

## MEMORANDUM

**TO:** David S. Plyman  
**FROM:** Alan Cooper  
**RE:** Dale Stinnett Request for Authority to "Set Containers"  
**DATE:** June 23, 2011

At your request, I have reviewed Dale Stinnett's memo of June 13, 2011, to the Rochelle City Council, requesting permission to "set containers" within the City.

In order to properly respond to Mr. Stinnett's request, it is necessary to analyze the interplay between the "exclusivity" provisions of a long-term contract between the City and Rochelle Waste Disposal Service, Inc., provisions of the Illinois Municipal Code authorizing such contracts, and City Code provisions relating to solid waste disposal and recyclable disposal.

### **City/Rochelle Waste Disposal Service, Inc., Contract**

The City is a party to a contract with Rochelle Disposal Service, Inc., ("RDI") dated April 26, 1995 (the "RDI Agreement"), which provides, among other things, that RDI "shall have the exclusive right to provide the residential landscape waste, residential recyclables and the residential, commercial, industrial, institutional and governmental solid waste collection...within the present and future City limits, during the term of this Agreement...". The term of the RDI Agreement is tied to the remaining solid waste disposal capacity at the Rochelle landfill, but in any event is not less than twenty (20) years or more than thirty (30) years from the date of the Agreement.

With respect to "residential recyclables", the RDI Agreement provides that "the Contractor's exclusive right to provide residential recyclable collection shall mean the exclusive right to perform such services on behalf of the City, or pursuant to the City's recycling programs offered from time to time and shall not preclude residents, businesses, industry or institutions from otherwise collecting, hauling, transferring or disposing of their own recyclables by means other than the use of Contractors services".

### **Illinois Municipal Code**

The authority for the RDI Agreement is found in Section 11-19-1 of the Illinois Municipal Code, which authorizes any city to make a contract with anyone for up to thirty years relating to the collection and disposition of "garbage, refuse and ashes". 65 ILCS 5/11-19-1. The terms "garbage", "refuse" and "ashes" are specifically defined in Section 11-19-2. In general, "garbage" means food waste, "ashes" means residue from fires used for cooking or heating, and "refuse" includes trash of various kinds (combustible and non-combustible), but excludes waste from building operations or solid wastes resulting from industrial processes and manufacturing operations. 65 ILCS 5/11-19-2. No mention is made in that section of "recyclables". However, Section 11-19-5, which authorizes municipalities to limit the methods of disposition of "garbage, refuse

and ashes", provides that "[m]aterial that is intended or collected to be recycled is not garbage, refuse or ashes". 65 ILCS 5/11-19-1.

Recently, in a federal case claiming that municipalities' exclusive contracts for trash disposal violated federal antitrust law, the United States Court of Appeals for the Seventh Circuit interpreted these sections of the Illinois Municipal Code to mean that municipalities' power to enter into exclusive contracts for disposal of "garbage, refuse and ashes" included the power to enter into exclusive contracts for the disposal of recyclables as well. The court reasoned that Section 11-19-1 gave municipalities the right to contract and that "an exclusive contract is merely a subset of the power to contract." *Active Disposal, Inc. v. City of Darien, et al.* 635 F. 3d 883, 886 (7<sup>th</sup> Cir. 2011). The court noted that the list of items included in the definition of "refuse" included items commonly recycled, such as "paper, cartons, boxes, metals, tin cans, metal furniture and glass". *Id.*, at 887-888. The exclusion of recyclables from the definition of "garbage, refuse and ashes" in Section 11-19-5 was held only to be applicable to "methods of disposition" of solid waste, and not a limitation on the power of municipalities to contract. *Id.*, at 886.

While the decision of a federal court interpreting state law is not binding on state courts, the Seventh Circuit's opinion would likely have persuasive force. I have assumed, for purposes of this analysis, that it is correct.

### **Rochelle Municipal Code**

Chapter 78 ("Solid Waste") of the Rochelle Municipal Code provides that the City will have charge of the administration and supervision of contractors for the collection of solid waste and recyclable materials, and that it shall be unlawful for anyone to engage in that business within the City unless authorized by the City Council. RMC §78-7(a). It also provides a recycling program which includes bi-weekly curbside pickup of recyclables, and provides for City-owned recyclable containers. RMC §78-7b(a); §78-12(b).

### **ANALYSIS**

My analysis, based on the provisions of the RDI Agreement, the Illinois Municipal Code, as interpreted by the Seventh Circuit, and the Rochelle City Code, is as follows:

First, the City's power to enter into exclusive contracts for solid waste collection does not extend to "waste from building operations or solid wastes resulting from industrial processes and manufacturing operations." 65 ILCS 5/11-19-2. Accordingly, to the extent the RDI Agreement might be read to provide exclusivity for collection of those types of waste, it would be beyond the City's power and unenforceable. Subject to that exception, however, the City has the power to make an exclusive contract with RDI for solid waste collection.

Second, the City's power to make exclusive contracts extends to "recyclables", and the RDI Agreement, insofar as it provides exclusivity with respect to recyclables, is therefore valid and enforceable.

Third, the RDI Agreement, on its face, provides exclusivity for recyclables only with respect to regular curbside recyclable collection, but does not otherwise prohibit residents, industries, businesses or institutions from using other contractors for collection of recyclables.

## **CONCLUSIONS**

Mr. Stinnett has requested permission to "set containers". It is not entirely clear what he means by this, although he makes it clear that he does not intend "to pick up curbside garbage". I have interpreted his request to include pickup of solid waste and/or recyclables within the City, except for regular curbside garbage pickup.

My analysis of the RDI Agreement and the applicable state statutes and City Code provisions leads me to conclude the following:

(1) the City's power to grant exclusive collection rights to RDI does not extend to the collection of "waste from building operations or solid wastes resulting from industrial processes and manufacturing operations", and the City Council would therefore have the right to give Mr. Stinnett permission to engage in collection of those materials without violating the RDI Agreement;

(2) the RDI Agreement would prohibit the City Council from giving Mr. Stinnett permission to collect solid waste (not including recyclables) within the City, except as set forth in (1) above;

(3) the RDI Agreement would prohibit the City Council from giving Mr. Stinnett permission to engage in curbside pickup of residential recyclables, but would not prohibit the City Council from giving him permission to contract with residents, industries, businesses or institutions for disposition of recyclables in any other manner.

While I believe the foregoing analysis and conclusions are sound, I believe it would be wise to circulate this memo to the attorneys for Mr. Stinnett and RDI, in order to allow them to comment on it before the matter is presented to the City Council.