

THE CITY ATTORNEY
CITY OF SAN DIEGO

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MEMORANDUM OF LAW

DATE: June 16, 2011
TO: Honorable Mayor and City Council
FROM: City Attorney
SUBJECT: Enforcement Functions at Miramar Landfill

INTRODUCTION

This Office has been asked to evaluate whether there are any legal limitations that would inhibit the City of San Diego's ability to outsource enforcement activities at the Miramar Landfill (Landfill). The Managed Competition Pre-Competition Assessment Report, dated April 8, 2011, lists all the functions being considered for outsourcing. The functions related to enforcement are:

2 Greenery Operations

2.15.1 Monitoring contamination in incoming loads

2.15.3 Enforcement/assessment of penalties

3 Hazmat Landfill Load Check

3.1 Conduct solid waste inspections

3.2 Unacceptable waste identification

3.3 Investigate incidents involving the disposal of hazardous waste and other unacceptable wastes

3.5 Enforcement

4 Fee Booth Operations

4.3 Screen for illegal material

5 Landfill Maintenance and Monitoring

5.3.1 Inspection (related to inactive landfill surface maintenance)

5.3.2 Regulatory inspection (related to inactive landfill surface maintenance)

5.5.1 Inspection (related to burn site management)

5.5.2 Regulatory inspection (related to burn site management)

There is presently a team of City of San Diego employees, the Hazardous Substances Enforcement Team (HSET), working at the Landfill. The HSET is composed of six hazardous materials inspectors. There are also two code enforcement officers.

The HSET conducts random inspections of commercial and residential refuse loads entering the Landfill to ensure the loads contain only wastes that the Landfill is permitted to accept. Unacceptable wastes include hazardous waste, infectious waste, liquid wastes, PCBs, radioactive waste, and universal waste. According to the City's Environmental Services Department statistics, inspections diverted approximately nineteen tons of hazardous waste from the Landfill in Fiscal Year 2010.

The HSET also engages in enforcement actions that result from observations made during the inspections in various tipping areas of the Landfill and at the Landfill fee booth. Based on information from the HSET Supervisor, Kirk Galarnau, the inspectors document a prohibited waste disposal incident by gathering material and photographic evidence, taking samples of prohibited waste for analysis, writing incident reports, and conducting related investigative activities. When appropriate, an inspector may issue a notice of violation to the responsible party for the disposal of prohibited waste in violation of the San Diego Municipal Code (Municipal Code) and the California Health and Safety Code (Health and Safety Code).

The City's Fee Schedule and Regulations for the Landfill describe the procedure for handling the disposal of unacceptable wastes, as follows:

The City conducts an Inspection Program to prevent the disposal of unacceptable wastes at the Miramar Landfill. Any person attempting to dispose of unacceptable wastes shall be issued a Notice of Violation and shall be responsible for the payment of all costs associated with the investigation, removal, packaging, storage, transport, and disposal of the unacceptable waste material. Unacceptable wastes will be confiscated, properly packaged and, in the City's sole discretion, stored at the Landfill for up to two (2) working days while the customer arranges for proper transport and disposal of the waste at the customer's sole expense.

QUESTION PRESENTED

Are there legal limitations on an external service provider performing solid waste inspections, investigating incidents involving the disposal of hazardous waste and other unacceptable waste, and engaging in enforcement action?

SHORT ANSWER

Yes. While an external service provider can observe and document unlawful disposals at the Landfill, only a designated enforcement official can enforce violations of the Municipal Code and the Health and Safety Code.

ANALYSIS

I. LEASE RESTRICTIONS

The City (Lessee) owns and operates the Miramar Landfill on land leased to the City from the Department of the Navy (Government) at Marine Corps Air Station Miramar under a fifty-year Ground Lease (Lease) entered into in 1995. The Lease imposes numerous duties and responsibilities on the City with respect to Landfill operations. These include responsibilities such as: (i) ensuring against the handling, receipt, storage and disposal of hazardous substances or hazardous wastes; (ii) closure and post-closure obligations; (iii) remediation obligations for unauthorized releases; and (iv) compliance with environmental laws (Lease, §§ 9, 20), to name a few.

Section 12 of the Lease provides:

- (a) Lessee shall not transfer or assign this Agreement or any interest therein nor sublet or otherwise make available to any third party any portion of the Leased Property or rights therein without the prior written consent of the Government. Under any assignment made, with or without consent, the assignee shall be deemed to have assumed all of the obligations of Lessee hereunder, but no assignment shall relieve the assignor of any of Lessee's obligations hereunder except for an extension of the Agreement term beginning after such assignment, and then only if the Government shall have consented thereto.
- (b) Government understands that Lessee intends to utilize private sector contractors to finance, design, build, operate, or otherwise "privatize" certain facilities on the Leased Property, and that to effectuate such "privatization" the Lessee may be required to enter into subleases with such private sector contractors which allow the contractors to encumber their subleased interests, subject to Government's prior written consent as described above. Government agrees to review any proposed subleases in a timely manner.

Paragraph 20 of the Lease addresses the environmental issues that are pertinent to the Landfill, including compliance with all federal, state and local laws regarding the disposal of hazardous waste and environmental health, safety, and protection.¹ The paragraph specifically imposes on the Lessee all environmental and financial liability for activities on the Landfill and provides that the City will indemnify and hold harmless the government for all fines, penalties, and causes of action.

Pursuant to these provisions of the Lease, the City remains ultimately responsible for compliance with the Lease terms. Outsourcing operations to an external service provider would not relieve the City of any of its obligations under the Lease.²

II. LIMITATIONS ON OUTSOURCING ENFORCEMENT DUTIES

A city may make and enforce within its territorial limits all local, police, sanitary and other ordinances and regulations it deems necessary to protect the public's health and welfare so long as the city ordinances do not conflict with general state or federal laws. *See* Cal. Const. art. XI, § 7. The "police power" granted to cities by this provision of the Constitution is broadly construed, but must be reasonably related to a legitimate government purpose. *Birkenfield v. City of Berkeley*, 17 Cal. 3d 129, 159 (1973). Pursuant to the authority granted by the Constitution,

¹ ENVIRONMENTAL LAW COMPLIANCE:

(a) This Agreement is subject to 10 U.S.C. Sec. 2692, which prohibits the storage and disposal on Department of Defense (DoD) property of toxic or hazardous materials not owned by DoD. The Government's execution of this lease is therefore contingent upon obtaining the necessary statutory relief to store or dispose of non-DoD owned toxic or hazardous materials on the Leased Property.

(b) Lessee shall be solely responsible for obtaining, at its sole cost and expense, any and all permits required for its activities on the Leased Property, independent of any existing permits and shall provide complete copies thereof to Government before commencing any construction or activities pursuant to this Lease.

(c) The Government's rights under this Agreement specifically include the right to inspect, upon reasonable notice, the Leased Property and Lessee's facilities and operations thereon, for compliance with environmental, safety, and occupational health laws and regulations, whether or not the Government is responsible for enforcing them.

(d) Lessee shall comply with all applicable Federal, State, and local laws, ordinances, rules, Executive Orders and regulations pertaining to environmental protection, health, and safety and shall be solely responsible for any and all fines, penalties, and enforcement actions instituted or imposed pursuant to said laws, ordinances, rules and regulations with respect to the Leased Property or Lessee's use thereof. Lessee hereby assumes all environmental and financial liability for its activities on the Leased Property, and Lessee further agrees to defend, indemnify, and hold the Government, its officers, agents and employees, harmless from any and all claims, fines, penalties, causes of action, or other civil or administrative liability arising out of or related to Lessee's activities on the Leased Property. Lessee shall be solely responsible to pay and shall hold Government harmless from any fee, assessment, charge or tax imposed on Lessee's activities or operations, including but not limited to the California Quarterly Solid Waste Disposal Fee and any other fee, assessment, charge or tax imposed upon or measured by the quantity or type of waste disposed on the Leased Property.

(e) Lessee shall be responsible for compliance with the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA) in connection with any construction or other action by Lessee not heretofore specifically covered in completed environmental documentation.

(f) The Lessee and the Government shall use best efforts to reduce the quantities of solid waste requiring landfill disposal under this Agreement through recycling and waste diversion as required by Federal, State, and local law and regulations.

(g) Any violation of the provisions of this paragraph shall be deemed a material breach of this Agreement.

² Under the terms of the Lease, if there is a violation of the environmental provisions, the Government may declare a material breach and terminate the Lease immediately.

the City has adopted a broad regulatory system that includes, but is not limited to, police-regulated businesses, signage, building code requirements, and waste management requirements.

Several Municipal Code provisions regulate the duties and authority of the City's enforcement officers, including the HSET officers, at the Landfill. In the general provisions of the Municipal Code, the individuals tasked with enforcing the City's Municipal Code provisions are designated as "Enforcement Officials." Municipal Code section 11.0210 defines enforcement official as "any person authorized to enforce violations of the Municipal Code or applicable state codes." Several other Municipal Code sections delineate the powers and duties of Enforcement Officials. They are:

§ 12.0102 General Enforcement Authority

The City Manager, the City Clerk or any of their designated Enforcement Officials have the authority and powers necessary to gain compliance with the provisions of the Municipal Code and applicable state codes. These powers include the power to issue Notices of Violation and field citations, inspect public and private property and use whatever judicial and administrative remedies are available under the Municipal Code or applicable state codes.

§ 12.0104 Authority to Inspect

A Director and any designated Enforcement Official are authorized to enter upon any property or premises to ascertain whether the provisions of the Municipal Code or applicable state codes are being obeyed, and to make any examinations and surveys as may be necessary in the performance of their enforcement duties. These may include the taking of photographs, samples or other physical evidence. All inspections, entries, examinations and surveys shall be done in a reasonable manner. If an owner, occupant or agent refuses permission to enter or inspect, the Enforcement Official may seek an administrative inspection warrant pursuant to the procedures provided for in California Code of Civil Procedure Section 1822.50 through 1822.59.

§ 12.0105 Power to Arrest

A Director or any designated Enforcement Official is authorized to arrest without a warrant any person whenever the Enforcement Official has reasonable cause to believe that the person has committed a violation of the Municipal Code or applicable state codes in his or her presence. Pursuant to Penal Code Section 836.5 the Enforcement Official can only arrest a person by issuing a misdemeanor field citation.

Each of the Municipal Code provisions refer to an Enforcement Official designated by City Manager or Department Director. The HSET employees who work at the Landfill are designated Enforcement Officials specifically tasked with ensuring compliance with City and state regulations related to the dumping of hazardous waste at the Landfill. Pursuant to the provisions of Municipal Code section 12.0105, they have the power to arrest by issuing a citation or notice of violation. These are important public powers that flow directly from the City's police power to make and enforce all necessary regulations within its jurisdiction. Public powers conferred upon a municipal corporation and its officers and agents cannot be delegated to others, without express authority by the San Diego City Council (City Council) or the San Diego Charter. "Delegation of important governmental authority requires a careful and purposeful consideration by those empowered to perform the functions." 2A McQuillin Mun. Corp. § 10:42 (3rd ed. 2011) (citing *Warren County Bd. of Health v. Warren County Bd. of Supervisors*, 654 N.W. 2d 910 (Iowa 2002)).

Because the Enforcement Official is authorized by the Municipal Code, it is controlled by case law defining "public officer." The California Supreme Court has said "a public office is said to be the right, authority, and duty, created and conferred by law-the tenure of which is not transient, occasional, or incidental-by which for a given period an individual is invested with power to perform a public function for public benefit." *People ex rel. Chapman v. Rapsey*, 16 Cal. 2d 636, 639 (1940).

The individual who occupies such an office is a public officer. He is a public agent and as such acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give to acts performed by the officer the authority and power of a public act or law.

Id.

The courts have expanded on these definitions by explaining that:

It seems to be reasonably well settled that where the legislature creates the position, prescribes the duties, and fixes the compensation, and these duties pertain to the public and are continuing and permanent, not occasional or temporary, such position or employment is an office and he who occupies it is an officer. In such a case, there is an unmistakable declaration by the legislature that some portion, great or small, of the sovereign functions of government are to be exercised for the benefit of the public, and the legislature has decided for itself that the employment is of sufficient dignity and importance to be deemed to be an office.

Id., quoting *Patton v. Bd. of Health*, 127 Cal. 388 (1899).

There are three necessary elements that must be present for a position to be a “public office.” First, it must be created by the legislature. Second, the power conferred must include the ability to perform some portion of the sovereign functions of government. Finally, the position must have permanency and continuity. *See, e.g. Coulter v. Pool*, 187 Cal. 181 (1921). The City’s Enforcement Officials meet all three requirements. The position is created by the City Council and codified in the Municipal Code, the duties include enforcing the ordinances created by the City Council and are deemed necessary to insure the safety of the public, and the position is permanent. The individuals in the positions may change, but the position and its duties continue regardless of who is the incumbent at any given time. As the *Chapman* court noted, individuals who perform sovereign functions act as an agent of the public and act only on behalf of the public. Conversely, an employee of an external service provider would have a duty to act on behalf of his or her employer first and the public second.

The courts have distinguished between individuals who fulfill the duties of a public officer and those who are simply employees of a public agency. In *Dibbs v. County of San Diego*, 8 Cal 4th 1200 (1994), the court said:

[t]he most general characteristic of a public officer, which distinguishes him from a mere employee, is that *a public duty is delegated and entrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting.* . . .

[Citations.] As a matter of course, in keeping with these definitions, a county officer is a public officer and may be specifically defined to be one who fills a position usually provided for in the organization of counties and county governments and is selected by the political subdivision of the state called the ‘county’ to represent that governmental unit, continuously and as part of the regular and permanent administration of public power, in carrying out certain acts with the performance of which it is charged in behalf of the public.

Dibbs, 8 Cal. 4th 1200 at 1212.

The City’s Enforcement Officials are specifically charged with ensuring compliance with the laws the City Council has adopted for the benefit of the public. Enforcing laws, regardless of whether the laws are federal, state, or local, is a sovereign function of government which flows directly from the City’s police power to make and enforce laws within its jurisdiction.

In addition to the City’s Municipal Code provisions defining the authority and duties of its “Enforcement Officials,” California Penal Code (Penal Code) section 830.7 specifically grants the authority to arrest to “Illegal Dumping Enforcement Officers” It provides in pertinent part:

§ 830.7. Persons not peace officers but having powers of arrest

The following persons are not peace officers but may exercise the powers of arrest of a peace officer as specified in Section 836 during the course and within the scope of their employment, if they successfully complete a course in the exercise of those powers pursuant to Section 832:

...

- (j) Illegal dumping enforcement officers, to the extent necessary to enforce laws related to illegal waste dumping, or littering, and authorized by a memorandum of understanding with, as applicable, the sheriff or chief of police within whose jurisdiction the person is employed, permitting the exercise of that authority. *An “illegal dumping enforcement officer” is defined, for purposes of this section, as a person employed full-time, part-time, or as a volunteer after completing training prescribed by law, by a city, county, or city and county, whose duties include illegal dumping enforcement and is designated by local ordinance as a public officer.* An illegal dumping control officer may also be a person who is not regularly employed by a city, county, or city and county, but who has met all training requirements and is directly supervised by a regularly employed dumping control officer. This person shall not have the power of arrest or access to summary criminal history information. No person may be appointed as an illegal dumping enforcement officer if that person is disqualified pursuant to the criteria set forth in Section 1029 of the Government Code. Persons regularly employed by a city, county, or city and county designated pursuant to this subdivision may be furnished state summary criminal history information upon a showing of compelling need pursuant to subdivision (c) of Section 11105.

(Emphasis added.)

This section reinforces the determination by the courts that the sovereign functions of enforcing city laws may not be performed by external service providers. It specifically says that an “illegal dumping enforcement officer” must be regularly employed by a city. While the section grants limited authority to individuals not employed by a city if they have met all the training requirements, such individuals must be directly supervised by a city employee and do not have the power to arrest or issue citations. The training requirements of Penal Code section 832 consist of an introductory course of training prescribed by the Commission on Peace Officer Standards and Training (POST). The City employees who are designated Enforcement Officials for the Landfill are required to complete this course.

Municipal Code section 12.0105 grants the City “Enforcement Officials” the power to arrest pursuant to Penal Code section 836.5.

Penal Code section 836.5 provides in pertinent part:

- (a) A public officer or employee, when authorized by ordinance, may arrest a person without a warrant whenever the officer or employee has reasonable cause to believe that the person to be arrested has committed a misdemeanor in the presence of the officer or employee that is a violation of a statute or ordinance that the officer or employee has the duty to enforce.

...

...

- (d) The governing body of a local agency, by ordinance, may authorize its officers and employees who have the duty to enforce a statute or ordinance to arrest persons for violations of the statute or ordinance as provided in subdivision (a)

The provisions of Municipal Code section 12.0105, which permit designated Enforcement Officials to effect arrests pursuant to the provisions of Penal Code section 836.5, are reinforced by the provisions of Penal Code section 830.7, which grant authority to arrest or issue citations *only* to City employees so that they may be qualified as “illegal dumping enforcement officials.” Nothing in the Municipal Code or Penal Code permits a person not employed by the City to be designated as an Enforcement Official. Even if the Municipal Code were amended to allow non-City employees to be designated Enforcement Officials, such an action would be prohibited by Penal Code section 830.7. Thus, while the City could theoretically outsource enforcement duties to an external service provider for inspection, monitoring, and waste identification purposes, actual enforcement, i.e., issuing citations or notices of violations, could only be performed by a City employee. Similarly, City employees would be required to directly supervise the inspection and monitoring work of the external service providers.³

³ Depending on how closely City employees control the work of the employees of the external service provider, there may be an issue of whether or not the employees are entitled to some City benefits, including participation in the San Diego City Employees’ Retirement System (SDCERS). In *Metropolitan Water District of Southern California v. Superior Court*, 32 Cal. 4th 491 (2004) (*Cargill*), the California Supreme Court determined that employees of an independent contractor who worked side by side with water district employees and who were supervised and integrated into the water district workforce were not independent contractors but were, in fact, common-law employees of the water district. As such, they were entitled to water district benefits, including participation in CALPERS, the state retirement system. Several of the factors considered by the court in *Cargill* will likely not be present in an agreement with an external service provider at the Landfill. However, until the relationship between the City’s supervisors and the external service provider’s employees is clearly defined, no realistic determination as to the employees’ status can be made. *But see Holmgren v. County of Los Angeles*, 159 Cal. App. 4th 593, 604-05 (2008) (concluding that engineers employed by contractor to perform work for county were not county employees and not eligible for county retirement benefits since their compensation was not fixed by the board of supervisors nor paid by the county; stating that concept of common law employee is not relevant to the analysis).

III. CITY LIABILITY FOR THE ACTS OF INDEPENDENT CONTRACTORS

The inspection duties that are performed by the Landfill HSET permit the Enforcement Official to stop and inspect trucks and the contents of the trucks for illegal or improper materials. This type of activity potentially gives rise to constitutional issues that may impact an individual's right to be free from illegal searches and seizures.

In most circumstances the acts of private parties do not give rise to constitutional protections. However, when state action is involved, the acts of private individuals may implicate constitutional protections. The courts have said that "[t]he constitutional prohibition against unlawful search and seizure applies only to those searches conducted by law enforcement officials or involving state action or where there is at least a joint operation between the private citizen and the police designed to arrest and obtain evidence against an individual." *People v. Leighton*, 124 Cal. App. 3d 497, 501 (1981) (citation omitted). Any action by an employee of an external service provider related to the enforcement of federal, state, or local laws would be deemed a joint action between the City and the external service provider. Thus, inspection and seizure procedures carried out by employees of external service providers must comply with the constitutional protections guaranteed by the Fourth Amendment to the United States Constitution. Any failure to adhere to the correct procedures could result in any evidence seized being excluded from any proceedings taken against the offender, whether in a civil or criminal action. Additionally, improper actions by the private employees could result in potential liability for the City pursuant to 42 U.S.C.A. § 1983. This statute grants an individual a right to pursue a civil action against the City for any deprivation of civil rights. Penalties under 42 U.S.C.A. § 1983 can include damages, punitive damages, and attorney fees.

CONCLUSION

The City has entered into a Lease with the Department of the Navy to use federal government land for landfill purposes. The Lease terminates in 2045. Under the terms of the Lease, the City is liable for all penalties, fines, and causes of action that may accrue as a result of violations of federal, state, or local environmental laws. Pursuant to the terms of the Lease, the City cannot assign any of these obligations to a sublessee.

Penal Code section 830.7 mandates that "illegal dumping enforcement officers" must be regular employees of the City. The section provides that persons not employed by the City may act in a limited role as enforcement officers, but they may not issue citations or notices of violation. Additionally, non-City employees performing any part of the enforcement procedures must be directly supervised by City employees. The provisions of the Municipal Code regarding the designation and duties of the City's Enforcement Officials must comply with the requirements of Penal Code 830.7. No person not employed by the City may exercise the full authority of an Enforcement Official.

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By  _____

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