of direct benefit to the assessed property and unrelated to the actual use made of the improvement. *San Marcos Water Dist.*, 42 Cal.3d at 162 (e.g., the cost of paving a street is assessed against all abutting properties in proportion to the amount of street frontage and regardless of the owner's use of the street); *Isaac v. City of Los Angeles,* 66 Cal. App. 4th 586, 595-596 (1998). In contrast, the proposed fee would be a use-based fee billed over the ten-year expected life of the refuse containers provided. Thus, the proposed fee is not an assessment.

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[10] *See, e.g.,* City Att'y Memorandum MS 2014-4 (Sept. 7, 2012).

[11] A fee imposed in accordance with Prop. 218 is not a tax under Prop. 26. Cal. Const. art. XIII C, § 1(e)(7).

[12] Previous cases have acknowledged that water, sewer, and refuse collection services, which are treated the same under Prop. 218, are probably property-related services, based on the Legislative Analyst's opinion, the ballot language, and the text of Article XIII D, sections 3(b) and 6(c). *Howard Jarvis Taxpayers Ass'n* v. *City of Roseville*, 97 Cal. App. 4th 637, 645-646 (2002); *see also Apartment Ass'n of Los Angeles County, Inc., v. City of Los Angeles*, 24 Cal. 4th 830, 839 (2001).

A user fee, on the other hand, is a fee charged to a person in exchange for their use of government-provided goods or services which are not provided to persons not charged the fee. The amount of the fee is related to the goods and services provided. *Bay Area Cellular Telephone Co.,* 162 Cal. App. 4th at 694-695; *Isaac,* 66 Cal. App. 4th at 597. Further, a user fee for an ongoing service is characterized by periodic charges rather than a one-time charge. *San Marcos Water Dist.*, 42 Cal.3d at 162. The proposed "approved container" fee has all of the characteristics of a user fee.

Finally, the proposed fee is arguably a fee for a property-related service. A property-related fee is one imposed directly on property owners simply because they own property, i.e., one that burdens landowners as landowners. *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles*, 24 Cal. 4th 830, 840 (2001). For example, in *HowardJarvis Taxpayer Ass'n v. City of Roseville,* 97 Cal. App. 4th 637 (2002), the court held that a flat fee for refuse collection services imposed on every householder to whom service was made available, regardless of whether refuse was collected, was a property-related fee. *Id.* at 643-644. Because the fee could not be avoided by opting out of the service, there was a direct relationship between the fee and property ownership. *Id.* at 646. Similarly, in *HowardJarvis Taxpayers Ass'n v. City of Salinas*, 98 Cal. App. 4th 1351 (2002), the court concluded a fee for storm water management facilities imposed on every developed parcel based on the impervious area of the parcel and charged to the owner or occupant of the parcel was a property-related fee. *Id.* at 1354-1355. The Court reasoned that the fee was based on the physical features of the property and a property owner could not avoid the fee altogether by declining the service. *Id.* at 1355.

In contrast, the California Supreme Court in *Apartment Ass'n of Los Angeles County, Inc.,* 24 Cal. 4th 830 (2001), held that an inspection fee imposed on private landlords to finance housing inspections and enforcement of housing laws was not a property-related fee because the fee was imposed only on landowners whose residential property was being rented and only so long as the landowner was in the business of renting the property. If the business ceased, the fee would cease. *Id.* at 838, 840. Similarly, in *Richmond v. Shasta Community Services Dist.*, 32 Cal. 4th 409 (2004), the California Supreme Court held that a connection fee imposed by a water district on new applicants for water service was not a property-related fee because it did not result from mere property ownership, but instead from the owner's voluntary decision to apply for the connection in the first place. *Id.* at 426-427. The Court distinguished between fees for establishing new service and fees for existing service, expressly recognizing that: "[a] fee for ongoing water service through an existing connection *is* imposed 'as an incident of property ownership' because it requires nothing other than normal ownership and use of property." *Id.* at 427 (emphasis added); s*ee also Bighorn-Desert View Water Agency v. Verjil*, 39 Cal. 4th 205, 215 (2006).

Comparing the structure of the proposed "approved container" fee to the structure of the fees in the cases analyzed above, the proposed fee appears to be comparable to those fees which the courts have determined were property-related fees. The "approved containers" arguably are the instrument or device that connects the property to the refuse collection system, and a container services fee on existing customers is arguably imposed as an incident of property

ownership because it requires nothing more than normal ownership and use of property. Thus, *as presently structured*, the proposed "approved container" fee appears to qualify as a property-related fee under Prop. 218.[13]

B. The Proposed Container Services Fee is Exempt from the Voter Approval Requirements of Prop. 218.

Property-related fees are subject to the voter approval requirements of Prop. 218 unless they fall within an exception. Cal. Const. art. XIII D, § 6(c); *City of Salinas*, 98 Cal. App. 4th at 1356. Specifically, fees for "sewer, water, and refuse collection services" are excluded from the voter approval requirements. Instead, fees for those services may be imposed using a majority protest procedure. Cal. Const. art. XIII D, § 6(c); *Paland v. Brooktrails Township Community Services Dist. Bd. of Directors*, 179 Cal. App. 4th 1358, 1366 (2009); *City of Salinas*, 98 Cal. App. 4th at 1356.

The question, therefore, is whether the proposed "approved container" fee is a fee for refuse collection services for purposes of Prop. 218. Neither Prop. 218 nor its implementing legislation defines the term "refuse collection services." *See* Cal. Const. arts. XIII C & D; Cal. Gov't Code § 53750 et seq. Our research has revealed no case which has defined the scope of this term either. However, courts have stated that the terms "sewer, water, and refuse collection services" should be interpreted according to the "popular, nontechnical sense" of the "service familiar to most households and businesses." In other words, we should apply the common meaning or understanding of the term. *City of Salinas*, 98 Cal. App. 4th at 1357-1358*; see also Griffith v. Pajaro Valley Water Management Agency,* 220 Cal. App. 4th 586, 595 (2013). Residential refuse collection traditionally has been accomplished by having residents store their household refuse in some form of receptacle which they periodically (usually one time per week) place in the right-of-way where the receptacle is emptied into a refuse collection vehicle and hauled away for disposal or recycling. So, the service most familiar to households includes the use of receptacles for purposes of storage and transfer of waste to the collection agency. By the early 1990s and before Prop. 218 was enacted, it was common for residential refuse haulers throughout California to furnish containers to customers as part of their refuse collection services.[14] Accordingly, it is likely that fees for providing containers constitute fees for "refuse collection services" under Prop. 218.[15]

In order to establish a fee using Prop. 218's majority protest procedure, the City must identify all the parcels which will be subject to the fee so that all property owners timely receive the requisite notice of public hearing, ballot, and opportunity to protest imposition of the fee. Cal. Const. art. XIII D, § 6(a); *Paland*, 179 Cal. App. 4th at 1370-1371 (In order for a charge to be a fee under Prop. 218, it must apply to parcels that can be identified in advance.) So, ESD will

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[13] In previous opinions, we analyzed whether Prop. 218 applied to "container fees" and concluded it did not. However, those fees were structured differently from the fee under consideration here. *See* 2007 City Att'y MOL 172 (2007-17; Oct. 16, 2007); 2005 City Att'y Report 435 (2005-13; June 13, 2005). We caution that each proposed fee must be analyzed on a case-by-case basis because the outcome will depend upon how the fee is structured.

[14] Email to author from HF&H Consultants, LLC, (Feb. 2, 2014); email to author from R. Epler (former ESD Assistant Director) (Feb. 3, 2014) (on file with author).

[15] See also League of California Cities Proposition 218 Implementation Guide at 59 (2007).

be required to accurately determine which parcels currently receive City refuse collection services in order to impose the "approved container" fee.

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 that for which the fee is imposed;

(c) the amount of the fee on any parcel or person must not exceed the proportional cost of the service attributable to that parcel; and

(d) the service must actually be used by, or immediately available to,[16] the property owner.

Cal. Const. art. XIII D, § 6(b). If the City can identify all the parcels upon which the proposed "approved container" fee will be imposed and the fee satisfies the requirements above, the fee may be imposed via Prop. 218's majority protest procedure.

Lastly, characterizing an "approved container" fee as a fee for "refuse collection services" under Prop. 218 may appear inconsistent with the City's position that refuse collection services under the People's Ordinance do not include providing free containers. However, the People's Ordinance does not use the catch-all phrase "refuse collection services" to describe the services it covers; instead it identifies specific services: "Residential Refuse shall be collected, transported and disposed of by the City. . . ." SDMC § 66.0127(c)(1). Even if it did, it is well-established that a word or phrase may have different legal meanings in different contexts. *People v. Woodhead*, 43 Cal. 3d 1002, 1008 (1987); *see also Richmond*, 32 Cal. 4th at 422.[17] Prop. 218 and the People's Ordinance were enacted in different contexts and are intended to serve different purposes. Thus, interpreting the scope of services included in Prop. 218 differently from the scope of services covered by the People's Ordinance is not inconsistent.

In order to maintain its character as a property-related fee, the "approved container" fee should be applied to all residents receiving City refuse collection services. No customer should be allowed to opt out of the fee. However, in order to help protect it from a legal challenge on the ground that it is a fee for those services in violation of the People's Ordinance, the fee could be structured such that a failure to pay the "approved container" fee does not result in the loss of refuse collection services under the People's Ordinance. If collected through the property tax bill, payment of the fee could simply be enforced by way of a lien on the property, as is the case

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[16] Service is immediately available if the agency has provided the necessary connections at the charged parcel and it is only the unilateral act of the property owner in requesting termination of service or failing to pay for the service that causes the service not to be actually used. *Paland*, 179 Cal. App. 4th at 1370.

[17] When the language is susceptible to more than one reasonable interpretation, courts look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme. *Woodhead*, 43 Cal.3d at 1008.

with other failures to pay some or all of a property tax bill.[18] If collected via the City's water/sewer bill, ESD could negotiate an enforcement mechanism with the City's Public Utilities Department. Either way, refuse collection services would continue whether or not the fee was paid. While the payment of an "approved container" fee is a legitimate condition of service under the People's Ordinance, and refuse collection services could be discontinued for failure to pay that fee, implementing the fee in a way that does not deny those services to those who fail to pay it will help shield the City from a claim that the fee violates the People's Ordinance.

Finally, in the event of a legal challenge to the fee, the City bears the burden of proving that the fee is not a "tax," that the amount charged is no more than necessary to cover reasonable costs, and that the allocation of those costs among fee payers bears a fair or reasonable relationship to the fee payer's burdens on, or benefits received from, the local government activity.[19] Cal. Const. art XIII D, § 6(b)(5). Thus, the fee should be structured with these principles in mind.

CONCLUSION

The City has the right to prescribe the containers customers must use to receive the benefit of free City refuse collection services. Consequently, the City can require customers to use only City refuse containers. The City is not obligated to furnish free refuse containers to customers. It can charge customers a cost-recovery, user fee for the use of City containers.

Although there is no case on point, the proposed "approved container" fee is arguably a property-related fee for "refuse collection services" for purposes of Prop. 218. Fees for refuse

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[18] We express no opinion on any specific requirements the County may have to place a property-related fee on the property tax rolls. We note that the City has an agreement with the County to place certain kinds of charges on the tax rolls. Whether the "approved container" fee would be covered by that agreement is beyond the scope of this opinion. We recommend addressing this issue directly with the County prior to finalizing the amount of the fee.

[19] Reasonable costs include all the required costs of providing the service, direct and indirect, short-term and long-term, including operation, maintenance, financial and capital expenditures, overhead, bad debt, and administrative costs. *City of Roseville*, 97 Cal. App. 4th 637, 647-648 (2002); *United Business Commission v. City of San Diego*, 91 Cal. App. 3d 156, 166 (1979); League of California Cities Proposition 26 Implementation Guide at 16 n.23 (Apr. 2011). A reasonable relationship is shown where a fee is designed to distribute the financial burden of the system in proportion to the contribution of each user to the problem. *City of Dublin v. County of Alameda*, 14 Cal. App. 4th 264, 284 (1993). But, "[t]he question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors." *California Farm Bureau Federation v. State Water Resources Control Board*, 51 Cal. 4th 421, 438 (2011); *Griffith v. City of Santa Cruz,* 207 Cal. App. 4th 982, 997 (2012). In determining the existence of a reasonable relationship, the courts have recognized that different classes of users may contribute more or less to the problem or impact the system in different ways. *SDG&E v. San Diego County Air Pollution Control Dist*., 203 Cal. App. 3d 1132, 1146-1147 (1988). Hence, different fees may be appropriate for different classes of users. Mathematical precision is not required in allocating costs, and the allocation method chosen need not be the best method, but it must reflect a fair or reasonable basis for distributing costs among the users. What is fair or reasonable may include consideration of the overall goals and purposes of the public agency in operating the system. *Id*. at 1147-1148; *Griffith v. City of Santa Cruz,* 207 Cal. App. 4th at 997; *Griffith v. Pajaro Valley Water Management Agency,* 220 Cal. App. 4th at 601. So long as fees restricted by cost-recovery rules follow these guidelines and revenues, including any surpluses which may accrue, are not used for general governmental purposes, the fee would not constitute a tax. *California Farm Bureau Federation,* 51 Cal. 4th at 438; *Griffith v. City of Santa Cruz,* 207 Cal. App. 4th at 997.

collection services are exempt from the voter approval requirements of Prop. 218 and may be established using the majorityprotest procedures provided that the fee satisfies all of the other requirements for property-related fees under Prop. 218. Thus, the City probably could use the Proposition 218 majorityprotest procedure to impose a fee for approved containers on all properties that receive City refuse collection services.

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