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MEMORANDUM OF LAW

DATE: August 31, 2006

TO: Elmer L. Heap, Jr., Environmental Services Director

FROM: City Attorney

SUBJECT: Use of Private Contractors for Refuse Collection

INTRODUCTION

The Environmental Services Department [ESD] has recently completed its business process re-engineering [BPR] efforts, undertaken at the request of the Mayor's Office, to review its services and operations for more efficient and cost-effective ways to provide essential public services. In connection with Mayor Sanders' efforts to streamline City government and to more cost-effectively use taxpayer dollars, a ballot measure will be placed on the November 2006 ballot which would allow the City to go out to bid for the performance by private contractors of certain public services currently performed by City employees. One public service under consideration for this managed competition program is the refuse collection service. This service is governed by the People's Ordinance of 1919 [People's Ordinance].

QUESTION PRESENTED

Whether the People's Ordinance requires City employees to collect residential and small business refuse generated within the City, thereby precluding the City from hiring private contractors to perform those refuse collection services?

SHORT ANSWER

No. The People's Ordinance does not preclude the City from engaging a private contractor to provide refuse collection services to City residential and small business customers.

ANALYSIS

Background

The People's Ordinance governs the collection, transportation, and disposal of Residential and Nonresidental Refuse generated in the City of San Diego. SDMC § 66.0127. It was first adopted in 1919, as a result of City residents' continued dissatisfaction with the private refuse haulers licensed by the City to collect City refuse. Citizens complained the private service was too costly, unreliable, and encouraged illegal dumping.[1] In addition, citizens were frustrated that the private garbage collector not only charged citizens to collect garbage, but also made money from selling the garbage to hog farmers for feed.[2] Based on the historical records, the main purpose of the People's Ordinance was to shift responsibility for managing and paying for garbage collection from the residents to City government, with the cost of service to be underwritten by a tax to be levied upon the citizenry and revenues from the City's sale of garbage to hog farmers for feed.[3] Accordingly, the 1919 version of the People's Ordinance placed the responsibility on the City's Manager of Operations to collect and dispose of all City refuse and required the Council to levy a sufficient tax to pay for collection and disposal. Individual customers were no longer responsible for directly paying for refuse collection.[4]

The People's Ordinance has twice been amended, once in 1981 and again in 1986. The 1981 amendment added section 14 to the text, but did not otherwise modify any other section of the

ordinance.[5] The 1986 amendment effected a complete overhaul of the language of the ordinance. The 1986 amendment constitutes the current version, is codified in the Municipal Code at section 66.0127, and provides in pertinent part:

> (b) No person shall collect, transport or dispose of any refuse except as provided herein.
>
> (c) The City Council shall by ordinance regulate and control the collection, transportation and disposal of all refuse provided that:
>
> (1) Residential Refuse shall be collected, transported and disposed of by the City at least once each week and there shall be no City fee imposed or charged for this service by City Forces;
>
> (2) 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. There shall be no City fee imposed or charged for this service by City Forces.
>
> (3) 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 as of the date of adoption of this ordinance.

The 1986 amendment was the first to introduce the phrase "City Forces." The use of that term in subsections (c)(1) and (c)(2) above, the particular phrasing of those two subsections, and some lingering impressions among staff that the People's Ordinance was intended to require City employees to perform the collection services, have prompted the request for an interpretation of these provisions.

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[5] The 1981 amendment added section 14 to the People's Ordinance. It did not modify sections 1-13. The purposes of the 1981 amendment primarily were to reaffirm free residential refuse collection, limit the amount of weekly commercial refuse the City was obligated to collect for free, and establish fees for commercial and industrial waste disposal at City landfills. (City Manager's Report No. 81-284 at 1-3). 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. (1981 Ballot argument in favor of Proposition F amending People's Ordinance to provide for limited commercial/industrial refuse collection, among other things.) For additional discussion of the 1981 and 1986 amendments see City Att'y MOL No. 2006-13 (July 19, 2006). This amendment did not address the manner or method of collection.

Rules of Statutory Interpretation

Statutory interpretation involves the application of various rules. *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 examining 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).

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 and the context within which the measure was enacted. *Halbert's Lumber, Inc.,* 6 Cal. App. 4th at 1239; *People v. Birkett*, 21 Cal. 4th 226, 232 (1999); *American Tobacco Co. v. Superior Court*, 208 Cal. App. 3d 480, 486 (1989), superseded by statute, Willie L. Brown, Jr.– Bill Lockyer Civil Liability Reform Act of 1987, Cal. Civil Code section 1714.45, as recognized in *Myers v. Philip Morris Companies, Inc.,* 28 Cal. 4th 828 (2002). That review includes analyses and arguments contained in voter materials. *Birkett*, 21 Cal. 4th at 243. It may also include evidence such as legislative memos, contemporaneous news accounts, comments of groups with contradictory interests, and the like, where other indicia of intent are minimal. *American Tobacco Co.,* 208 Cal. App. 3d at 486-88. 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 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).

If the above 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.

So, we begin by examining the actual language in the current People's Ordinance. The term "City forces" is not defined in the People's Ordinance, nor elsewhere in the Municipal Code, nor in the City Charter. The term "City forces" is found in one section of the City Charter, section 94. That section governs construction of public works, providing for competitive bidding for such works, except public works under a certain amount, which the Manager may accomplish by City forces if the "work can be done by City forces more economically than if let by contract." This phrase implies that "City forces" means City employees as distinguished from a private contractor.

"City forces" is also found in four other sections of the Municipal Code,[6] none of which include a definition of the term, and only one of which clearly uses the term to distinguish City forces from private enterprise.[7] Research has revealed no legislative history on these other four sections which would aid in the interpretation here. However, we note that certain public works projects performed between 2002 - 2004 by City forces, undertaken pursuant to Municipal Code section 22.3105, for improvements to ESD's Miramar Operations Center also involved limited work by independent contractors. These contractors were hired to assist City forces on those portions of the work which City forces were unable to provide. Thus, in practice, the term "City forces" has been broadly applied to include independent contractors working under the direction of City forces.

Several City Attorney opinions published both before and after 1986 also use the term "City forces" to refer to City employees as distinct from an independent contractor.[8] But, none of these authorities actually define the term. Based on the above information, "City forces" appears to be generally synonymous with "City employees," but is not necessarily exclusive of the term independent contractor. Thus, the meaning of the term "City forces" is unclear.

Even if "City forces" was clearly limited to City employees, a broader examination of subsections (c)(1) and (c)(2) does not necessarily lead to the conclusion that the City must employ *only* City forces, to the exclusion of independent contractors, for refuse collection. Moreover, it is reasonable to conclude that if the drafters intended that consequence, it would have been a simple matter to say so. Yet, there are no mandatory words used in connection with the term "City forces" such as "must" or "shall" or "only." Thus, in addition to the uncertain

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[6] SDMC §§ 22.3105(a)-(b); 22.3212(f); 26.06(c)(4); and 63.25.30.

[7] SDMC § 26.06(c)(4).

[8] 1967 City Att'y MOL 225; 1953 City Att'y MOL 394; 1946 City Att'y MOL 118; 1997 City Att'y MOL 296; June 25, 1993 Report to Committee on Public Services and Safety by the City Attorney's Office re Special Assessments for Security Services; June 20, 1991 Report to Mayor & Council by the City Attorney's Office re Potential Conflict of Interest Arising from Management Audit of SDDPC.

meaning of the term "City forces," the entirety of those two sections is unclear as regards the issue in question.

Legislative Intent and Purpose

So, we turn to the purpose of the People's Ordinance, the purpose of the 1986 amendment, and the available legislative history, both written and oral. Beginning with the 1919 People's Ordinance, we recall that its purpose was to make garbage collection a municipal function, i.e., to make the City responsible for actively managing and paying for the collection and disposal of municipal refuse, and to pay for it by levying a tax[09] and selling certain components of the refuse to hog farmers for feed.

Subsequently, in 1931, a new City Charter was adopted. Three provisions of the Charter are pertinent to the analysis here. First, Charter section 213, as originally enacted, provided that all ordinances in force at the time would continue in force unless amended or repealed. Section 213 was amended in 1941 to provide that: "All ordinances not inconsistent with any of the provisions of this Charter shall continue in force until amended or repealed . . . ." Second, Charter section 46 authorized the City Manager to appoint a Director of Public Works to oversee, among other municipal functions, the Division of Refuse Collection and Disposal. Third, Charter section 49 provided that the Division of Refuse Collection and Disposal shall consist of a superintendent who shall be responsible for collection and disposal of garbage "and for the supervision and administration of *all contracts let by the City for such collection and disposal."* San Diego City Charter former § 49 (emphasis added). According to a City Attorney Opinion written in 1953, San Diego Superior Court Judge Turrentine issued an opinion in 1937, in a case entitled *San Diego Hog Producers Assn. v. City of San Diego*, which concluded that the 1931 Charter did not repeal or modify the People's Ordinance, except to change the names of officials charged with enforcing it. The opinion further concluded that the People's Ordinance was not inconsistent with the Charter.[00] Thus, if we are to interpret the 1919 People's Ordinance in harmony with former Charter section 49, it is evident that the People's Ordinance did not preclude the City from contracting with a private party for refuse collection services.[01]

[09] The City has never specifically identified and levied the tax provided for under the People's Ordinance. Rather, residential refuse collection and disposal services have always been funded through the General Fund. (City Manager's Report No. 81-284 at 2; 1985 City Att'y MOL 73)

[00] 1953 Op. City Att'y 87; see also 1953 Op. City Att'y 420.

[01] Also see *Annual Report of the Public Works Department for Fiscal Year 1933-1934* at 16, wherein the Division of Refuse Collection and Disposal reported that bids had been received for the performance of refuse collection services under private contract. However, none of the bids had succeeded in coming within the presents costs of providing the service by City employees.

In 1986, the City Manager proposed additional revisions to the People's Ordinance. The amendment was intended as a complete overhaul of the ordinance. The purpose was six-fold: (1) to eliminate antiquated language and outdated requirements; (2) to limit the City's collection obligations; (3) to limit the City's exposure to liability by prohibiting entry onto private streets/alleys to collect refuse, except under limited circumstances; (4) to regulate nonresidential refuse disposal fees; (5) to authorize the Manager to establish regulations for refuse services;

and (6) to reflect current City collection standards, which equated to free curbside pick-up on public streets only.[02]

The initial version of the amendment submitted to Council did not contain the phrase "City forces" and said simply that "(i) Residential Refuse shall be collected . . . by the City at least once each week . . . . (iii) There shall be no City fee charged for the collection . . . of Residential Refuse. . . ."[03] No other draft of the 1986 amendment, aside from the final version, was found in the City Clerk's files or in the voluminous historical records reviewed by the author.

The "analysis" in the voter pamphlet simply paraphrased the wording in the amendment and did not include any true analysis of the measure. The pamphlet included no argument against the proposition, and the argument in favor focused on the fact that residential collection would continue to be free. There was no discussion regarding whether City employees and/or independent contractors would provide the service.[04]

None of the historical records reviewed, official or unofficial, even raise the issue here, i.e., the exclusive use of City employees to collect residential and small business refuse. It was not a stated objective in the City Manager's Report, nor in the hearings before the City Council, nor in the voter materials.[05] Thus, there is no indication in the historical records that the legislative intent of the 1986 amendment to the People's Ordinance was to preclude the City from hiring independent contractors to perform refuse collection services for City residential and small business customers.

Other Aids to Interpretation

Oral Legislative History

Other extrinsic evidence supports this conclusion. The author had the opportunity to separately interview the architects of the 1986 amendment, former Deputy City Manager Coleman Conrad and former Deputy City Attorney Rudolf Hradecky. Both indicated that they had no intent at the time to restrict the meaning of City forces to City employees exclusively,

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[02] City Manager's Report No. 86-293 at 1-3; November 4, 1986 General Election Voter Information Pamphlet by San Diego County Registrar of Voters, Proposition C.

[03] See Memo from Deputy City Manager Coleman Conrad to Deputy Mayor and City Council (June 13, 1986) (on file with the City Clerk).

[04] November 4, 1986 General Election Voter Information Pamphlet by San Diego County Registrar of Voters, Proposition C.

[05] City Manager's Report No. 86-293 at 1-3; November 4, 1986 General Election Voter Information Pamphlet by San Diego County Registrar of Voters; Tape recordings of City Council hearings of July 28-29, 1986.

nor to preclude the City from outsourcing City collection services. Both stated that a primary goal was to limit, as much as possible, the City's collection responsibilities to existing service levels and standards, in particular because the increasing demands for service, particularly due to the proliferation of gated communities and planned residential developments, were severely straining the General Fund.[06] Moreover, these newer communities contained private streets which were not constructed to City standards, a factor which increased the City's exposure to liability.[07] At the time, the City essentially collected residential and small business trash brought to the curb of a public street in trash containers.[08] By contrast, private trash haulers were collecting residential refuse generated by condominium complexes, apartment buildings, gated communities, etc., where trash was set out for collection in dumpsters rather than trash containers.[19] So, City Forces was meant to refer to those services currently being provided under the City's direction and control.

The author also interviewed Mr. Richard Hays, then Deputy Director of the Refuse Collection Division, who also was involved in the discussions regarding the1986 amendment. In contrast to the recollections expressed above, he stated the intent of the 1986 amendment was that City employees, not outside contractors, would continue collecting residential refuse under existing City standards, but that residential refuse from planned residential developments and gated communities would be collected by private haulers.[10]

Administrative Interpretation

In addition, ESD staff reports that the City has hired private contractors to collect refuse from residential customers in at least two instances. One instance involves an existing contract for collection services for a few homes, located in an isolated area of the City, which are too costly to service with City crews. The other is a prior contract with Waste Management of San Diego for the collection of residential recyclables at approximately 40,000 homes from 1991-1999.[11] These actions suggest that the Department charged with administering refuse collection services under the People's Ordinance did not believe the use of independent contractors was forbidden.

Taking all of the above information into account, the weight of the evidence tilts in favor

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[06] Interview with former Deputy City Attorney Rudolf Hradecky on July 26, 2006; Interview with former Deputy City Manager Coleman Conrad on July 27, 2006.

[07] City Manager's Report No. 86-293 at 2.

[08] Interview with former Deputy City Manager Coleman Conrad on July 27, 2006; City Manager's Report No. 86-293 at 2.

[19] Interview with former Deputy City Manager Coleman Conrad on July 27, 2006; City Manager's Report No. 81-284 at 2.

[10] Interview with former ESD Director Richard Hays on July 27, 2006.

[11] See Agreement between the City of San Diego and Waste Management of San Diego document No. RR-276355 and amendments thereto; City Manager's Report No. 90-278.

of the conclusion that the term "City forces" simply refers to those curbside refuse collection services being provided by the City, regardless of whether they are performed by City employees or City contractors or a combination of both. That term and the context within which it is used in the People's Ordinance do not limit collection services to City employees only. This conclusion is consistent with the object which the People's Ordinance originally sought to achieve, i.e., to make the City responsible for municipal refuse collection and disposal to be funded by way of a tax and/or sales of garbage for feed. It is also consistent with the "evil" the ordinance sought to prevent, i.e., continued expensive and unreliable private collection services acquired and paid for on an individual basis where the homeowner had little to no control over the price charged or the quality of service. Based on the available legislative history, voter materials, and other information, it was not an objective of the 1986 amendment to limit performance of City refuse collection services to City employees only. This conclusion is also consistent with sound public policy in that it provides the City with the flexibility to most efficiently and cost-effectively provide this important public service.

CONCLUSION

The People's Ordinance does not preclude the City from hiring private contractors to provide refuse collection services to residential and small business customers. Thus, it is not necessary to seek an amendment to the People's Ordinance in order to pursue managed competition of refuse collection services.

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