



# Memorandum

**TO:** HONORABLE MAYOR AND  
CITY COUNCIL

**FROM:** RICHARD DOYLE  
City Attorney

**SUBJECT:** Commercial Solid Waste  
Redesign

**DATE:** March 19, 2009

## SUPPLEMENTAL MEMO

### BACKGROUND

On March 2, 2009, the Transportation and Environmental Committee forwarded the Environmental Services Department's (ESD) recommendations concerning the proposed redesign of the commercial solid waste franchise system to the City Council for discussion. In addition, the Committee requested clarification on whether the City could give preference in the selection process to companies that paid prevailing wage and/or to a local business, and if as a condition for issuance of the franchise, require the successful bidder to comply with labor peace policies. Since the issuance of franchises by the City constitutes the regulation of commercial solid waste services, this memorandum discusses these issues from that context.

The following discussion does not address whether these requirements could be imposed if the City adopted the Recycle Plus residential model and purchased the services. While there is greater freedom to impose wage and labor requirements when the City has a proprietary interest as a market participant, other business and policy consideration such as the loss of franchise fee revenue may also need to be considered.

If the City were to adopt ESD's recommendation to require living wage requirement, our Office must prepare a living wage ordinance to implement the recommendation.

### DISCUSSION

#### **A. Local Business Preference**

The Commerce Clause is not implicated when the City enters the market and purchases the service as it does with the residential Recycle Plus program. In this case, however, regulating in favor of local businesses would trigger rigorous scrutiny by the courts.

The U.S. Supreme Court has held that a local government cannot use its regulatory power to favor local businesses by discriminating against out-of-state businesses or investment in favor of local business or investment unless it can show that it has **no other neutral means to advance a legitimate local interest**. *C&A Carbone Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (*Clarkstown*) The United States Constitution grants Congress the power to regulate commerce with foreign nations and among the several states. By negative implication, States, including local governments, are prohibited from advancing their own interests through regulation by discriminating against the movement of articles of commerce into or out of the state. The courts rigorously scrutinize regulations that discriminate against equal access to the market.

Regulating in favor of local businesses by giving them extra points in the selection process is akin to the ordinance that the U.S. Supreme Court considered and struck down in *Clarkstown*. In *Clarkstown*, the challenged ordinance required all solid waste (whether generated in Clarkstown or outside and brought in) to be sent to a designated local transfer station. The article of commerce was the service of processing and disposing of solid waste. The ordinance regulated interstate commerce because solid waste received from out of state must be sent through the local transfer station at an additional cost, and out of state businesses did not have access to the market of performing the service. Clarkstown's ordinance was still discriminatory even if in-state or in-town processors were covered by the prohibition. Clarkstown's interest in generating revenue or addressing health and safety concerns were not local interests that justified discrimination against interstate commerce. These legitimate local interests could have been advanced by other means such as adopting uniform safety regulations and/or subsidizing the facility through general taxes or municipal bonds.

If all other factors such as cost, facility, and experience are equal, the local business would always be selected because of the preference. As in *Clarkstown*, a preference for local business is contrary to the Commerce Clause purpose of ensuring equal access to the market. Here, both in-state and out-of-state businesses should have equal access to the market of providing commercial solid waste collection and processing services.

#### **B. Preference for Companies that Pay Prevailing Wage**

We have previously advised that under *Chamber of Commerce v. Bragdon*, 64 F.3d 497 (9th Cir. 1995) (*Bragdon*), the City is preempted by the National Labor Relations Act (NLRA) from requiring payment of prevailing wage as a condition of issuing a license to provide exclusive commercial solid waste services. Although giving a preference to companies who pay prevailing wages does not mandate them to do so, companies who wish to be competitive for the lucrative franchise would be pressured to renegotiate their total wage and benefit package under circumstances similar to those in *Bragdon*.

In our response to Teamsters Local 350 inquiry, we summarized the Ninth Circuit court's analysis of the prevailing wage requirement. A prevailing wage is not a fixed statutory or regulatory minimum wage. It is derived from the combined collective bargaining of third parties in the particular geographic area or market and not the result of negotiations between the employer and employees actually involved in the project. A requirement to pay the prevailing wage impacts the bargaining process in a much more "invasive and detailed fashion" than other isolated statutory provisions of general application. The prevailing wage would affect not only the total wages and benefits paid but also the division of the total package that is paid in hourly wages directly to the worker and the amount paid by the employer in health, pension, and welfare benefits for the workers. In *Bragdon*, contractors and their employees would be pressured to renegotiate to increase the hourly wage and reduce the benefit package in order to compete for jobs in Contra Costa. Moreover, if political bodies interfered with the free play of economic forces by imposing particular wage and benefit packages, employees may seek to resolve their disputes through the political process rather than with their employers.

### **C. Labor Peace Requirement**

The City's labor peace provisions have in the past required prospective bidders to state their process for resolving disputes and maintaining labor stability. This process is then incorporated in the agreement. While the City can request this information in the Request for Proposal, the City could not use labor practices as a factor in selecting the franchisee or to intervene in a subsequent dispute by enforcing the provision (e.g. failure to follow the process as a basis to terminate the franchise or take other negative action). *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) (*Golden State*)

In *Golden State*, the U.S. Supreme Court held the NLRA preempted local government agencies from using their power to intercede or attempt to influence the outcome of labor disputes. *Golden State*, a taxi cab company, applied to the City of Los Angeles for renewal of its operating franchise. *Golden State's* labor contract with its drivers expired on the day before the City Council was scheduled to consider the action on the franchise renewals. The drivers struck *Golden State* and Teamster representatives argued against renewal of *Golden State's* franchise at the Council meeting because of the pending labor dispute. The Council postponed decision on *Golden State's* application but approved other taxi franchises. At a subsequent meeting, the Council discussed the strike with the sympathies of several Councilmembers for the union on the record. The City Council then conditioned renewal of the *Golden State* franchise on settlement of the labor dispute by a certain date. When the dispute was not settled by that date, the franchise expired by its own terms.

The U.S. Supreme Court found Los Angeles' actions improperly tried to ensure transportation service to the public by interfering with a lawful strike by the unionized

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employees of a privately owned transit company. The municipal powers to grant franchises cannot be used in a manner which restricts economic weapons of self-help provided under federal law. More importantly, the failure or refusal to award a contract based on whether the contractor is or is not unionized is viewed by a court as unlawful interference with the collective bargaining process. This decision resulted in Los Angeles having to pay approximately \$11 million in damages, and attorney's fees. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) (*Golden State II*)

## CONCLUSION

For the reasons discussed above, as a regulator of commercial solid waste services, the City may not in the franchisee selection process give preference to local businesses or companies that pay prevailing wage, or base its selection on labor peace considerations. Further, the City may not enforce against successful franchisees that choose to change their labor peace process.

While the City does have the ability to grant local business preference, require prevailing wage, and/or labor peace provisions when it is acting in a proprietary role and for a proprietary purpose, this is not the proposal before Council nor the subject of this memorandum.

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