

GRACE C. LOWENBERG
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

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 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

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.)

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.*

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.⁰⁹

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)

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

⁷ *Id.*

⁸ *Id.* at 1-2.

⁰⁹ 1981 Ballot argument in favor of Proposition F amending People's Ordinance to provide for limited commercial/industrial refuse collection, among other things.

(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.⁰⁰

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.⁰¹ The basis for this recommendation was to help contain costs as the City continued to grow. The Manager

⁰⁰ See 1985 City Att’y MOL 75 .

⁰¹ City Manager's Report No. 86-293 (June 13, 1986) at 2 and attached draft ordinance at 2.

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.”⁰²

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.⁰³

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.⁰⁴

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:

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.

⁰² *Id.*

⁰³ Tape recordings of City Council hearings of July 28 & 29, 1986.

⁰⁴ 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 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.⁰⁵ 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.

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.”⁰⁶ 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.⁰⁷ This change was a significant departure from the 1981 version which reserved to the Council the authority to establish such rules and regulations.⁰⁸ 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

⁰⁷See Sample Ballot for November 4, 1986 General Election, Proposition C.

⁰⁸1981 version of People’s Ordinance, SDMC § 66.0123, Section 14.

¹⁹In 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 444.¹⁰

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.¹¹ 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.

¹⁰ For additional discussion of the legislative delegation issue, see 1998 City Att’y MOL 0337.

¹¹ 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

Grace C. Lowenberg
Deputy City Attorney

GCL:mb
ML-2006-13