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**MEMORANDUM OF LAW**

**DATE:** July 16, 2010

**TO:** Honorable Mayor and City Council

**FROM:** City Attorney

**SUBJECT:** Charter sections 26 and 26.1 and the People's Ordinance

**INTRODUCTION**

The City of San Diego (City) provides refuse, recycling, and yard waste collection and disposal services (collectively "refuse collection services") to some residents under the so-called People's Ordinance adopted by initiative in 1919 and amended by subsequent voter-approved ballot propositions. Under a 1986 amendment, the City is required to provide free refuse collection service to eligible residences, primarily consisting of single family homes. Most condominium and apartment dwellers and businesses pay private haulers for their service.

San Diego's City Charter is the City's equivalent of a local constitution and preempts conflicting ordinances. Charter section 26.1 broadly delegates to the City Council the exclusive authority to provide public services under terms and conditions determined by the City Council by ordinance. Charter section 26 conveys broad authority to the City Council to abolish city departments or divisions by a two-thirds vote. Construed together, these Charter sections would provide preemptive authority of the City Council over the People's Ordinance.

At this office's initiative, this Memorandum of Law addresses the process by which the City may discontinue refuse collection services and the City's obligation to fund them, sell the operation as a going concern and leave refuse collection to the private sector.

**QUESTIONS PRESENTED**

1. Notwithstanding the People's Ordinance, can the City Council under Charter sections 26 and 26.1 discontinue refuse collection services and the City's obligation to fund them, sell the operation as a going concern and leave refuse collection to the private sector?

2. If not, how can such authority be vested in the City Council under Charter Sections 26 and 26.1?

### **SHORT ANSWERS**

1. There is a conflict between the People's Ordinance and Charter sections 26 and 26.1 that cannot be harmonized. Any such conflict should be resolved with voter approval.

2. A City Charter amendment could be drafted that clarifies Charter sections 26 and 26.1. It would permit, but not require, the City to discontinue refuse collection services and the City's obligation to fund them, sell the operation as a going concern and leave refuse collection to the private sector under governing state law. Voter approval would be needed.

### **ANALYSIS**

#### **I. THE PEOPLE'S ORDINANCE.**

The People's Ordinance governs the collection, transportation, and disposal of Residential and Nonresidential 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.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> Accordingly, the 1919 version of the People's Ordinance required the Council to levy a sufficient tax to pay for collection and disposal. Individual customers were no longer responsible for contracting with private haulers and directly paying for refuse collection.<sup>4</sup>

Historical records indicate the City never imposed the tax. Rather, the services were paid for with general fund revenues and, up until the early 1960s, from revenues generated from the sale of certain refuse to hog farmers for feed.<sup>5</sup>

The People's Ordinance was twice amended by majority vote of the electorate, once in 1981 and again in 1986. Both amendments were sponsored by City government, meaning they were placed on the ballot not as a result of a citizens' petition, but on the recommendation of the Mayor's Office. The primary purpose, amongst others, of both amendments was to reduce the

City's responsibility for collecting refuse,<sup>6</sup> but the amendments deleted the 1919 provision that required the City Council to impose a trash tax.

As a result of the 1981 and 1986 amendments, only single family homes, some multi-family homes, and some businesses now receive free refuse collection services. Most condominium and apartment dwellers pay private haulers for their service.

The People's Ordinance provides no limit on the number of homes the City must service, nor the amount of refuse it is obligated to collect from each home. Thus, as the City's population grew, so did the service level. In fiscal year 1985, the City collected 289,000 tons of residential refuse. That tonnage equated to about 264,000 residences.<sup>7</sup> Currently, the City services about 304,000 residential customers and, for fiscal year 2009, collected about 340,000 tons of refuse, 76,000 tons of recyclables, and 31,000 tons of greenery.<sup>8</sup>

The FY2010 budget for trash (black bin) collection services is about \$34,000,000. The budget for curbside collection of household recyclables (blue bin) and greenery (green bin) is about \$16,000,000.<sup>9</sup> Trash collection is, and traditionally has been, funded from the General Fund. Household recyclables and greenery collection are funded from the Recycling Enterprise Fund.

Popular belief holds that refuse collection services are paid for through property taxes, which are deposited to the General Fund. There is no separate property tax for refuse collection services. Like other cities, San Diego shares property taxes with the state, county, schools and other public agencies. Out of every \$1.00 in property taxes paid by residents and businesses in the City of San Diego, the City receives 17 cents.<sup>10</sup> A review of City budgets for the last seven fiscal years shows that for each year, the City's property tax revenues was not sufficient to cover the police department budget.<sup>11</sup>

Of the estimated 510,000 housing units in the City,<sup>12</sup> only 304,000 residential units (i.e. 60%) are eligible for City refuse collection services. The other 40 percent of residents pay for private refuse collection services and also pay for the free refuse collection service received by the other 60 percent through taxes, franchise fees, and AB 939 fees. A recent survey showed that of all cities in California with populations over 7,000, only three – San Diego, Newport Beach, and El Monte – did not charge for collection services.<sup>13</sup>

<sup>6</sup> City Manager's Report No. 81-284 (July 1, 1981) at 2; City Manager's Report No. 86-293 (June 13, 1986) at 2 and attached draft ordinance at 2.

<sup>7</sup> Turner, Matt. Collection Services Division. City of San Diego Environmental Services Dept. 21 Feb. 2007. E-mail to author.

<sup>8</sup> Valerio, Mary. Collection Services Deputy Director. City of San Diego Environmental Services Dept. 5 Jan. 2009. Email to author.

<sup>9</sup> City of San Diego Fiscal Year 2010 Annual Budget pp. 550, 552. These figures are lower than comparable figures for the last few fiscal years because of the downturn in the economy.

<sup>10</sup> City of San Diego Fiscal Year 2007 Annual Budget p. 27; CMR No. 08-060 April 17, 2008.

<sup>11</sup> City of San Diego Fiscal Year Annual Budgets FY 2003 – FY 2010

<sup>12</sup> SANDAG, Fast Facts San Diego. Visited January 28, 2010. <[http://](http://www.sandag.org/resources/demographics_and_other_data/demographics/fastfacts/sand.htm)

[www.sandag.org/resources/demographics\\_and\\_other\\_data/demographics/fastfacts/sand.htm](http://www.sandag.org/resources/demographics_and_other_data/demographics/fastfacts/sand.htm)>

## II. SAN DIEGO CHARTER SECTIONS 26 AND 26.1.

A city charter is to a city what the state constitution is to the state. Thus, “a charter bears the same relationship to ordinances that the state Constitution does to statutes . . . . While a city charter may be amended by a majority vote of the electorate (Cal. Const., art. XI, § 3), an ordinance cannot alter or limit the provisions of a city charter.” *Citizens for Responsible Behavior v. Superior Court (Riverside City Council)*, 1 Cal. App. 4th 1013, 1034 (1991) (citations omitted).

In interpreting a charter, the California Supreme Court has stated:

[W]e construe the charter in the same manner as we would a statute. (citations omitted). Our sole objective is to ascertain and effectuate legislative intent. We look first to the language of the charter, giving effect to its plain meaning. (citations omitted). Where the words of the charter are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the charter or from its legislative history.

*Domar Electric, Inc., v. City of Los Angeles*, 9 Cal 4th 161, 171-172 (1994). It is well-established 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). 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 v. Holcomb*, 114 Cal. App. 939, 942 (1981). With these principles in mind, we turn to the Charter.

Charter section 26.1 broadly delegates to the City Council the exclusive authority to provide public services under terms and conditions determined by the Council by ordinance. Charter § 26.1. Section 26.1 provides:

*It shall be the obligation and responsibility of The City of San Diego to provide public works services, water services, building inspection services, public health services, park and recreation services, library services, and such other services and programs as may be desired, under such terms and conditions as may be authorized by the Council by ordinance.*

Charter § 26.1 (emphasis added).

Refuse collection and disposal services traditionally have been characterized as public works services.<sup>04</sup> The purpose of section 26.1 was to place the administration of public services, including refuse collection and disposal, under the immediate authority of the City Council (rather than the Charter) in order to improve flexibility, efficiency, and economy in providing City services.<sup>05</sup>

Charter section 26 conveys broad authority to the City Council to abolish city departments or divisions by a two-thirds vote:

The existing Departments, Divisions . . . of the City Government are hereby continued unless changed by the provisions of this Charter or by ordinance of the Council. The Council shall by ordinance, by majority vote, adopt an administrative code providing for the detailed powers and duties of the . . . departments of the City Government, based upon the provisions of this Charter. *Thereafter, except as established by the provisions of this Charter, the Council may change, abolish, combine, and rearrange the departments, divisions . . . of the City Government provided for in said administrative code, but such ordinance creating, combining, abolishing or decreasing the powers of any department, division . . . shall require a vote of two-thirds of the members elected to the Council . . . .*

Charter § 26 (emphasis added).

We find no ambiguity in sections 26 or 26.1. The City Council has discretion to determine the terms and conditions of services provided by the City and to reduce or even abolish the duties and responsibilities of any City department or division, except as those are established by the Charter.<sup>06</sup> Accordingly, the Council may not by ordinance create a department which duplicates or infringes on the duties and responsibilities assigned by the Charter to another

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<sup>04</sup> See, e.g., former Charter section 46 which placed refuse collection and disposal under the Department of Public Works. Section 46 was repealed and folded into the existing Charter section 26.1 in the 1963 charter amendment adding section 26.1. To this day, refuse collection and disposal remains within Public Works. See City of San Diego Official website. Visited Feb. 3, 2010. <<http://www.sandiego.gov/directories/departments.shtml>>

<sup>05</sup> See “Argument For Proposition R” in ballot materials for the election of September 17, 1963; 1992 City Att’y ML 92-67 (8/10/92). The 1931 Charter established the Division of Refuse Collection and Disposal to oversee the collection and disposal of garbage. San Diego City Charter former § 49. In 1953, the Charter was amended to repeal various charter provisions establishing the City’s organizational structure and to empower the City Manager to determine that structure, including section 49. (See Ballot materials for Proposition B passed at the election of April 21, 1953). All of those former provisions were consolidated into new Charter Section 46 which created a Department of Public Works to oversee streets, sewers, refuse collection and disposal, public works, etc. San Diego City Charter former § 46. That trend continued when, in 1963, the Charter was again amended to repeal remaining sections dealing with certain public services such as water and public health services, to repeal section 46, and to add what is now Charter section 26.1. However, it’s important to note that the argument in favor expressly states that the proposition does not intend “in any way to eliminate present city departments or present city services.”

<sup>06</sup> See City Att’y Report to Council RC 97-18 (Aug. 27, 1997) .

department or to the City Manager (Mayor). *Hubbard v. City of San Diego*, 55 Cal. App. 3d 380, 388 (1976)(interpreting San Diego City Charter section 26). Such an act would require an amendment to the Charter. *Id.* at 392.

It appears that the provisions of Charter sections 26 and 26.1 are at odds with the People's Ordinance.

### **III. A CHARTER AMENDMENT MAY BE ADOPTED TO CLARIFY CHARTER SECTIONS 26 AND 26.1.**

The 1919 People's Ordinance and all amendments were adopted by the voters. Unless it provides otherwise, a legislative act adopted by City voters may only be amended or repealed by the voters or by Charter amendment. SDMC § 27.1049. Thus, in a 2005 opinion consistent with the City's historical interpretation of the People's Ordinance, this Office concluded that an amendment to, or repeal of, the People's Ordinance would require a majority vote of the electorate.<sup>07</sup>

In a case decided subsequent to our opinion, the California Supreme Court found that voters and a legislative body may share powers where they would otherwise conflict. In *Bighorn-Desert View Water Agency v. Verjil*, 39 Cal. 4th 205 (2006), the Court reviewed a proposed voter initiative which would both reduce water rates and require a water agency's board of directors to obtain voter approval before adopting future increased or new fees for water delivery. *Bighorn*, 39 Cal. 4th at 217-18. The initiative appeared inconsistent with state statutes which vested the authority to set water rates in the water agency board and required the board to set rates in amounts sufficient to cover the costs of service. *Id.* at 210.

The Court concluded that: "by exercising the initiative power voters may decrease a public water agency's fees and charges for water service, *but the agency's governing board may then raise other fees or impose new fees without prior voter approval.*" *Id.* at 220 (emphasis added). The Court reasoned:

Although this power-sharing arrangement has the potential for conflict, we must presume that both sides will act reasonably and in good faith, and that the political process will eventually lead to compromises that are mutually acceptable and both financially and legally sound. (See *DeVita v. County of Napa, supra*, 9 Cal. 4th at pp. 792-793 . . . ["We should not presume . . . that the electorate will fail to do the legally proper thing."].) We presume local voters will give appropriate consideration and deference to a governing board's judgments about the rate structure needed to ensure a public water agency's fiscal solvency, and we assume the board, whose members are elected [citations omitted] will give appropriate consideration and deference to the voters expressed wishes for affordable water service. The notice and hearing requirements of subdivision (a) of section 6 of California

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<sup>07</sup> San Diego City Attorney RC-2005-13 (2005).

Constitution article XIII D will facilitate communications between a public water agency's board and its customers, and the substantive restrictions on property-related charges in subdivision (b) of the same section should allay customers' concerns that the agency's water delivery charges are excessive.

*Id.* at 220-221.

In other words, the Court recognized that both the voters and the governing body had authority to adjust fees and that the authority of the one did not usurp the authority of the other, but rather the powers of each must be harmonized to give effect to both. To require voter approval of all future fee increases or new fees imposed by the water agency board would impermissibly abrogate the authority delegated to the board to establish fees. Hence, the Court concluded the voter approval requirement was invalid. *Id.* at 219.

An analogous situation exists here. Reading section 26 together with section 26.1, which authorizes the Council to determine the circumstances under which refuse collection services will be provided, and applying the analysis in *Bighorn*, it is arguable that the Council may, by ordinance adopted by a two-thirds vote, eliminate City-provided refuse collection services altogether and rely on the private sector to provide those services under a City franchise.<sup>08</sup>

However, two factors argue against that conclusion. First, Section 26.1 expressly requires the Council to provide public works services, which traditionally have included refuse collection services.<sup>19</sup> Second, the ballot argument in favor of section 26.1 states that it is not intended to eliminate present City departments or present City services.

Conversely, it is important to recognize that section 26.1 does not require any given level of service, but rather leaves that determination to the Council's discretion. Conceivably, the Council could determine that refuse collection services will be limited to the management of one or more franchise agreements granted to one or more private solid waste collection haulers who perform the actual collection and disposal services.

Also, the People's Ordinance in existence when section 26.1 was first enacted in 1963 was considerably different from its 1981 and 1986 versions. In 1963, the People's Ordinance required the imposition of a tax to support refuse collection services. Plus, those services were

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<sup>08</sup> SDMC § 66.0108 requires a franchise to collect solid waste within the City; Title 14 CCR § 17331 requires a property owner or tenant to arrange for the weekly removal of solid waste.

<sup>19</sup> City Att'y ML 2000-15 (Aug. 1, 1997); *see also* former Charter section 46 which placed refuse collection and disposal under the Department of Public Works. Section 46 was repealed and folded into the existing Charter section 26.1 in the 1963 charter amendment adding section 26.1. To this day, refuse collection and disposal remains within Public Works. See City of San Diego Official website. Visited Feb. 12, 2010. <<http://www.sandiego.gov/fm/annual/fy10vol.2.shtml>>.

funded in part with revenues from the sale of garbage to hog farmers for feed, a practice which ceased in the 1960s.<sup>10</sup> Further, the City's population was significantly lower in 1963 than it is today.<sup>11</sup> So, "present City services" as they existed in 1963 were not only much more limited than they are today, but also were provided via a dedicated funding source.

We have found no case since *Bighorn* applying, or further elaborating on, the line of reasoning discussed herein. The language in *Bighorn* may be open to interpretation and that is a question of law that has not been decided by any court. Given the foregoing, if policymakers choose to pursue this matter, the safer legal route would be to place a Charter amendment on the ballot for voter approval which clarifies that Charter section 26 and 26.1 preempt the People's Ordinance.

It should be noted that the Meyer-Milias-Brown Act (MMBA) requires meet and confer with labor organizations prior to a decision to place on the ballot a measure that affects a "term and condition of employment". *People ex.rel. Seal Beach Police Officers Ass'n v. City of Seal Beach*, 36 Cal.3d 591 (1984).

The *Seal Beach* case involved charter amendments that clearly involved terms and conditions of public employment, specifically the immediate firing, subject to the administrative hearing procedure, of any city employee who participated in a strike. The Supreme Court concluded that the city was required to meet and confer before it proposed charter amendments. *Id.* At 602.

The possible amendment discussed below is a clarification of City Charter sections 26 and 26.1 that permits, but does not require, a decision. The obligation to meet and confer at the appropriate time would need to be met in good faith.

#### **IV. A POSSIBLE CITY CHARTER AMENDMENT.**

A City Charter amendment could be drafted that clarifies Charter sections 26 and 26.1 to permit, but not require, the City to: essentially get out of the trash hauling business, sell the operation as a going concern, eliminate the entire refuse collection services division along with the City's obligation to fund those services, and leave trash hauling to the private sector under state laws that govern trash hauling.

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<sup>10</sup>People's Ordinance O-7691 (Apr. 8, 1919); City of San Diego's Waste Management Department, *Just the Facts: The City of San Diego People's Ordinance of 1919* (Feb. 1992); *Paid Political Advertisement, The Garbage Question, San Diego Evening Tribune*, April 8, 1919, at 2.

<sup>11</sup> In 1919, the City's population was about 74,000. In 1960, it was about 573,000. In 2000, it was over 1,200,000. City of San Diego Citizens Assistance Facts and History. Visited February 4, 2010. <<http://www.sandiego.gov/citizensassistance/facts/history.shtml>>



In other words, voters would approve a Charter amendment providing that Charter sections 26 and 26.1 preempt the People's Ordinance on certain conditions. The conditions could include, for example, that the City completely get out of trash hauling and that some portion of the savings (about \$34 million annually) be set aside annually to reduce taxes or fees and/or increase fire and police budgets, while using the balance of savings and proceeds from the sale of the operations to help reduce the structural deficit.

The effect of this amendment would be to permit- but not require- the City to eliminate the free refuse collection services available to single-family home residents. They would join most condominium and apartment dwellers, as well as all other residents in the County, in contracting with private haulers. The City could mandate that residents be charged no more than the average cost in the County.

If the City Council chose to exercise this option, an entire City division could be eliminated under Charter sections 26 and 26.1.

### **CONCLUSION**

There is a process by which the City can get out of the trash hauling business, sell the business as a going concern, eliminate the City's obligation to fund refuse collection services, and leave trash hauling to the private sector. If this option is pursued, we would recommend an enabling amendment to the City Charter to clarify that Charter sections 26 and 26.1 preempt the People's Ordinance. However, getting out of the trash hauling business, selling the business and eliminating the services would only occur as long as specified conditions are met. Such an amendment would require voter approval.

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