

THE CITY OF SAN DIEGO
REPORT TO THE CITY COUNCIL

REPORT NO: 10-142

DATE ISSUED: November 1, 2010

ATTENTION: Budget and Finance Committee

SUBJECT: City-Provided Waste Collection Services in Areas Covered by Hold Harmless Agreements and to Small Businesses

REFERENCE: 1) Memorandum of Law dated October 23, 2009; Subject: Termination of Refuse Collection Services Provided Pursuant to Hold Harmless Agreements; Responsibility to Service NTC Naval Housing

2) Memorandum of Law dated July 19, 2006; Subject: Small Business Enterprise Refuse Collection Requirement Under People's Ordinance

THIS IS AN INFORMATIONAL ITEM ONLY. NO ACTION IS REQUIRED ON THE PART OF THE COMMITTEE.

STAFF RECOMMENDATION: Accept the report.

BACKGROUND:

The People's Ordinance, San Diego Municipal Code (SDMC) §66.0127, provides that "Residential Refuse" shall be collected, transported, and disposed by the City at least once each week, that the City shall not enter upon any private property to collect any refuse except in the case of public emergency or pursuant to a hold harmless agreement in effect on November 4, 1986, and that the City shall not collect "Non-Residential" Refuse except from certain small business enterprises if authorized by the City Council. Refuse collection services include curbside collection of recyclable materials and yard waste, where cost effective to do so, for diversion from landfill disposal to comply with AB 939 and the City's environmental stewardship goals. The City currently provides refuse collection to 304,000 residences and small businesses, biweekly recycling to 257,000 residences and yard waste collection to 191,000 residences.

Hold Harmless Agreements

Refuse collection services are provided by the City to 102 residential developments accessed by private streets and rights-of-way under "Hold Harmless Agreements" between the City and the

Small Businesses

Approximately 4,621 small businesses receive City-provided refuse collection services. This number includes building uses identified by either the Business License Tax or the Post Office as businesses, and includes facility uses such as churches. City-provided refuse collection was originally intended as a lifeline service for small businesses. City facilities such as fire and police stations and libraries receiving City collection services are excluded from the count of businesses as services to them are not limited by the People’s Ordinance.

Municipal Code § 66.0127 defines “Small business enterprise” as a commercial establishment providing sales and services to the public and licensed or taxed by the City. It also states “The City shall not collect Nonresidential Refuse, except that Nonresidential Refuse from a small business enterprise may be collected by City Forces if authorized by the City Council and limited to once a week service in an amount no greater than one hundred fifty percent (150%) of the refuse generated by an average City residential dwelling unit.” The City Council, by ordinance, may eliminate collection services to small businesses.

City of San Diego Business Customers	
Council District	Number of Business Locations
1	410
2	1,807
3	1,209
4	158
5	6
6	181
7	285
8	565
Total:	4,621

FISCAL CONSIDERATIONS:

Termination of refuse, recycling and yard waste collection services to units covered by Hold Harmless Agreements could annually save the General Fund approximately \$675,000 and the Recycling Fund approximately \$15,000, inclusive of reduced recycling commodity revenue each year. The service termination may increase franchise revenues to the General Fund by approximately \$190,000 annually since the refuse would be collected by Non-Exclusive Franchised Haulers. Units continuing to receive service due to their location on a public dedicated street would slightly decrease these savings.

MARY JO LANZAFAME
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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?

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.

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.

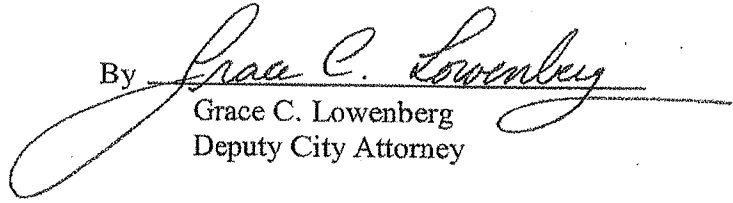
¹¹ See Exhibits A&B; Footnotes 3 and 6 above; Email from Robert Epler dated September 3, 2009.

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).

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.

Grace C. Lowenberg
Deputy City Attorney

GCL:mb
Attachments:2
Exhibits A and B
(Sample Agreements)
ML-2009-17

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. E. 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:

2722 Torrey Vista Road, San Diego 22, California

Lot 2, Block 2, Subdivision according to map 5214

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.

XI (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.

EXHIBIT B

(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 _____

(continued)

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Michael J. Aguirre
CITY ATTORNEY

MEMORANDUM OF LAW

DATE: July 19, 2006
TO: Elmer L. Heap, Jr., Environmental Services Director
FROM: City Attorney
SUBJECT: Small Business Enterprise Refuse Collection Requirement
Under People's Ordinance

INTRODUCTION

In connection with the Environmental Services Department's [ESD] re-engineering effort, questions have arisen regarding the level of small business refuse collection services the City is required to provide for free under the People's Ordinance, pursuant to Council's authorization to collect such refuse. For decades, the City collected business refuse at no charge. In 1981 and again in 1986, the People's Ordinance was amended by the voters to limit free collection of business refuse. You have asked how to interpret that limitation as described below.

QUESTION PRESENTED

How should eligibility for small business refuse collection services under the People's Ordinance be determined?

SHORT ANSWER

The City Manager, now the Mayor, has the discretion to establish criteria for determining whether a business constitutes a small business enterprise eligible for free refuse collection services under the People's Ordinance. The exercise of that discretion must be guided by: (1) the purpose of the 1986 amendment, which was to relieve the General Fund of the burden of subsidizing refuse collection services for all businesses; (2) the basis of the small business exemption, which was to preserve some financial assistance, in the way of limited free collection, to small businesses provided that Council approved; (3) the statutory limit on the volume of refuse that may be collected from any single small business enterprise; (4) the context within which the 1986 amendment was proposed and approved, which included the facts that only 2 percent of all businesses were using City services at the time, equating to the daily tonnage collected by two crews, and that small businesses were a subset of that percentage; and (5) the general rules prohibiting arbitrary, oppressive, and unreasonable action. The City Council also may, by ordinance, entirely eliminate City refuse collection services to small businesses.

If the meaning is unambiguous, then the language controls, unless a literal interpretation would lead to an absurd result or a result inconsistent with the legislative purpose. *Cruz*, 13 Cal. 4th at 782-83; *Halbert's Lumber, Inc.*, 6 Cal. App. 4th at 1239; *Castaneda*, 114 Cal. App. 3d at 942. If the meaning is in doubt, the courts will look to the legislative history. *Halbert's Lumber, Inc.*, 6 Cal. App. 4th at 1239. If that review does not entirely resolve the ambiguity, the court will interpret the statute so as to give it a reasonable and common sense meaning consistent with the apparent purpose and intent of the lawmakers and taking into consideration the consequences flowing from a particular interpretation, so that, in application, the interpretation will result in wise policy rather than mischief or absurdity. *City of Costa Mesa v. McKenzie*, 30 Cal. App. 3d 763, 770 (1973); *Industrial Risk Insurers*, 232 Cal. App. 3d at 1043. Moreover, statutes are presumed to be valid, and liberal effect is given to the legislative intent when possible. Reasonable certainty under the circumstances is all that is required, not mathematical precision. *United Business Com. v. City of San Diego*, 91 Cal. App. 3d 156, 176 (1979). Statutes must be upheld unless they are "clearly, positively, and unmistakably" unconstitutional. *Id.* at 176.

Because the People's Ordinance is ambiguous with regard to the meaning of the phrase small business enterprise, the historical records leading to the 1986 amendment were reviewed. The results of that review follows.

Historical Background:

Prior to 1981, the 1919 People's Ordinance required the City to collect all refuse generated within City limits. Because there was very little commercial/industrial refuse generated in San Diego when the Ordinance was first enacted in 1919, it made no distinction between residential, commercial or other refuse,² nor did it distinguish between small, medium, and large businesses in any fashion. As a practical matter, by 1981, the City was collecting all residential refuse, but very little commercial/industrial refuse.³ Commercial/industrial refuse

interpretation is correct. The latter requires a showing of careful consideration by senior officials, consistent application over time, and interpretation contemporaneous with the enactment of the statute. *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1, 11-13 (1998). Responses to inquiries of staff indicate that no written guidelines exist for determining which businesses constitute a "small" business under the People's Ordinance. Rather, refuse crews have applied a two container limit to businesses. Two containers generally conforms to the waste volume limitation imposed by section 66.0127(c)(2). But, even that guideline has not been applied consistently over time. Thus, reference to an administrative interpretation would not be useful in this case.

² 1981 Ballot argument in favor of Proposition F amending People's Ordinance to provide for limited commercial/industrial refuse collection, among other things. (Voter materials may be considered in determining intent. *Cruz*, 13 Cal. 4th at 773, n.5.)

³ City Manager's Report No. 81-284 (July 1, 1981) at 2. (Committee reports and other reports may be considered in determining intent. *Cruz*, 13 Cal. 4th at 773, n.5.)

Version 2: Section 14. Notwithstanding any of the provisions of this People's Ordinance to the contrary, the City Council may by ordinance, establish rules and regulations for the collection, transportation, and disposal of City refuse in the City of San Diego in order to protect the health and safety of the residents of the City and to ensure the provision of efficient and effective waste management services. Such rules and regulations *may include limitations* on the *quantities* of commercial wastes and industrial wastes collected by the City

(Emphasis added.) No further limits on commercial/industrial waste collection are found in this version.

Version 3: "Section 14. Notwithstanding any provisions of this People's Ordinance to the contrary, the City Council may by ordinance, establish rules and regulations for the collection, transportation, and disposal of City refuse in the City of San Diego in order to protect the health and safety of the residents of the City and to ensure the provision of efficient and effective waste management services. Such rules and regulations shall not include any fees for the collection, transportation or disposal of residential waste generated within the City of San Diego. . . .

Such rules and regulations shall include *limitations* on the quantities of commercial wastes and industrial wastes collected, with the City *in no event collecting* from any single *commercial or industrial enterprise* waste in an *amount* greater than one hundred fifty percent (150%) of the waste generated by an average City residential dwelling unit. . . ."

(Emphasis added.) No further limits on commercial/industrial waste collection are found in this version.

Version 1 clearly limits commercial waste collection to those enterprises which generate no more than 150 percent of the waste generated by the average City household. However, Version 3 was the one submitted to and approved by the voters in the election of November 3, 1981. The 1981 collection limitation applied to all commercial/industrial businesses without distinguishing amongst them as to size, number of employees, amount of refuse generated, gross revenues, market share or otherwise. Moreover, the language used both in the approved amendment to the ordinance and in the related documentation describing it all indicates that the limitation was a limitation on the amount or volume to be collected, not on the type or size of the businesses from which it would be collected.¹⁰

¹⁰ See 1985 City Att'y MOL 75 .

This Proposition will eliminate the antiquated language and unreasonable requirements of the "People's Ordinance" and continue to give city residents weekly curbside service at the public rights-of-way on a no-fee basis. It will also allow small businesses to be provided this service on a similar basis, limited to an amount no greater than 150% of the refuse generated by an average residential dwelling.

This Proposition gives the City Council the ability to make the decisions that are necessary for the efficient and cost effective collection, transportation and disposal of refuse under modern requirements, and allows the City Manager to issue rules and regulations for the efficient operation of this system."

The Ballot Argument is signed by the Mayor, City Council, and City Manager.

Comparing the text of the 1981 version of the People's Ordinance to the 1986 amendment, it is apparent that the former allowed for refuse collection from all businesses up to a certain volume of waste, while the latter was an attempt to further limit service to businesses. The historical records clearly indicate that by 1986 the City intended to eliminate free refuse collection services for businesses, except for limited collection for small businesses. However, those shed little light on what was meant by a "small" business enterprise.¹⁵ So, both the legislative intent and the statutory language are ambiguous on that point. In cases where neither the language nor the legislative intent are entirely clear, the statute should be interpreted so as to make it reasonable, practical, in accord with common sense, and avoid an absurd result. *Halbert's Lumber, Inc.*, 6 Cal. App. 4th at 1236, 1239.

Applying the rules of statutory construction here, it is apparent that some meaning must be attributed to the word "small" in order to effectuate the purpose and intent of the 1986 amendment. The rules tell us that each word must be accorded its plain meaning and not treated as superfluous. That rule is particularly relevant here. If no definition is given to "small," then no limitation on business collection will have been effectuated by the 1986 amendment, and all businesses City-wide would be entitled to free City collection services. This result would be contrary to the clearly expressed intent of the Council and the voters to further limit free collection services to only certain types of businesses. The dilemma is in discerning a precise meaning for "small," when few clues have been provided. However, the rules tell us that when a review of the language and the intent do not entirely resolve an ambiguity, the courts will take a reasonable and common sense approach consistent with the apparent purpose and intent, and which, in application, will result in wise policy rather than mischief or absurdity. Such an approach presents itself here.

¹⁵ A request was made of the Department regarding whether it could reconstruct any information about which small businesses were receiving City collection services in 1986, with the idea that some criteria might be gleaned from that information which could be applied today. However, according to the Department, such records do not exist.

administrative officer must observe in exercising the delegated discretion. “The essential requirement is the Legislature’s specification of a standard – an intelligible principle to which the person or body authorized to [administer the act] is directed to conform’ [citation] – but it may leave to the administrative agency the precise determination necessary to bring the standard into operation.” *Times Mirror Co. v. City of Los Angeles*, 192 Cal. App. 3d 170, 188 (1987), quoting *El Dorado Oil Works v. McColgan*, 34 Cal. 2d 731 (1950).

The essentials of the legislative function are the determination and formulation of the legislative policy. Generally speaking, attainment of the ends, including how and by what means they are to be achieved, may constitutionally be left in the hands of others. The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the “power to fill up the details” by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect

Kugler, 69 Cal. 2d at 376. Safeguards may be implied from the purpose of the ordinance. *In re Petersen*, 51 Cal. 2d 177, 185 (1958); *Wilkinson*, 144 Cal. App. 3d at 442. Moreover, the law implies a requirement that the administrative agency will properly perform its public duty and not act in an arbitrary or oppressive manner. *In re Petersen*, 51 Cal. 2d at 185. Further, the law implies a requirement that the rules and regulations developed pursuant to the delegated authority will be reasonable. *Wilkinson*, 144 Cal. App. 3d at 444.²⁰

With respect to business refuse collection, the Council and the voters clearly intended to limit free collection services to small businesses only. In fact, the amendment authorized the Council to entirely eliminate this service to small businesses. Thus, they resolved the fundamental policy issue. The purpose of this amendment was to relieve the General Fund, i.e., the taxpayers, of the economic burden of subsidizing refuse collection services for all businesses, while still preserving some financial assistance, in the way of limited free collection, to small businesses provided that the Council approved. The Council adopted the small business exemption specifically in response to opposition by the small business association and member businesses. The City Manager’s Report explains that only 2 percent of businesses within the City were receiving City collection services at that time.²¹ It is reasonable to assume that small businesses were a subset of that number. That level of service equated to the tonnage collected by two crews on a daily basis. *Id.* The purpose of the business exclusion, the basis for the small business exemption, and the context within which the amendment was proposed and approved, all as described above, together with the safeguards implied by law, supply adequate standards to guide implementation of the fundamental policy to offer free collection services to small businesses only. Thus, the City Manager, now the Mayor, has discretion to “fill up the details” by establishing rules and regulations to implement that policy.

²⁰ For additional discussion of the legislative delegation issue, see 1998 City Att’y MOL 0337.

²¹ City Manager’s Report No. 86-293 at 2.