

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: June 9, 2017

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Fiscal Year 2018 Budget and Twice Weekly Refuse Collection to Mission Beach Residences During the Summer Months

INTRODUCTION

At the May 4, 2017, Budget Committee hearing for the Environmental Services Department (ESD), the Committee received public comments requesting that the City of San Diego (City) provide a second weekly refuse collection in Mission Beach during the summer months under the People's Ordinance. Last year, the Mayor's revised Fiscal Year (FY) 2017 Budget included funding for that service, however it was a one-time expenditure to be re-evaluated in future fiscal years.¹ The Mayor's proposed and revised FY 2018 Budget did not allocate funding for this additional service.^{2, 3}

On June 3, 2016, this Office issued a memorandum analyzing whether the City could collect "residential refuse," as defined under the People's Ordinance, twice weekly in Mission Beach during the summer months. *See* City Att'y MS-2016-17 (June 3, 2016). More recently, on May 10, 2017, this Office issued a summary of information on this subject to Councilmember Zapf. *See* Attachment A. We have also verbally provided related information during several past Budget Committee hearings for ESD, including for FY 16 and FY 15. As the public has again requested the second collection during FY 2018, we now provide this opinion to reiterate and consolidate our advice related to the City providing that service under the People's Ordinance.

¹ *See* Independent Budget Analyst Report No. 16-11, at 10-11 (June 8, 2016).

² Of note, the proposed FY 2018 Budget reflects General Fund expenditures outpacing revenue growth and includes budget reduction proposals from each City Department in order to present a balanced budget. *See* FY 2018 Proposed Budget, Executive Summary (May 3, 2017).

³ On June 5, 2017, the City Council amended the Mayor's revised FY 18 Budget and included \$70,000 for a second collection in Mission Beach during the summer. The Mayor has indicated that he may exercise veto authority over the amended Budget, which could include vetoing the City Council's addition of funding for the second collection. In that event, the City Council can undertake a veto override action within five business days of the Mayor's veto action. *See* San Diego Charter § 69.

QUESTION PRESENTED

Does a second weekly refuse collection to all Mission Beach residences during the summer months violate the People's Ordinance?

SHORT ANSWER

Very likely yes. The People's Ordinance prohibits the City from collecting "nonresidential refuse," as defined, which includes refuse from single and multi-family residences that are occupied through ownership, lease or rental for less than one month (transient occupancy). The public reports that a large number of short-term, summer residential rentals in Mission Beach cause the summer fly population and the need for additional refuse collection. The People's Ordinance prohibits the City from collecting refuse from residences with transient occupancy, including those in Mission Beach. The City may collect "residential refuse," as defined under the People's Ordinance, twice weekly in Mission Beach during the summer if a rational basis exists for the preferential treatment. *See* City Att'y MS-2016-17.

BACKGROUND

The People's Ordinance, codified at San Diego Municipal Code section 66.0127, governs the collection, transportation, and disposal of refuse in the City of San Diego. The People's Ordinance was first adopted in 1919 as a voter initiative and subsequently amended by the voters through City-sponsored initiatives in 1981 and 1986. It was a response to City residents' continued dissatisfaction with the private refuse haulers licensed by the City to collect City refuse. Citizens complained the private service was too costly, unreliable, and encouraged illegal dumping.⁴ In addition, citizens were frustrated that the private collector not only charged citizens to collect refuse, but also made money from selling the refuse to hog farmers for feed.⁵

The 1919 version of the People's Ordinance required the Council to levy a sufficient tax to pay for collection and disposal. However, the 1986 amendment to the People's Ordinance eliminated the City's ability to impose a tax to fund these services and required the City to continue providing the services to eligible residences. The 1986 amendment also limited the residences eligible for the service. Eligible residences are primarily single-family homes and ineligible residences are primarily condominiums, apartments, and mobile homes. There is no limit to the amount of refuse the City must collect from each eligible residence, and dispose of, for free. San Diego is the only major California city that does not recover at least a portion of its refuse collection expenses from those that are provided collection services.⁶

The primary source of funding for refuse (black bin) collection services is the City's General Fund. Currently, the General Fund provides \$34 million annually to ESD to provide refuse

⁴ City Manager's Report No. 86-293 at 1.

⁵ City Manager's Report No. 94-223 at 2; City Manager's Report No. 93-197 at 2.

⁶ Fees for refuse collection services are charged in all but three California cities with populations over 7,000. Only the City of San Diego, Newport Beach, and El Monte do not charge for collection services. 2010 City Att'y MOL 349 at 352 (2010-16; July 16, 2010).

collection to eligible residences.⁷ See IBA Report No. 17-16 at 91 (April 28, 2017). Further, ESD's Recycling Fund expends over \$18 million annually to collect recyclable materials, including greenery, from those residences.⁸ *Id.* at 85.

ANALYSIS

I. THE PEOPLE'S ORDINANCE PROHIBITS THE CITY FROM COLLECTING "NONRESIDENTIAL REFUSE"

Under the People's Ordinance, the City must collect, transport, and dispose of "residential refuse" at least once per week at no cost to the residence. SDMC § 66.0127(c)(1). "Residential refuse" is the refuse normally generated from a "residential facility" that is placed at the curb line of public streets at designated times in approved containers.⁹ ESD currently provides once weekly refuse collection services, at no cost, to all City residences that receive the service.

The People's Ordinance, state law, and case law do not require the City to provide refuse collection services beyond once a week. State law obligates the property owner or tenant to remove refuse from their property at least once per week. Cal. Code Regs., title 14, § 17331. And, "[i]t 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 v. City of Los Angeles*, 217 Cal. App. 2d 134, 139 (1963). So, although the People's Ordinance requires the City to collect "residential refuse" once weekly, the City is not obligated to provide a higher level of service.

Under the People's Ordinance "the City *shall not* collect Nonresidential Refuse . . ." SDMC § 66.0127(c)(2) (emphasis added). The use of the term "shall" in the statutory context is generally regarded as mandatory and not permissive in nature, particularly where a general code provision dictates it is mandatory and nothing else indicates it should apply differently to the code section at issue. See *Kingdomware Technologies, Inc. v. U.S.*, 136 S. Ct. 1969, 1977 (2016); see also *Governing Board v. Felt*, 55 Cal. App. 3d 156, 162 (1976); see also SDMC § 11.0209(b) (providing that, for purposes of the Municipal Code, "[s]hall" is mandatory; "may" is permissive). Further, this Office and ESD have consistently interpreted the People's Ordinance as prohibiting City collection of "nonresidential refuse." See 2006 City Att'y MOL 317 at 318 (2006-13; July 19, 2006); see also City Att'y MS-2016-17, fn 3 (June 3, 2016); see also Waste Management Regulation R-009-10 at 4 (July 26, 2010) (providing the City "will not provide Non-Residential Refuse Collection Services"). The People's Ordinance is clear in its prohibition on the City's collection of "nonresidential refuse."

⁷ Of note, there is no separate property tax that funds City refuse collection services. Like other cities, San Diego shares property taxes with the state, county, schools and other public agencies.

⁸ This funding, if not spent on recycling collection services, could serve as a significant funding source for implementation the City's adopted Zero Waste Plan. See Report to City Council No.15-063 at 6 (June 17, 2015).

⁹ "Residential Facility" is a single family or multi-family residential structure that is used and occupied through ownership, lease or rental for periods of one month or more ("nontransient occupancy"). SDMC § 66.0127(a)(4); SDMC § 66.0127(a)(5).

“Nonresidential refuse” means all privately generated refuse that is not “residential refuse.”¹⁰ SDMC § 66.0127(a)(3). As described above, “residential refuse” is the refuse normally generated from a single or multi-family residence that is used and occupied for “nontransient occupancy” (occupancy through ownership, lease or rental for periods of one month or more). SDMC § 66.0127(a)(2). Therefore, the People’s Ordinance prohibits the City from collecting refuse from single and multi-family residences that are used or occupied for less than one month, because they generate “nonresidential refuse.” *See* SDMC §§ 66.0127(a)(3)-(5). The public views short-term residential summer rentals in the Mission Beach area as causing an increase in the summer fly population that requires additional refuse collection.¹¹ The People’s Ordinance prohibits the City from collecting refuse from those Mission Beach residences that are occupied through ownership, lease or rental for less than one month.¹²

II. THE MISSION BEACH COMMUNITY MAY PURSUE OTHER MEANS OF OBTAINING ADDITIONAL REFUSE COLLECTION SERVICES

This Office has advised that the Mission Beach community may seek other alternatives to obtain additional refuse collection services, such as through the formation of a Maintenance Assessment District (MAD) or by contracting with one of the City’s franchised haulers. For example, in FY 2014, the nonprofit Beautiful Mission Beach contracted with franchisee Dependable Disposal for additional refuse collection services during the summer months. This Office can assist with the pursuit of that option by again facilitating the execution of a memorandum of agreement between the City and the community’s choice of franchised hauler.¹³ Overall, these alternatives do not raise concerns related to the People’s Ordinance because they do not entail the City providing the additional refuse collection services.

¹⁰ The sole exception is once-weekly collection of certain refuse generated by small business enterprises, if authorized by the City Council. SDMC § 66.0127(a)(1)-(3); SDMC § 66.0127(c)(2). City Council eliminated all refuse collection services for all small business enterprises beginning in FY 2012. And, providing additional refuse collection to any Mission Beach residences as small business enterprises could violate the intent of the exception. *See* 2006 City Att’y MOL 317 (2006-13; July 19, 2006).

¹¹ *See generally*, public comments submitted at Budget Committee hearings for ESD.

¹² The City may collect “residential refuse” more than once weekly, such as in Mission Beach during the summer months, as a policy decision. But, the preferential treatment must comply with equal protection requirements. Equal protection under the federal and state constitutions requires that governmental decision makers treat parties equally under the law if those parties are, in all relevant respects, alike. U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7; *Las Lomas Land Co., LLC v. City of Los Angeles*, 177 Cal. App. 4th 837, 857 (2009). To withstand a legal challenge, a rational basis must exist for the preferential treatment. In other words, the preferential treatment must bear a rational relationship to a legitimate state interest. *Warden v. State Bar*, 21 Cal. 4th 628, 650 (1999). Here, a rational basis may exist due to the severe fly problem that has been reported to exist in Mission Beach during the summer months, which may be addressed by a second collection. Courts have upheld governmental actions that target nuisances and public health and safety concerns as exercises of legitimate state interests. *See County of Tulare v. Nunes*, 215 Cal. App. 4th 1188 (2013); *see also Griffith v. City of Santa Cruz*, 207 Cal. App. 4th 982 (2012). Although the City Council is not required to articulate its reasoning at the time of decision making, the record should contain sufficient information to support a rational basis. That could include the type of information that Mission Beach residents have presented at prior ESD budget hearings.

¹³ The memorandum of agreement is necessary to allow the franchisee’s use of City-provided collection containers.

Additional options exist in repealing or amending the People's Ordinance given that the prohibition on City collection of "nonresidential refuse" is due to specific language in the ordinance. The 1919 People's Ordinance and its subsequent amendments were adopted by the voters and may only be amended, or repealed, by a majority vote of the electorate. 2005 City Att'y Report 435 at 236 (2005-13; June 13, 2005). The City Council has the authority to submit an initiative proposing an amendment or repeal of an existing legislative act to the electorate for a vote. *Id.*; SDMC § 27.1001. City residents may also undertake a voter initiative through a successful initiative or referendum petition and signature gathering campaign. SDMC § 27.1001. Thus, the Council, or City residents, may exercise their initiative powers and place a measure on the ballot to amend the People's Ordinance. This Office has previously analyzed a potential amendment that would permit the City to collect a cost-recovery fee for the collection services provided. *See* 2005 City Att'y Report 435 (2005-13; June 12, 2005). If the Council desires to pursue amending or repealing the People's Ordinance, this Office is available to assist with that effort.

CONCLUSION

The People's Ordinance prohibits the City from collecting "nonresidential refuse," as defined, which includes refuse from single and multi-family residences with occupancy of less than one month. A second collection in Mission Beach during the summer months presents a significant risk of violating the People's Ordinance because the public reports that a large number of short-term, summer residential rentals in Mission Beach cause the summer fly population and the need for additional refuse collection. The City may collect "residential refuse," as defined under the People's Ordinance, twice weekly in Mission Beach during the summer months if a rational basis exists for the preferential treatment.

The People's Ordinance does not prohibit the Mission Beach community's pursuit of additional refuse collection services by contracting with one of the City's private franchised haulers or through formation of a Maintenance Assessment District (MAD) that includes the additional service. Additionally, the People's Ordinance may be amended or repealed through a voter initiative to address its current restrictions.

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By /s/ Amanda L. Guy
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ALG:js

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cc: Mario X. Sierra, Director, Environmental Services Department

Darren Greenhalgh, Assistant Director, Environmental Services Department

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**Office of
The City Attorney
City of San Diego**

(619) 533-5800

DATE: May 10, 2017

TO: Councilmember Lorie Zapf

FROM: City Attorney

SUBJECT: Summary of Information Related to the People's Ordinance and a Second Refuse Collection in the Mission Beach Area

The following summarizes information related to the People's Ordinance (San Diego Municipal Code section 66.0127) and a second refuse collection in the Mission Beach area. Our Office has provided the following information publicly during several past Budget Committee hearings for the Environmental Services Department (ESD) and in MS-2016-17, dated June 3, 2016.

- The People's Ordinance governs the collection, transportation, and disposal of refuse in the City of San Diego (City).
- The People's Ordinance provides that the City shall collect "residential refuse" at least once per week at no cost to the resident. *See* SDMC § 66.0127(c)(1). "Residential Refuse" is the refuse normally generated from a "residential facility"¹ that is placed at the curb line of public streets at designated times in approved containers. *See* SDMC § 66.0127(a)(2).
- The City may collect "residential refuse" twice weekly in the Mission Beach area if a rational basis exists for the preferential treatment. *See* MS-2016-17. Rational basis means that the additional refuse collection must bear a rational relationship to a legitimate public interest.
- The People's Ordinance prohibits the City from collecting "nonresidential refuse."² *See* SDMC § 66.0127(c)(2). "Nonresidential refuse" includes refuse from a "residential facility" that does not have occupancy through ownership, lease or rental for periods of one month or more ("nontransient occupancy"). *See* SDMC § 66.0127(a)(3)-(5).

¹ "Residential facility" means a single family or multi-family residential structure used and occupied for Nontransient Occupancy. SDMC § 66.0127(a)(4).

² The only exception for "nonresidential refuse" is for a Council-approved, once-weekly, collection from a "small business enterprise." "Small business enterprise" means a commercial establishment providing sales and services to the public and licensed or taxed the City. SDMC § 66.0127(a)(5).

May 10, 2017

Page 2

- The public views residential summer vacation rentals in the Mission Beach area as causing an increase in the summer fly population that requires additional refuse collection.³ The People's Ordinance prohibits the City from collecting refuse from residences that are occupied through ownership, lease or rental for less than one month.
- The People's Ordinance does not prohibit the Mission Beach community's pursuit of additional refuse collection services from a City franchised hauler or through a maintenance assessment district (MAD).

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By



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Bruce Williams, City Council Representative, District 2

³ See generally, public comments provided at ESD Budget Committee hearings.