

**CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511**

Date: June 5, 2012

MEMORANDUM

TO: Common Council

FROM: Michael P. May, City Attorney
Roger A. Allen, Assistant City Attorney

RE: Resolution #01676 - Refuse Collection for Condos over 500 Units

This resolution was referred to our office for legal comment. The issue is whether the City may lawfully provide, free of charge, bin collection refuse/recycling collection service to condominium complexes that have more than 500 units. My opinion is that this practice may be subject to legal challenge and presents other practical problems.

Factual Background

The City has a long-standing official policy of not providing refuse/recycling collection services to private condominium properties. This policy was adopted because the private roads in such developments are generally substandard and cannot endure the load of the heavy equipment needed to provide these services. Thus, traversing these roads presents significant concerns for City employee safety and presents significant issues of legal liability.

Over the past several years a practice has developed whereby the City provides large lugger bins to the Cherokee Condominiums (hereinafter "Cherokee"). The bins are placed off of the street but are in the City's right-of-way and City trucks do not have to traverse the private roadways of Cherokee to empty or to remove these bins. Use of these bins permits a certain efficiency of services that would be lost if City crews were required to empty individual trash/recycling cans from each of the 700 plus units in Cherokee.¹ Cherokee is not charged any fees for this service. The City has provided this same service to certain special events promoters and routinely charges fees for providing them with this service. For example, sponsors of "Art Fair On The Square" and "Taste of Madison" pay a fee for the large blue lugger bins that the City places on the Capitol Square for these

¹ This, of course, assumes that each of the residents would bring their refuse cans to the City curb on "trash days." Experience has shown that most private condominiums will not bring individual cans to the curb but rather they will contract with private refuse removal companies because these companies will provide on-site collection.

events. The City apparently has not offered, nor does it provide, any similar services to any other condominiums or multi-unit housing complexes.

The Policy Must Be Rationally Related To A Legitimate Legislative Purpose

We have said before that municipalities are free to legislate on any subject matter, such power being restrained only by the federal and state constitution and any "...enactments of the legislature of statewide concern as with uniformity shall affect every city..." Article XI, § 3, Wisconsin Constitution. Municipalities have been granted the broadest authority to "...act for the government and good order of the city, for its commercial benefit and for the health, safety, and welfare of the public..." §62.11(5), Wis. Stats.

Municipal efforts to exercise home rule authority are reviewed with deference. Courts will require that ordinances bear rational relationships to the ends they seek to promote. Generally speaking, if any reasonable basis exists to support the enactment of an ordinance, resolution and/or policy, it will be upheld. *Clark Oil & Refining Corp. v. Tomah*, 30 Wis. 2d 547, 554 (1966).² Ordinances enjoy a presumption of constitutional validity and the burden is upon the challenger to establish that the ordinance is legally insufficient. *Id.*

It is not difficult to enumerate several rational bases for providing the proposed refuse/recycling service free of charge to large condominiums. For it example, the efficiencies realized in serving a large condominium in this manner may not be realized with smaller condominiums; the City has a finite supply of lugger bins and purchasing additional ones to serve smaller condominiums may be cost prohibitive, and; Cherokee may be the only such development with the necessary off street right of way for suitable placement of these bins.

However, that does not mean that Cherokee should be able to receive a service without a fee that others are being charged for. Whenever an enactment creates a classificatory scheme whereby different classes pay different fees for the same service, the enacting municipality must establish that there is a rational basis for the scheme. "The challenged classification must rationally relate to a legitimate state interest."³ We have been unable to ascertain any rational basis for providing this service without fee to some while charging other entities a fee for the very same service. Unless the City can articulate why it will not charge a fee

² In *Clark Oil* the court struck down a City of Tomah ordinance that prohibited the transfer of gasoline and other petroleum products in trucks that carried more than 1,500 gallons. The ordinance was enacted to promote public safety. However, the evidence adduced at trial established that certain safety features not available on the smaller gasoline trucks, actually made them more dangerous than those trucks that carried more than 1,500 gallons and that featured these safety components. The court struck down the ordinance as being unreasonable.

³ *Rubin v. City of Wauwatosa*, 116 Wis.2d 305 (Ct. App. 1983). City collected garbage/refuse without a fee from residences but charged a fee for businesses and dwelling uniform. The court held that the rational basis for charging a fee to businesses was the cost of collections from businesses was higher than from residences.

to Cherokee that it charges to others, this ordinance is likely to be overturned upon a challenge.

Conclusion

A rational basis needs to be supplied for providing this service to Cherokee and not to smaller housing developments. Although we suspect that such a basis could be articulated, there needs to be an articulation of why Cherokee should receive these services without paying the same fee as is charged other recipients of this service. Absent either of these justifications, the proposed policy might not survive a legal challenge. Furthermore, in providing the proposed services, the Common Council should be prepared to answer the requests for extension of this policy that will naturally come from the many entities about the City that currently pay for private companies to remove their waste and recycling.