

MEMORANDUM OF LAW

DATE: April 26, 1988

TO: Mike Walker, Refuse Disposal Division,
General Services Department
FROM: City Attorney
SUBJECT: City of San Diego Refuse Disposal Programs;
Support from Enterprise Fund

By recent memorandum you requested our comments on the suitability of certain programs to receive funding support from the Waste Management Enterprise Fund. A copy of your memorandum is attached for ease of reference. We understand that fees collected at the Miramar Sanitary Landfill will be deposited into an enterprise fund and be used to pay the operating costs of designated programs. We have discussed the rationale for including each of these program elements with you and how they relate to the costs of disposal.

An evaluation of the twenty (20) programs or services identified in your memo suggests each has elements that fit into one of the following categories:

- A. Program elements which merely reflect or create the City's direct costs in disposing of refuse or in providing a service by City forces;
- B. Program elements which are part of an overall waste management program.

From this analysis, we see the principal legal issues to be:

- a. Is the cost of the program a part of the "full ascertainable costs" for disposal of nonresidential refuse?
- b. Would funding of such a program element from an enterprise fund constitute a proceeds of tax to the extent revenues

exceed the reasonable value of providing such service and therefore require an adjustment to the appropriations limit?

These two legal issues involve first, the interpretation and effect of the People's Ordinance of 1919, as amended; and second, the effect of the so-called "Gann Limit" Cal. Const. art. XIII B as it relates to transfers of responsibility for funding of services from a public sector to the private sector and the monetary effect, if any, on the appropriations limit. Cal. Const. art. XIII B, sec. 3.

The first issue under the People's Ordinance asks how the city's "full ascertainable costs" of handling nonresidential refuse are to be determined in order to set disposal fees at the landfill. The second issue under the Gann Limit concerns whether distribution of landfill revenue fees through an enterprise fund might require an adjustment to the appropriations limit Cal. Const. art. XIII B sec. 3 if the reasonable costs of providing waste management services includes the funding of some portion of the program not related to providing such services Cal. Const. art. XIII B sec. 8(c).

We have included the second issue more for completeness of response rather than as a constraint upon adoption of the program. We discern that consideration of the Gann Limit should accompany management decisions governing the inclusion of certain programs within an enterprise fund.

Our analysis follows:

I. The effects of the "People's Ordinance" on establishing disposal fees

The "People's Ordinance," Ordinance No. O-16692 N.S. amended by the electorate on November 4, 1986 and codified as San Diego Municipal Code section 66.0123, provides for the collection of refuse within the city and the imposition of fees for such services. It revised the People's Ordinance of 1919, Ordinance No. 7691, centralizing refuse collection responsibilities under the city manager. All references hereafter are to the San Diego Municipal Code.

Section 66.0123, subd. (c)(i) limits the powers of the city council and the city manager to charge collection fees for residential refuse by providing that "Residential refuse shall be collected, transported and disposed of by the city at least once each week and there shall be no fee imposed or charged for this

service by city forces." Emphasis added. Section 66.0123 subd. (c)(iv) then provides that "fees established by Ordinance of the city council for disposal of nonresidential refuse shall not exceed the full ascertainable cost to the city for such disposal." Emphasis added.

"Refuse" is defined as "waste material of any nature or description generated within the city limits." Section 66.0123 subd. (a)(i). "Residential Refuse" is defined by section 66.0123 subd. (a)(ii) as refuse "normally generated from a residential facility and which is placed at the curblineline of public streets in approved containers." Ibid. "Nonresidential Refuse" is then defined as all refuse that is not "Residential Refuse." Section 66.0123 subd. (a)(iii).

Several observations are in order relative to interpreting

the term "full ascertainable cost" for the disposal of nonresidential refuse. First of all, nonresidential refuse may include refuse generated from residential facilities not collected by city forces, refuse collected by city forces from other than residential facilities and refuse not collected at curbside. It is apparent that the term "residential refuse" was intended to be narrowly restricted to only that refuse generated from a certain class of residential facility which is brought to the curblane. Refuse that is not brought to the curblane does not qualify for fee exempt service, except in one area not pertinent to our analysis. The city council may authorize city forces to collect refuse from small businesses. Section 66.0123 subd. (c)(ii).

The term "fee" is used in section 66.0123 in distinction to the term "tax." The former People's Ordinance of 1919 Ordinance No. 7691, in section 1 provided that the city council was "to levy and collect a sufficient tax each year for the purpose of paying the cost of the collection and disposal of said city refuse." Emphasis added. See attached Memorandum of Law dated April 29, 1980 concerning "Refuse Disposal Fees." Section 66.0123 now allows a narrowly defined category of refuse to be collected at city expense and user fees to be imposed for refuse disposal at city disposal sites for all other refuse. The city general fund subsidizes only that refuse collection clearly authorized by the ordinance.

San Diego Municipal Code section 66.0125 establishes the fees for disposing of refuse at the landfill. Subsection (a) expresses as its intent the recovery of the "full and actual costs involved in providing such facilities" and for extending the "capacity and useful life of such facilities for the general

welfare of the community." The schedule of fees is adjusted on an annual basis from a base line of \$8.00 per ton effective July 1, 1987.

Section 66.0123 does not prescribe any particular method for disposal nor identify the elements comprising the costs of disposal. The city's current disposal program is sanitary landfill oriented. The city is now engaged in a new landfill site search and evaluation together with recycling. The costs for disposing of nonresidential refuse may now involve many different considerations for solid waste management not directly related to typical solid waste collection or use of landfills.

We therefore believe that the cost elements involved in determining the city's "full ascertainable costs" of refuse disposal may rationally be identified from the following general costs:

1. The costs associated with landfill site study, replacement, acquisition, depletion administration and operation, utilization, site preparation, closure, modernization or rehabilitation;
2. The costs of managing waste associated with air or water quality standards such as studies, contracts or the preparation of the sites against methane and noxious gas and leachate generation as required by State law Government Code section 66799 et seq. to protect the surrounding environment from the operation of a landfill.
3. The costs of programs designed to reduce or interdict the flow of hazardous materials and wastes into the landfill or into the sewage system on the basis that contamination of the refuse stream affects the life of the landfill, forcing premature closure and increasing other costs of disposal to the city.
4. The full costs of disposing of all other waste products which qualify as "nonresidential refuse" under section 66.0123 subd. (a)(i), such as sludge from waste water treatment, so long as it does

not include hazardous or toxic materials or wastes. This class of refuse and its associated costs could be factored into the computations for determining the city's "full ascertainable cost" for disposal of nonresidential refuse because it is waste material that is not defined as "residential refuse." See section 66.0123 subd. (a)(i - iii).

II. The Application of the Gann Limit

From a cost accounting viewpoint, the city's full costs of waste disposal include costs for disposing of residential refuse as well as nonresidential refuse, regardless of the source of transportation. However, the People's Ordinance limits the fees to be charged to landfill users disposing of nonresidential refuse to the costs apportioned to nonresidential refuse disposal, so as not to subsidize the city's disposal costs of residential refuse.

An unintended effect of this however, is to allow the city's own costs of collecting and disposing of nonresidential refuse to be included in the formula for computing landfill fees. Cf. item 4 above. That does not mean, however, that the revenue derived from landfill fees for nonresidential refuse disposal may then also fund the city's actual costs in disposing of its "nonresidential refuse." Otherwise, the cost of services being borne by the landfill user will include a portion of the city's expenses.

Under an enterprise fund, revenues generated from user fees are used to pay the operating costs and overhead of all included programs providing the services within the enterprise fund. Under a refuse disposal enterprise fund, for example, water utilities could be charged for disposing of "sludge" at a city disposal site and that revenue be credited to the fund for future site acquisition and other waste management services. This does not, however, mean that other programs which are incorporated into the enterprise fund may also be fully funded from that revenue unless they contribute to the services being rendered.

We note that some of the programs you listed are reasonably related to services for the overall city waste management program, while others merely reflect the city's custodial responsibilities and costs in cleaning up litter and wastes normally borne by the general fund. Using landfill fee revenue to fully offset the latter city costs of collecting litter and

wastes by city forces may be viewed as a shift of funding responsibility to the private sector. We see this as an issue only to the extent that the costs of city programs included in the enterprise fund not reasonably related to costs of landfill management services are fully funded from the disposal fees charged to the using public, unless such programs bear their proportionate share of the burden of landfill management.

The limitation prescribed by the People's Ordinance on charging certain landfill fees is a separate and distinct issue from the effects of the "Gann Limit" and user fees. All references to the Gann Limit or to sections hereafter are to Cal. Const. art. XIII B. Gann Limit concerns arise when there is a shift in funding responsibility via user fees from the public to the private sectors and a corresponding effect on the appropriations limit of the public entity. We will also note that the Gann Limit does not prevent including or funding any of these programs from the Waste Management Enterprise Fund. The effect of their inclusion is to be measured only by the change, if any, in the annual appropriations limit.

Under the Gann Limit, when user fees "exceed the costs

reasonably borne by such entity in providing the regulation, product or service," the excess constitutes the "proceeds of taxes." Sec. 8 subd. (c). This excess, in turn, affects the "appropriations subject to limitation" see section 8(b), requiring an adjustment in the total annual appropriations of the entity permissible pursuant to California Constitution article XIII B section 1, by a decrease in the city's appropriations limit for the year of the transfer attributable to such excess. Sec. 3 subd. (b).

The amount of the decrease in the city's appropriations limit, if identifiable, would theoretically be that portion of the landfill fee revenue which actually offsets the city's direct costs for collecting and disposing of litter and wastes by city forces that was previously funded by the general fund and does not contribute to a part of the "services" being paid for by the landfill user fees for nonresidential refuse disposal. However, to the extent that the electorate is permitted to change or adopt a new appropriations limit pursuant to Cal. Const. art. XIII B, sec. 4 and an increase in this limit was approved on November 4, 1987 as Proposition "E," we opine that the net effect, if any, of shifting funding responsibility will be negligible for the years the electorate authorized the change in the appropriations limit.

We may now address the twenty (20) programs or program elements that are scheduled to receive support from the Waste

Management Enterprise Fund from the two perspectives we earlier set out:

- a. Is the cost of the program a part of the "full ascertainable costs" for disposal of nonresidential refuse?
- b. Would funding of such a program element from an enterprise fund constitute a proceeds of tax to the extent revenues exceed the reasonable value of providing such service and therefore require an adjustment to the appropriation limit?

We believe the following programs are both part of the city's "full ascertainable costs" for determining fees and qualify for full funding from the enterprise fund without affecting the appropriations limit:

1. Household Hazardous Waste Program
2. Management and Disposal of Stored Hazardous Material
3. Litter Control, to the extent the program is responsible for enforcement programs which are related to waste management services for refuse and landfill preservation

6. Hazardous Material Advisory Committee
7. Resource Conservation and Management Program
8. Hazardous Waste Treatment and Disposal Planning
10. Brush and Weed Abatement, to the extent that full cost recovery is provided for by ordinance
11. Hazardous Material Response Team
12. Code Enforcement (Building Inspection Support Services Division) to the extent that the program deals with identifying, citing and abating non-permitted fill areas and construction refuse as part of a waste management program
13. Code Enforcement Regulatory Planning Division to the extent that such program involves waste management and environmental pollution planning

20. Intergovernmental Relations Department, to the extent refuse disposal legislation and lobbying are part of the costs of providing refuse disposal services.

We do so on the basis that each is an element of waste management and that the full cost of each is reasonably related to providing an element of waste management service to the using public paying user fees. We also included "Brush and Weed Abatement" because that is a program which currently recaptures the full costs for such services, although technically it is not a "service" to the landfill user.

The following programs or elements would also be part of the city's full ascertainable costs of nonresidential refuse disposal, since the waste is "nonresidential waste":

4. Street Sweeping
5. City Facility Custodial and Waste Services
9. Jack Murphy Stadium
14. Abandoned Vehicle Abatement
15. Park Litter Maintenance
16. Beach Litter Control
17. Shoreline Debris
18. Fire Ring Cleaning
19. Brush Clearing

They may be included in the Waste Management Enterprise Fund. However, to the extent that each of these programs or operations has been funded by the general fund in the past, do not contribute to extending the life or management of the landfill and do not bear their proportionate share of landfill costs in the fund, they are not costs of waste management services to the landfill users. If fully funded from the enterprise fund, they are costs of disposal for which any shift in funding

responsibility may result in a change to the appropriation limit, if the costs are identifiable. It may be very impractical to precisely identify what the actual shift is. As noted above, however, the impact of this change will depend upon the appropriations limit authorized and may be minimal in the net effect.

The inclusion of these programs in the enterprise fund is a management decision. To summarize, therefore, we opine that you may determine the city's full ascertainable costs of disposing of nonresidential refuse (as defined and elaborated upon within this memorandum) and impose a proportionate fee on a unit basis to all users depositing refuse at the landfill. The fees enumerated in San Diego Municipal Code section 66.0125 should be recomputed to determine whether they are within the limits established by the People's Ordinance. The funding of certain services identified above from the enterprise fund is permissible, bearing in mind any potential impact on the city's appropriations limit in those years when the limit is not authorized.

Please feel free to contact the undersigned if you have any further questions on this subject.

JOHN W. WITT, City Attorney

By

Rudolf Hradecky

Deputy City Attorney

RH:mrh:210(x043.2)

Attachment

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