

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

developments. Hold Harmless Agreements issued between 1964 and November 1986 limit the City's liability for damage to private property and were granted on a case-by-case basis after City staff determined that collection operations could be performed safely. An amendment to the People's Ordinance, approved by the electorate on November 4, 1986, precludes the City from entering into any further Hold Harmless Agreements after that date.

All Hold Harmless Agreements have clauses permitting either party to terminate service with at least seven days advance written notice. The Mayor has the authority to terminate the Hold Harmless Agreements on behalf of the City.

The 102 Hold Harmless Agreements cover approximately 14,200 residential units located throughout the City. Some units covered by these Agreements have addresses on and abut public streets, and may qualify under the People's Ordinance to receive City-provided waste collection without a Hold Harmless Agreement if they set their containers out for collection on the abutting public street.

The distribution of affected residential units is as follows.

Council District	Day of Collection	Number of Hold Harmless Agreements	Number of Residential Units
1	Monday	23	2,785
1	Tuesday	3	819
Total Dist. 1		26	3,604
2	Monday	9	1,421
Total Dist. 2		9	1,421
3	Thursday	1	27
3	Friday	2	306
Total Dist. 3		3	333
4	Wednesday	1	57
4	Thursday	4	829
4	Friday	2	174
Total Dist. 4		7	1,060
5	Tuesday	26	3,565
Total Dist. 5		26	3,565
6	Wednesday	11	2,099
Total Dist. 6		11	2,099
7	Friday	7	711
Total Dist. 7		7	711
8	Thursday	13	1,409
Total Dist. 8		13	1,409
	Totals:	102	14,202*

* Includes units that may abut public streets and continue to qualify for service

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.

Eliminating refuse collection from small businesses may reduce annual costs by approximately \$300,000 in the General Fund and generate approximately \$80,000 in additional franchise fee revenue to the General Fund.

PREVIOUS COUNCIL and/or COMMITTEE ACTION:

None.

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS:

None to date.

KEY STAKEHOLDERS AND PROJECTED IMPACTS:

Approximately 14,200 residential units covered by the 102 Hold Harmless Agreements and 4,621 businesses currently receive refuse and/or recycling collection throughout all City Council districts in the City of San Diego.



Chris Gonaver
Environmental Services Director



David Jarrell
Deputy Chief Operating Officer
Public Works

Attachments:

- 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

H: BPR/Budget & Finance HH and Sm Business.mlv-sb

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ASSISTANT CITY ATTORNEY

GRACE C. LOWENBERG
DEPUTY CITY ATTORNEY

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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?

SHORT ANSWERS

1. Yes. The City may terminate service under the hold harmless agreements by giving at least seven days advance written notice of termination.
2. No. The City Manager (Mayor) has authority to terminate the hold harmless agreements.
3. No. The City should discontinue service to NTC naval housing unless residents can place their refuse at the curb of a public street on collection day in accordance with City collection requirements.

FACTUAL BACKGROUND

From 1964 through 1986, the City entered into agreements with property owners or managers to provide City refuse collection services at no charge to certain residential properties.¹ These properties were situated such that it was impractical for the residents to place their refuse adjacent to a public street for collection. This meant that, in order to provide collection services to these residents, City trash trucks would have to travel over private property to access the refuse containers.² These agreements were entered into as a courtesy at the request of residents and on a case-by-case basis, after City staff was satisfied that collection operations could be performed safely if certain service requirements were followed.³ Typically, the agreements were recorded with the San Diego County Recorder's Office.

Under the agreements, the property owner or manager agrees to permit the City to enter onto the described property for purposes of collecting refuse; abide by service requirements such as pickup locations, routing, and scheduling established by the City Manager; and indemnify the City. The agreements do not contain an express requirement that the City actually collect refuse. Paragraph 4 of each agreement contains one of two slightly different termination clauses: (1) "This agreement may be terminated at any time upon the giving of seven (7) days' written notice of such intent;" or (2) "Said Agreement may be terminated at any time, upon the giving of seven (7) days written notice of such intent."⁴

¹ See attached Exhibits A and B for samples of the hold harmless agreements.

² The practice of routinely entering onto private property to collect refuse had been discontinued in 1941. City Manager Report No. 86-293 dated June 13, 1986, p.2.

³ See, e.g., Memorandum from Deputy Director Rich Hays to Councilmember Bill Mitchell re Refuse Collection in Fairway Vista dated November 27, 1985; Memorandum from Deputy City Attorney P. Rosenbaum to Councilmember Dick Murphy re: Tierrasanta Trash Pick-Up dated June 22, 1981.

⁴ See attached Exhibits A and B.

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.

of nuisances and safeguarding public health.” *Silver v. City of Los Angeles*, 217 Cal. App. 2d 134, 139 (1963); 14 Cal. Code Regs. title 14, § 17331 (providing that property owner or tenant is responsible for removal of refuse from property at least once per week). While the 1986 amendment to the People’s Ordinance recognized the hold harmless agreements, it did so only for purposes of describing the limit on services provided via access over private streets. The intent was not to guarantee service under hold harmless agreements, but merely to acknowledge that services would be continued “pursuant to” existing hold harmless agreements. SDMC § 66.0127(c)(3).⁶

The term “pursuant to” means “in compliance with,” “in accordance with” or “according to.” Black’s Law Dictionary 1272 (8th ed. 2004); Webster’s Third New International Dictionary Unabridged 1848 (1971). Thus, the residences served under the hold harmless agreements have no right to service under the People’s Ordinance absent the agreements. SDMC § 66.0127(c)(3). So, the general rule is applicable here, the language in the agreements will govern their termination, and the usual rules of contract interpretation will apply. *See Golden West Baseball Co.*, 25 Cal. App. 4th at 21.

As set forth above, the agreements provide that they are terminable at will by either party upon giving seven days’ advance written notice of termination. A provision that a contract may be cancelled at the option of one of the parties by giving written notice for a period of time before ceasing obligations under the contract is valid. *Brawley v. Crosby Research Foundation, Inc.*, 73 Cal. App. 2d 103, 114 (1946); 14A Cal. Jur. 3d *Contracts* § 280 (3d ed. 2008). In order to accomplish the termination, the terminating party must comply with the notice provision. *Black v. City of Santa Monica*, 13 Cal. App. 2d 4, 6 (1936); 14A Cal. Jur. 3d *Contracts* § 280 (3d ed. 2008). Thus, the City may lawfully terminate the hold harmless agreements by giving at least seven days written notice of termination before it ceases collection services.⁷

2. The Manager (now Mayor) has Authority to Terminate the Hold Harmless Agreements

The People’s Ordinance provides that: “[p]ursuant to the ordinance duly adopted by the City Council, the City Manager may then duly promulgate such rules and regulations as are appropriate to provide for the collection, transportation and disposal of refuse.” SDMC § 66.0127(d). A primary purpose of this provision is to delegate to the City Manager authority to regulate and manage refuse collection operations.⁸ The ordinance granting that authority is codified at section 66.0124 of the Municipal Code, which provides in part:

⁶ City Manager Report No. 86-293 dated June 13, 1986, p.2; Transcript of City Council hearing of July 14, 1986, pp.1-6.

⁷ See Memorandum from Deputy City Attorney P. Rosenbaum to Councilmember Dick Murphy re: Tierrasanta Trash Pick-Up dated June 22, 1981.

⁸ City Atty MOL No. 2006-13 (July 19, 2006) p. 8 and authorities cited therein.

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).

As explained above, the purpose of prohibiting City trucks from traveling over private property to collect refuse is to limit the City's liability to third parties for damage to private streets and private property by keeping City trucks and City workers on City property or City rights-of-way. The better-reasoned interpretation is that the prohibition against entering onto private property applies to any property belonging to third parties, i.e., property that is not owned or controlled by the City. SDMC § 66.0127(c)(3). This interpretation is consistent with the requirement in section 66.0127(a)(2) that all refuse be brought to the curb line of a public street, i.e., a City-controlled street, or alternatively, that a pre-existing hold harmless agreement be in place, in order to be eligible for City collection services. In practice, small businesses receiving City refuse collection services also are required to place their refuse at the curb of a public street. This practice further supports the notion that the City was attempting to limit liability related to refuse collection by agreement or by keeping City resources off of third party property. Finally, the definition of "public property" in other sections of the Municipal Code is limited to City-owned/controlled property. SDMC § 54.0202; *see* SDMC § 66.0102. Thus, Navy installations would constitute "private property" for purposes of the People's Ordinance.

We are aware of verbal comments from former City staff that they understood City refuse collection services would be provided at the NTC naval housing. However, a review of agreements and other records related to the NTC redevelopment project have revealed no written agreement to that effect. In fact, the Navy was notified a number of years ago that, in order for the City to continue collection, the streets would have to be dedicated in accordance with City requirements. However, efforts to reach agreement with the Navy on the street dedication were unsuccessful and were ultimately suspended. In any event, any agreement by the City to provide refuse collection services to NTC naval housing would require the Navy to comply with the People's Ordinance. The Navy has not done so. Thus, the City does not have a responsibility to service NTC naval housing.

Pursuant to San Diego City Charter section 265(b)(2), the Mayor has authority to enforce all laws and ordinances of the City. Thus, in order to comply with the People's Ordinance, we recommend sending written notice forthwith to the appropriate Navy representative terminating service to this development after a reasonable period of time, unless residents can place their refuse at the curb of a public street on collection day in accordance with City collection requirements.

CONCLUSION

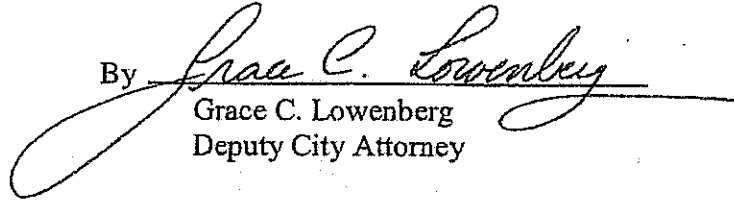
The Mayor may terminate service under the hold harmless agreements by giving at least seven days' advance written notice of termination. Since the original hold harmless agreements were recorded, it would be prudent to record the notices of termination as well.

The City does not have a responsibility to collect residential refuse from the naval housing development at NTC. In order to comply with the People's Ordinance, the City should discontinue service to NTC naval housing, unless residents can place their refuse at the curb of a public street on collection day in accordance with City collection requirements.

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, reading "Grace C. Lowenberg", written over a horizontal line.

Grace C. Lowenberg
Deputy City Attorney

GCL:mb

Attachments:2

Exhibits A and B

(Sample Agreements)

ML-2009-17

EXHIBIT A

221174

FILE/PAGE NO.
RECORDED REQUEST OF
CITY CLERK

DEC 7 8 01 AM '64

532

SERIES 5 0001 1054
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:

2799 Kearny Villa Road, San Diego 22, California

Lot 2, Dorr at Home Subdivision according to map 5211

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.

(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

2342

84-480324

RECORDED IN
OFFICIAL RECORDS
OF SAN DIEGO COUNTY, CA.

1984 DEC 27 AM 10:51

VERA L LYLE
COUNTY RECORDER

RECORDING REQUESTED BY

After recording, conform one copy and mail to:

City of San Diego
Refuse Collection Division
2781 Caminito Chollas MS #40
San Diego, CA 92105-5098

52
32 F4

NO FEE

PERMIT AND AGREEMENT TO HOLD CITY HARMLESS

(corporation)

THIS AGREEMENT is made by THE CITY OF SAN DIEGO, a municipal corporation, herein called "City", and LADERA BERNARDO HOMEOWNERS ASSOCIATION, herein called "Owner".

R E C I T A L S

A. Owner of the following described property located in the City of San Diego has requested that City collect and dispose of refuse from said property as part of City's refuse collection program.

B. Circumstances exist which make it impractical for owner to deposit said refuse adjacent to a public street for collection.

C. Owner agrees to have the refuse placed in such container that shall conform to the San Diego Municipal Code requirements and in a location acceptable to the Refuse Collection Division of the General Services Department of City.

NOW, THEREFORE, in consideration of the recitals and mutual obligations, 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 are: Lot 58 of Bernardo Heights Unit No. 25 in the County of San Diego, State of California, as per Map No. 10796 recorded on December 16, 1983, of the Official Records of said County.

2. Upon execution and recordation of this agreement, the Refuse Collection Division of the General Services Department of the City of San Diego is hereby given permission to enter upon said property for the purpose of collecting refuse.

(continued)

(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)

GRACE C. LOWENBERG
CITY CITY ATTORNEY

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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.

ANALYSIS

The People's Ordinance [Ordinance] governs the collection, transportation, and disposal of Residential Refuse generated in the City of San Diego. SDMC § 66.0127. "Residential Refuse" generally means refuse normally generated by a residential facility within City limits and placed at the curb line of a public street at designated times in approved containers. SDMC § 66.0127(a)(2). The Ordinance also prohibits the City from collecting 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. There shall be no City fee imposed or charged for this service by City Forces. . . ." SDMC § 66.0127(c)(2).

What constitutes a small business enterprise is unclear. The phrase "small business enterprise" is defined in the Ordinance as: "a commercial establishment providing sales and services to the public and licensed or taxed by the City." SDMC § 66.0127(a)(6) (formerly SDMC § 66.0123(a)(vi)). While that definition gives meaning to the phrase "business enterprise," it does not give any meaning to the word "small," which modifies that phrase. The inclusion of the word "small" implies attributes distinct from other business enterprises. Yet, the definition does not include any distinguishing features such as total amount of waste generated, number of employees, gross revenue, market share, or any other characteristic by which to distinguish a small business enterprise from any other business enterprise. Moreover, the word "small" is not defined in the Ordinance. In addition, it is not defined in the general definitions contained in sections 66.0102 or 11.0210 of the San Diego Municipal Code [Code]. Finally, other sections of the Code which mention small businesses either were enacted after 1986 (See SDMC §§ 22.3603, 31.0301(e)), so their definitions are not relevant, or do not contain a definition of small business. See SDMC §§ 26.06, 54.0208(d). Thus, an ambiguity exists in the statutory language.

When called upon to resolve statutory ambiguities, courts have employed various rules of statutory interpretation. *Castaneda v. Holcomb*, 114 Cal. App. 3d 939, 942 (1981). Paramount among those is the rule that a statute should be interpreted so as to effectuate its purpose, i.e., the object to be achieved and the evil to be prevented. *People v. Cruz*, 13 Cal. 4th 764, 774-75 (1996); *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1159 (1991); *Industrial Risk Insurers v. Rust Engineering Co.*, 232 Cal. App. 3d 1038, 1042 (1991)(citations omitted). That purpose is determined initially by the language used in the statute. *Cruz*, 13 Cal. 4th at 775; *Industrial Risk Insurers*, 232 Cal. App. 3d at 1042. Each word should be given its plain meaning, unless the word is specifically defined in the statute. *Cruz*, 13 Cal. 4th at 775; *Halbert's Lumber, Inc. v. Lucky Stores, Inc.*, 6 Cal. App. 4th 1233, 1238 (1992). "[I]f possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose." *Cruz*, 13 Cal. 4th at 782 (citation omitted).¹

¹ Administrative interpretations of a statute also deserve consideration if specific expertise in the subject matter is relevant to the interpretation and/or if factors indicate the agency's

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.)

was collected almost entirely by private haulers.⁴ Moreover, while the Ordinance required the City to impose a tax for refuse collection, transportation and disposal, the City never did.⁵ Rather, those services traditionally were funded by the General Fund.⁶

In 1981, the City wanted to formally limit the refuse the City was required to collect. Three reasons were given: (1) it was felt that the City should not and did not have a duty to collect and dispose of commercial refuse on a weekly basis as was the case for residential refuse; (2) if the City were required to collect this type of refuse, the cost to the general fund would double in the first year of such collection; and (3) if the City collected commercial refuse, the commercial refuse haulers would go out of business.⁷ Hence, an amendment to the People's Ordinance was proposed to both reaffirm free residential refuse collection and limit the amount of weekly commercial refuse service to specific quantities.⁸ In other words, the purpose was to put a fair limit on the amount of refuse collected from commercial/industrial establishments, with any higher level of service to be paid for by those establishments.⁹

Three versions of the proposed 1981 amendment to the People's Ordinance were found. They are as follows:

Version 1: Section 14. Notwithstanding any provisions of this 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

* * *

(B) Such rules and regulations shall include limitations on the quantities of commercial and industrial wastes collected and *in no event shall the City collect from any single commercial or industrial waste enterprise generating more than 150% of a typical city residential dwelling unit.*"

(Emphasis added)

⁴ 1981 Ballot argument in favor of Proposition F amending People's Ordinance to provide for limited commercial/industrial refuse collection, among other things.

⁵ City Manager's Report No. 81-284 (July 1, 1981) at 2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 1-2.

⁹ 1981 Ballot argument in favor of Proposition F amending People's Ordinance to provide for limited commercial/industrial refuse collection, among other things.

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 .

The 1986 Amendment

In 1986, the City Manager proposed additional amendments to the People's Ordinance. The proposal included entirely eliminating all nonresidential refuse collection, which included commercial and industrial waste collection, without regard to the size of the business.¹¹ The basis for this recommendation was to help contain costs as the City continued to grow. The Manager noted that "[m]ost commercial businesses . . . have already turned to private trash haulers for additional or exclusive service. The remaining businesses account for 2 percent of the Refuse Collection Division's total tonnage. On a daily basis, this translates to approximately the tonnage collected by two crews and represents, in our view, a subsidy of commercial activity."¹²

The tape recordings of the July 28 and 29, 1986, Council hearings on this matter reflect only three speakers, all of whom claimed to be from the small business association or small business owners, and who opposed the elimination of small business refuse collection. Unfortunately, the discussion did not include any mention of what constituted a small business or exactly which small businesses were receiving City collection service. Moreover, it is not evident from the tapes that the Council had any clear understanding of which businesses received the service and which of those were considered small businesses. What is clear is that the Council did not intend to change the status quo with respect to those small businesses who were then receiving City collection services.¹³

At the conclusion of the hearing, the Council voted to prohibit the collection of business refuse by City forces, except for a limited amount of refuse generated by small businesses. Specifically, the Council voted to revise the Manager's proposed amendment to add (1) the current definition of "small business enterprise" and (2) the current provisions for Council-authorized City collection of nonresidential refuse generated from a small business enterprise in an amount no greater than 150 percent of the amount of refuse generated by the average City residential dwelling unit.¹⁴

The 1986 Council discussions also suggest that the Council had taken affirmative action after the 1981 amendment to the People's Ordinance to authorize small business refuse collection; however, the 1981 amendment did not require such authorization and no record of it has been found. In any event, Council authorization to collect small business refuse is apparent from the July 29, 1986 Council hearing.

The proposed amendment approved by the Council in July 1986 became Proposition C on the ballot for the November 4, 1986 election. The argument in favor of Proposition C stated:

¹¹ City Manager's Report No. 86-293 (June 13, 1986) at 2 and attached draft ordinance at 2.

¹² *Id.*

¹³ Tape recordings of City Council hearings of July 28 & 29, 1986.

¹⁴ Tape recording of City Council hearing of July 29, 1986; July 30, 1986 memo to Mayor & Council from City Attorney; July 30, 1986 memo from City Clerk to City Attorney.

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.

The 1986 City Manager's Report explained that: "Another benefit of revising the ordinance is that rules and regulations involving the day to day collection and disposal methods could be adjusted by the City Manager. This would enable the Manager to adjust to modern technology and/or emergencies as they evolve."¹⁶ The ballot materials also explained that the amendment would allow the City Manager to establish rules and regulations for the efficient operation of the refuse collection system.¹⁷ This change was a significant departure from the 1981 version which reserved to the Council the authority to establish such rules and regulations.¹⁸ The ordinance granting that authority to the City Manager is codified at section 66.0124 of the Code. It provides in part: "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 the power to promulgate rules and regulations regulating such collection and subsequent transportation and disposal, including but not limited to . . . (b) Service standards" Based on this language, it is reasonable to conclude that the City Council intended to delegate to the City Manager the discretion to define what constitutes a "small" business eligible to receive free City services.

Delegation of Authority

That conclusion is consistent with the statement, made in both the Manager's Report and the Ballot Argument described above, that one goal of the 1986 amendment was to give the Manager greater discretion in regulating refuse collection. Moreover, support for this position is found in another aspect of the People's Ordinance, specifically the requirement that in order to be eligible to receive City refuse collection services residential customers must place their refuse in an "approved" container. Like the word "small," the word "approved" is not defined in the People's Ordinance or elsewhere in that Chapter. Instead, what constitutes an "approved" container historically has been defined by the Manager. Similarly, defining what constitutes a "small" business eligible for free refuse collection services is also within that realm of discretion.

This delegation of discretion is not inappropriate. While it is a well-established rule that legislative power is nondelegable, there are equally well-established limits to the scope of that rule. *Kugler v. Yocum*, 69 Cal. 2d 371, 375 (1968). Legislative power may be delegated as long as the legislative body resolves the fundamental policy issue and ensures safeguards are in place to avoid an abuse of the delegated responsibility. *Id.* at 376-377; *Wilkinson v. Madera Community Hospital*, 144 Cal. App. 3d 436, 442 (1983).¹⁹ Those safeguards usually take the form of a sufficiently articulated purpose or policy which provides some standard which the

¹⁶ City Manager's Report No. 86-293 (June 13, 1986) at 3 and attached draft ordinance at 2.

¹⁷ See Sample Ballot for November 4, 1986 General Election, Proposition C.

¹⁸ 1981 version of People's Ordinance, SDMC § 66.0123, Section 14.

¹⁹ In reviewing the legality of a regulation adopted pursuant to a delegation of legislative authority, judicial review is limited to determining whether (1) the regulation is within the scope of authority conferred; and (2) the regulation is reasonably necessary to achieve the purpose of the statute. *Yamaha Corp. of America*, 19 Cal. 4th at 11.

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.

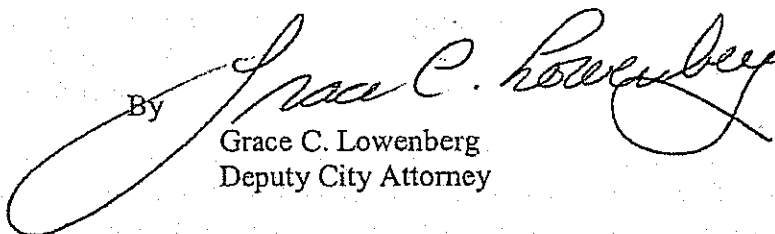
CONCLUSION

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 collection services under the People's Ordinance. The exercise of that discretion must be guided by the purposes of the 1986 amendment to the Ordinance, the basis for the small business exemption, the limitation on volume which may be collected from any single small business enterprise, the context within which the 1986 amendment was proposed and approved, and the general rules prohibiting arbitrary, oppressive, and unreasonable action. To the extent such criteria do not exist in written form or in a single document, it would be advisable to issue a waste management regulation which incorporates all the criteria into a single document.

Finally, in evaluating re-engineering options, it is important to keep in mind that providing refuse collection services to small businesses is discretionary with the City Council. The Council may, by ordinance, eliminate City refuse collection to small businesses altogether.

MICHAEL J. AGUIRRE, City Attorney

By

A large, stylized handwritten signature in black ink, appearing to read "Grace C. Lowenberg". The signature is written over the printed name and title of the Deputy City Attorney.

Grace C. Lowenberg
Deputy City Attorney

GCL:mb
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