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Jan I. Goldsmith
CITY ATTORNEY

MEMORANDUM OF LAW

DATE: October 23, 2009

TO: Chris Gonaver, Environmental Services Department Director

FROM: City Attorney

SUBJECT: Termination of Refuse Collection Services Provided Pursuant to Hold Harmless Agreements; Responsibility to Service NTC Naval Housing

INTRODUCTION

In connection with efforts to reduce General Fund expenditures, the Environmental Services Department [ESD] has been reviewing refuse collection services it provides under the People's Ordinance, codified at San Diego Municipal Code section 66.0127 [People's Ordinance]. One service under review is refuse collection from residential properties accessed from private streets and ways pursuant to agreements commonly referred to as "hold harmless agreements." You have asked whether the City may terminate these agreements and, if so, whether the decision to terminate requires City Council approval. You also asked whether the City has a responsibility to collect residential refuse from the NTC naval housing development which is located on federal property.

QUESTIONS PRESENTED

1. May the City terminate residential refuse collection services provided pursuant to hold harmless agreements?
2. If so, is City Council approval required to terminate these agreements?
3. Does the City have a responsibility to collect residential refuse from the naval housing development at NTC?

SHORT ANSWERS

1. Yes. The City may terminate service under the hold harmless agreements by giving at least seven days advance written notice of termination.
2. No. The City Manager (Mayor) has authority to terminate the hold harmless agreements.
3. No. The City should discontinue service to NTC naval housing unless residents can place their refuse at the curb of a public street on collection day in accordance with City collection requirements.

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 at the request of residents 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 agrees to permit the City to enter onto the described property for purposes of collecting refuse; abide by service requirements such as pickup locations, routing, and scheduling established by the City Manager; and indemnify the City. The agreements do not contain an express requirement that the City actually collect refuse. Paragraph 4 of each agreement contains one of two slightly different termination clauses: (1) "This agreement may be terminated at any time upon the giving of seven (7) days' written notice of such intent;" or (2) "Said Agreement may be terminated at any time, upon the giving of seven (7) days written notice of such intent."⁴

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.

In 1986, the People's Ordinance was amended by the voters. That amendment prohibits the City from entering into any further hold harmless agreements. Specifically, it states: "The City shall not enter onto private property to collect 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." SDMC § 66.0127(c)(3). Around that time, the City had experienced a proliferation of private condominium complexes and planned residential developments with private streets which were not constructed to City standards and not designed with refuse collection in mind. One of the purposes of the amendment was to limit the City's liability by restricting service on private streets and ways to those under existing hold harmless agreements.⁵

ESD recently conducted field surveys of the hold harmless properties. These surveys reveal that the City currently is providing refuse collection services under 105 hold harmless agreements to over 14,000 residential units. It appears that some of these units potentially could be serviced from a public street in which case, even if the hold harmless agreement were terminated for these units, they still could be eligible for City collection service if they could satisfy other City collection requirements. These surveys also reveal that some adjacent residences, outside the scope of the hold harmless agreements, whose containers could only be accessed by private streets, also are receiving City collection services.

ANALYSIS

1. The City May Terminate Service Under the Hold Harmless Agreements

Because of the nature of the agreements, we briefly consider whether they implicate any property interests. The agreements are essentially a right of entry for the benefit of the owner or tenant. They contain no language indicative of any intent to grant an interest in real property. *See, e.g., City and County of San Francisco v. Union Pacific R.R. Co.*, 50 Cal. App. 4th 987, 995 (1996). Neither do they create a covenant running with the land. *See* Cal. Civil Code §§ 1460-1471. At most, they constitute a license, which simply authorizes one party to perform acts on the property of another with the owner's permission. *Golden West Baseball Co. v. City of Anaheim*, 25 Cal. App. 4th 11, 36 (1994). "[A] license does not create or convey any interest or estate in the real property; it merely makes lawful an act that otherwise would constitute a trespass." 6 Miller & Starr, California Real Estate § 15:2 (3d ed. 2006); *Jensen v. Kenneth I. Mullen, Inc.*, 211 Cal. App. 3d 653, 657 (1989). More likely, the relationship here is merely that of invitee. *See Jensen*, 211 Cal. App. 3d at 658. In any case, no real property interest was created from these agreements.

Next we note the general rule 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

⁵ City Manager Report No. 86-293 dated June 13, 1986, p.2.

of nuisances and safeguarding public health.” *Silver v. City of Los Angeles*, 217 Cal. App. 2d 134, 139 (1963); 14 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). While the 1986 amendment to the People’s Ordinance recognized the hold harmless agreements, it did so only for purposes of describing the limit on services provided via access over private streets. The intent was not to guarantee service under hold harmless agreements, but merely to acknowledge that services would be continued “pursuant to” existing hold harmless agreements. SDMC § 66.0127(c)(3).⁶

The term “pursuant to” means “in compliance with,” “in accordance with” or “according to.” Black’s Law Dictionary 1272 (8th ed. 2004); Webster’s Third New International Dictionary Unabridged 1848 (1971). Thus, the residences served under the hold harmless agreements have no right to service under the People’s Ordinance absent the agreements. SDMC § 66.0127(c)(3). So, the general rule is applicable here, the language in the agreements will govern their termination, and the usual rules of contract interpretation will apply. *See Golden West Baseball Co.*, 25 Cal. App. 4th at 21.

As set forth above, the agreements provide that they are terminable at will by either party upon giving seven days’ advance written notice of termination. A provision that a contract may be cancelled at the option of one of the parties by giving written notice for a period of time before ceasing obligations under the contract is valid. *Brawley v. Crosby Research Foundation, Inc.*, 73 Cal. App. 2d 103, 114 (1946); 14A Cal. Jur. 3d *Contracts* § 280 (3d ed. 2008). In order to accomplish the termination, the terminating party must comply with the notice provision. *Black v. City of Santa Monica*, 13 Cal. App. 2d 4, 6 (1936); 14A Cal. Jur. 3d *Contracts* § 280 (3d ed. 2008). Thus, the City may lawfully terminate the hold harmless agreements by giving at least seven days written notice of termination before it ceases collection services.⁷

2. The Manager (now Mayor) has Authority to Terminate the Hold Harmless Agreements

The People’s Ordinance provides that: “[p]ursuant 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.” SDMC § 66.0127(d). A primary purpose of this provision is to delegate to the City Manager authority to regulate and manage refuse collection operations.⁸ The ordinance granting that authority is codified at section 66.0124 of the Municipal Code, which provides in part:

⁶ City Manager Report No. 86-293 dated June 13, 1986, p.2; Transcript of City Council hearing of July 14, 1986, pp.1-6.

⁷ See Memorandum from Deputy City Attorney P. Rosenbaum to Councilmember Dick Murphy re: Tierrasanta Trash Pick-Up dated June 22, 1981.

⁸ City Atty MOL No. 2006-13 (July 19, 2006) p. 8 and authorities cited therein.

The collection and subsequent transportation and disposal of refuse within the City of San Diego is under the supervision of the Manager who shall have power to promulgate rules and regulations regulating such collection and subsequent transportation and disposal, including but not limited to:

- (a) Collection routes and scheduling and designation of disposal sites and limitations thereon;
- (b) Service standards and pickup locations;

SDMC § 66.0124.⁹ Thus, the Manager (Mayor) has control over the management of refuse within the City.¹⁰

This authority extends to the termination of the hold harmless agreements. According to City records, the hold harmless agreements were approved at the Department Director level. That is, the services were furnished at the City Manager's discretion. They were not submitted to the City Council for approval.¹¹ Moreover, when the City Council intended to retain authority to decide whether to furnish or eliminate service, it did so expressly. For example, the extension or elimination of refuse collection services to small businesses is expressly made subject to City Council approval. See SDMC § 66.0127(c)(2).¹² The City Manager (Mayor) therefore has authority to terminate these agreements without City Council approval.

3. The City is Not Required to Collect Refuse at NTC Naval Housing

According to City and SanGIS records, the streets over which City trash trucks must travel to access the refuse containers at NTC naval housing are not publicly dedicated streets, nor is this area the subject of a hold harmless agreement. The federal government owns the NTC naval housing parcel. According to the San Diego County Tax Assessor's records, it is labeled a "military reservation." While it could be argued that federal government property is not "private property" under the People's Ordinance and, therefore, not subject to the prohibition on collection from private property, that argument lacks merit.

⁹ Section 66.0124 was formerly section 66.0117, adopted by Ordinance No. O-11074 on May 31, 1973; amended by Ordinance No. O-16816, adopted on February 23, 1987, to add: "and designation of disposal sites and any limitations thereon" to the end of subsection (a); amended by Ordinance No. O-18353, adopted on October 21, 1996, which made minor, non-substantive revisions and renumbered it to section 66.0124.

¹⁰ City Atty MOL No. 87-46 (May 1, 1987), p. 2.

¹¹ See Exhibits A&B; Footnotes 3 and 6 above; Email from Robert Epler dated September 3, 2009.

¹² Transcript of City Council hearing of July 29, 1986. pp. 5, 7-8 (City Council approval would be required to eliminate service to small business).

As explained above, the purpose of prohibiting City trucks from traveling over private property to collect refuse is to limit the City's liability to third parties for damage to private streets and private property by keeping City trucks and City workers on City property or City rights-of-way. The better-reasoned interpretation is that the prohibition against entering onto private property applies to any property belonging to third parties, i.e., property that is not owned or controlled by the City. SDMC § 66.0127(c)(3). This interpretation is consistent with the requirement in section 66.0127(a)(2) that all refuse be brought to the curb line of a public street, i.e., a City-controlled street, or alternatively, that a pre-existing hold harmless agreement be in place, in order to be eligible for City collection services. In practice, small businesses receiving City refuse collection services also are required to place their refuse at the curb of a public street. This practice further supports the notion that the City was attempting to limit liability related to refuse collection by agreement or by keeping City resources off of third party property. Finally, the definition of "public property" in other sections of the Municipal Code is limited to City-owned/controlled property. SDMC § 54.0202; *see* SDMC § 66.0102. Thus, Navy installations would constitute "private property" for purposes of the People's Ordinance.

We are aware of verbal comments from former City staff that they understood City refuse collection services would be provided at the NTC naval housing. However, a review of agreements and other records related to the NTC redevelopment project have revealed no written agreement to that effect. In fact, the Navy was notified a number of years ago that, in order for the City to continue collection, the streets would have to be dedicated in accordance with City requirements. However, efforts to reach agreement with the Navy on the street dedication were unsuccessful and were ultimately suspended. In any event, any agreement by the City to provide refuse collection services to NTC naval housing would require the Navy to comply with the People's Ordinance. The Navy has not done so. Thus, the City does not have a responsibility to service NTC naval housing.

Pursuant to San Diego City Charter section 265(b)(2), the Mayor has authority to enforce all laws and ordinances of the City. Thus, in order to comply with the People's Ordinance, we recommend sending written notice forthwith to the appropriate Navy representative terminating service to this development after a reasonable period of time, unless residents can place their refuse at the curb of a public street on collection day in accordance with City collection requirements.

CONCLUSION

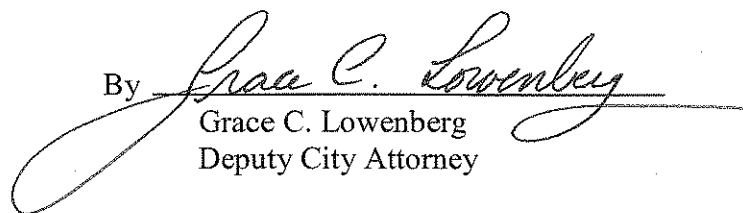
The Mayor may terminate service under the hold harmless agreements by giving at least seven days' advance written notice of termination. Since the original hold harmless agreements were recorded, it would be prudent to record the notices of termination as well.

The City does not have a responsibility to collect residential refuse from the naval housing development at NTC. In order to comply with the People's Ordinance, the City should discontinue service to NTC naval housing, unless residents can place their refuse at the curb of a public street on collection day in accordance with City collection requirements.

Finally, in order to comply with the People's Ordinance, the City also should discontinue service to those residences serviced from private streets adjacent to, but not included in, the hold harmless agreements, unless those residents can place their refuse at the curb of a public street on collection day in accordance with City collection requirements.

JAN I. GOLDSMITH, City Attorney

By

A handwritten signature in cursive script that reads "Grace C. Lowenberg". The signature is written over a horizontal line. The word "By" is positioned to the left of the signature.

Grace C. Lowenberg
Deputy City Attorney

GCL:mb

Attachments:2

Exhibits A and B
(Sample Agreements)
ML-2009-17

EXHIBIT A

221174

FILE/PAGE NO.
RECORDED REQUEST OF
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 2, Door of Hope Subdivision according to map 52111
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.

(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.

(4) Said 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) In the event that suit is brought upon this Agreement to enforce the terms thereof, City shall be entitled to a reasonable sum as attorney's fees.

Dated October 27, 1961.

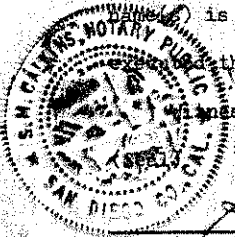
Gwen Carruthers
Gwen Carruthers, Administrator
~~The Salvation Army~~ Deer of Hope and Booth Memorial Hospital

State of California)
) SS.
County of San Diego)

On Oct 27, 1960 before me, the undersigned, a Notary Public in and for said State, personally appeared GWEN CARRUTHERS, known to me to be the person(s) whose

name is (are) subscribed to the within instrument and acknowledged that SHE is (are) the same.

Witness my hand and official seal.



S. M. Calkins
Notary Public in and for said State
My Commission Expires Sept. 28, 1968

APPROVED: [Signature]
Sanitation Superintendent

APPROVED: [Signature]
Public Works Director

APPROVED AS TO FORM:

EDWARD T. BUTLER, City Attorney

[Signature]
Deputy

Dated 12/2, 1964.

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

52
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 _____