

MEMORANDUM

TO: David S. Plyman
FROM: Alan H. Cooper
RE: Dale Stinnett Request
DATE: September 28, 2011

In my memorandum of June 23, 2011, I reached certain conclusions regarding the enforceability of the 30-year contract between the City and Rochelle Disposal Services, Inc. ("RDSI"), relating to solid waste and recyclables collection within the City. At the end of that memorandum, I recommended that, while I believed the conclusions in the memorandum were sound, it should be circulated to the attorneys for Mr. Stinnett and RDSI for their review and comment.

Mr. Stinnett's attorney has advised me that he agrees with the analysis in my memorandum. Chuck Cole, the attorney for RDSI, has provided a written response to my June 23 memorandum, taking issue with the conclusions of the memo. He has also provided a supplemental memo dated August 5, 2011, with additional analysis.

With your permission, I have provided copies of my memo and the two memos from Mr. Cole to Adam Simon, my contact at the Ancel Glink law firm, and have discussed the memos and the analyses contained therein with him. This memorandum, which incorporates the comments made to me by Ancel Glink, is intended as a response to Mr. Cole's analysis, and an amendment to the views expressed in my June 23 memo.

DISTINCTION BETWEEN POWER TO REGULATE AND POWER TO ENTER INTO LONG-TERM CONTRACTS

In my June 23 memo, I had concluded that the power to enter into exclusive contracts for solid waste collection was grounded in 65 ILCS 5/11-19-1, and that that statute also defined the limits of the power. Mr. Cole has argued that the City's power to regulate waste collection is not based on that statute, but is grounded in the City's inherent police power to regulate matters related to public health, and that the power to regulate includes the power to enter into exclusive contracts for solid waste collection.

Based on my review of the cases cited by Mr. Cole, and my discussion with Ancel Glink, I have concluded that Mr. Cole is correct on these points—*i.e.*, that the City's power to regulate solid waste collection is found in its inherent police powers and is not dependent on the statute I cited, and also that the City's regulatory power includes the power to enter into exclusive contracts. It should be noted that the City has not exercised its regulatory power to enact an ordinance that provides for exclusivity; it has simply entered into a contract with exclusivity provisions.

That said, there is a further issue to be addressed, and that is the City's power to enter into a contract for waste collection which extends for 30 years. As has been pointed out to me by Ancel Glink, the power to regulate (including the power to enter into exclusive contracts) is one question,

and the power to enter into long-term contracts for that purpose is another. Accordingly, while I believe Mr. Cole is correct in his analysis of the source of the City's power to regulate waste disposal, and the power to enter into exclusive contracts in furtherance of such regulation, I have also concluded that it is necessary to address the question of the power of the City to enter into a long-term contract for this purpose.

THE CITY'S POWER TO ENTER INTO LONG-TERM CONTRACTS RELATING TO SOLID WASTE COLLECTION

While municipalities have the general power to "contract and be contracted with" under the Illinois Municipal Code ("Code"), 65 ILCS 5/2-2-12, the power is not unlimited. In particular, Section 8-1-7 of the Code provides that, with certain exceptions, "no contract shall be made by the corporate authorities...unless an appropriation has been previously made concerning that contract", and that "[a]ny contract made...in violation of the provisions of this section shall be null and void as to the municipality". 65 ILCS 5/8-1-7(a). The requirement of a prior appropriation effectively limits contracts to one year, and contracts exceeding one year for which no appropriation has been made have been declared void, not just voidable. *Beling v. City of East Moline*, 14 Ill. App. 2d 263 (2nd Dist. 1957).

Section 8-1-7 contains exceptions to the one-year limitation, for certain types of contracts, including contracts for "the provision of services which directly relate to the prevention, identification or eradication of disease". 65 ILCS 5/8-1-7(b). Assuming that this exception would apply to contracts for solid waste collection and disposal, it would allow the City to make contracts "for a term exceeding one year and not exceeding the term of the mayor...holding office at the time the contract is executed". It would also allow the City to "include in the annual appropriation ordinance for each fiscal year, an appropriation of a sum of money sufficient to pay the amount which, by the terms of the contract, is to become due and payable during the current fiscal year." Accordingly, this section of the Code could be interpreted to allow the City to enter into contracts for solid waste collection which exceed one year, as long as the contract did not exceed the term of the mayor at the time the contract was executed.

That brings us to Section 11-19-1 of the Code, which was relied on in my earlier memorandum. Section 11-19-1 provides that any municipality may make contracts with any person or corporation "for more than one year and not exceeding 30 years relating to the collection and final disposition, or relating solely to either the collection or final disposition of garbage, refuse and ashes." 65 ILCS 5/11-19-1(a). The terms "garbage", "refuse" and "ashes" are each specifically defined in Section 11-19-2, as follows:

"Garbage" means *"wastes resulting from the handling, preparation, cooking and consumption of food; wastes from the handling, storage and sale of produce"*.

"Refuse" means *"combustible trash, including, but not limited to, paper, cartons, boxes, barrels, wood, excelsior, tree branches, yard trimmings, wood furniture, bedding;*

non-combustible trash, including, but not limited to, metals, tin cans, metal furniture, dirt,

small quantities of rock and pieces of concrete, glass, crockery, other mineral waste;

street rubbish, including, but not limited to, street sweepings, dirt leaves, catch-basin dirt, contents of litter receptacles,

but refuse does not mean earth and wastes from building operations, nor shall it include solid wastes resulting from industrial processes and manufacturing operations such as food processing wastes, boiler-house cinders, lumber, scraps and shavings."

"Ashes" means *"residue from fires used for cooking or heating buildings"*.

I would interpret Section 11-19-1 as defining the types of waste which can be the subject of a 30-year contract, and also as excluding from its scope those items of waste which are specifically excluded from the definition of "refuse", *i.e.*, *"earth and wastes from building operations"* and *"solid wastes resulting from industrial processes and manufacturing operations"*.

Based on the foregoing analysis, I would conclude that:

(1) the City has the power to regulate solid waste collection within the City, including the right to enter into exclusive contracts, as long as the term of the contract does not exceed statutory limitations; and

(2) the City has the power to enter into a 30-year contract with respect to *"garbage, refuse and ashes"*, as defined in the Code, but not with respect to *"earth and wastes from building operations"* and *"solid wastes resulting from industrial processes and manufacturing operations"*; and

(3) insofar as the RDSI Agreement is intended to cover *"earth and wastes from building operations"* and *"solid wastes resulting from industrial processes and manufacturing operations"* over a 30-year period, it is void.

WHAT THE CONTRACT PROVIDES WITH RESPECT TO RECYCLABLES

In my earlier memorandum, I concluded that the contract between the City and RDSI would prohibit the City Council from giving Mr. Stinnett permission to engage in curbside pickup of 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. Mr. Cole has disagreed with this conclusion, on the basis that the contract does not limit the collection of residential recyclables to "curbside pickup". However, I believe my earlier conclusion was correct.

As I pointed out in my earlier memorandum, the contract provides that RDSI shall have the exclusive right to collect "residential recyclables". However, the contract also 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." This clause appears to allow for residents to contract for their own recyclable disposition with contractors other than RDSI. It is different from the contract clause dealing with non-recyclable waste, where the contract allows residents, businesses, industries and institutions to dispose of their own solid waste, but prohibits them from using another commercial contractor for that purpose.

There thus appear to be two contractual limitations with respect to collection of recyclables. First, the contract limits such collection to "residential" recyclables, which would exclude recyclables generated by industries, businesses and institutions. Second, the right to collect residential recyclables is further limited to collection "on behalf of the City or pursuant to the City's recycling programs" and does not preclude the disposition of residential recyclables in some other way.

The City does, in fact, have a recycling program, which is located in Article I of Chapter 78 of the Rochelle Municipal Code. That program provides for recyclable materials to be placed in recycling containers at the curbside and picked up by the City biweekly. Rochelle Municipal Code §§78-6 and 78-7. Accordingly, it was, and still is, my conclusion that the contract limits RDSI's exclusivity with respect to residential recyclables to bi-weekly curbside collection pursuant to the City's recycling program.

CONCLUSIONS

Based on the foregoing, my conclusions with respect to the power of the City Council to act upon Mr. Stinnett's request are as follows:

1. The RDSI Agreement is enforceable with respect to the collection of "*garbage, refuse and ashes*", but not with respect to the collection of "*waste from building operations or solid wastes resulting from industrial processes and manufacturing operations*", and the City Council would have the power to grant Mr. Stinnett's request to engage in the collection of those materials without violating the RDSI Agreement;
2. The RDSI 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 RDSI 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.

Mr. Cole has requested the opportunity to address the City Council (and any City Council committee to which Mr. Stinnet's request may be referred) concerning this matter before a decision is made, and I believe his request should be granted. Mr. Stinnett's attorney has not made a similar

request, but I believe he should be afforded a similar opportunity.

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