

MEMORANDUM OF LAW

DATE: February 16, 1988

TO: Gary Easton, Director of Operations, Fire
Department

FROM: City Attorney

SUBJECT: Hazardous Materials Cost Recovery Ordinance

We have reviewed the model ordinance forwarded by your memorandum of January 14, 1988. The proposed ordinance allows for the recovery of costs for suppression and clean-up associated with flammable materials and hazardous materials incidents. Recovery is allowed against those who negligently or in violation of law cause the incident which requires an emergency response to protect the public health and safety. You have asked if the model ordinance would be useful to supplement existing law or ordinances.

Our review herein of the ordinance is not intended to be exhaustive, but to reflect conceptual approval of the model ordinance based on an interstitial legislative approach. We recognize that emergency response and clean-up costs can be substantial and should not burden City taxpayers at the benefit of those who create extra hazardous conditions. For the most part, the proposed ordinance would fill in areas not expressly covered by existing law relative to cost recovery for emergency responses. The model ordinance therefore appears legally appropriate for consideration, however with certain revisions.

With regard to hazardous materials spills, certain provisions of the Health and Safety Code (e.g. sections 25189 and 25540) create civil liability for cost recovery for certain types of emergency responses. There are other provisions applicable to clean-up costs for spills of hazardous materials, whether intentional or accidental. See, for example, 22 California Administrative Code section 66564 dealing with transportation spills. These sections are not all-inclusive and neither appear to prohibit nor preempt a municipal ordinance covering areas not otherwise addressed by State law. Our Municipal Code (San Diego Municipal Code sections 44.0118 and 66.0103) only has provisions

related to cost recovery for clean-up of common refuse and litter, rather than the categories of substances you refer to; it could therefore be augmented by the model ordinance.

You also mentioned Health and Safety Code section 13009.6 in your memorandum. That section allows cost-recovery for hazardous materials emergency responses whenever evacuation beyond the

property of origin occurs or where there is a real and imminent threat to public health and safety beyond the property of origin. The proposed ordinance would allow cost-recovery for hazardous materials emergency response operations on the property of origin. As noted below, we believe that such an approach is permissible.

In the area of cost-recovery for flammable materials emergency responses, California currently allows cost-recovery for the costs of suppression related to fire spread to adjoining property. See, Health and Safety Code section 13000.6. This statute does not, however, address the costs of fire suppression on the property of origin. One court concluded that this statutory omission precluded cost-recovery. See, *People v. Williams*, 222 Cal.App.2d 152, 34 Cal.Rptr. 806 (1963); Anno, 90 A.L.R.2d 873 (1963); Cf. 34 Cal.Jur.3d, sec. 14, Fires and Fire Districts. However, it should also be pointed out that the *Williams* case depended upon the absence of such language; the court implied that such omission could be legislatively cured. See, 222 Cal.App.2d at 155. That could be accomplished either by a change to the Health and Safety Code or adoption of an ordinance under a Charter City's authority to legislate in areas affecting a municipal concern, to the extent that such legislation was not preempted. *Bishop v. City of San Jose*, 1 Cal.3d, 56, 63, 460 P.2d 137, 81 Cal.Rptr. 465 (1969). This same reasoning can apply to hazardous materials emergency response operations on the property of origin as well.

There is a tendency on the part of the state legislature to allow for cost-recovery in the various enabling statutes previously referred to. There is also an absence of express language in these statutes to preclude local legislation or cost recovery efforts. Finally, there is no statutory duty requiring a political subdivision to provide fire suppression services or, inferentially, to absorb such costs. See, Government Code section 850. Therefore, to the extent not otherwise provided for or precluded by law, the model ordinance would appear appropriate for adoption. The City would be in no worse a position, cost-recovery wise, than it would be were the ordinance not in effect, and may even be in a better position if adopted.

Should you elect to go forward, we will then propose certain language changes and a prefatory section relative to adoption of the ordinance as a matter under the municipal affairs of a Charter City to improve the City's litigation posture. The existing text is appropriate for committee review and discussion, however. You may also wish to review the issue of cost recovery with Financial Management to determine the fiscal aspects of such

an approach.

JOHN W. WITT, City Attorney

By

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Deputy City Attorney

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cc George Story

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