

BAYEAST

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November 7, 2012

Fran David, City Manager
City of Hayward
777 B Street
Hayward, CA 94541

Dear Ms. David:

The Bay East Association of REALTORS® recognizes the City of Hayward is facing a growing illegal dumping problem. However, the proposed amendments to Chapter 5, Article 7 of the Hayward Municipal code simply have too many unintended consequences for it to be considered as an effective solution.

Please consider the following concerns raised by the proposed ordinance:

The Proposed Amendments are not necessary because the City already has a mechanism for removing illegal dumping and assessing any abutters who are actually responsible.

The City's current arrangement with Waste Management of Alameda County ("WMAC") for removing illegally dumped materials on public property allows for WMAC to remove illegally dumped garbage located on a public right-of-way. Once removed, WMAC bills the abutting property owner for the removal expense.

The City takes the position that this current approach could lead to higher refuse service costs for all rate payers.¹ To the extent that WMAC directly bills the property owners responsible for the dumping, it is not clear why billing the individuals responsible would lead to increased rates for *all* rate payers. To the extent that WMAC is not able to recover all of its costs from responsible parties and has to increase its charge to the City, increasing the rate that everyone pays is a more equitable way for the City to finance those increased disposal costs than the approach set out in the Proposed Amendments would be.

The City also says that it can take an average of 7 days to have the trash removed under the current scheme. But it's not clear that requiring private property owners to do the clean-up would be more efficient. In addition, the City also notes that it anticipates a substantial increase in phone calls from

¹ October 23, 2012 staff report to the Hayward City Council regarding the amendment

property owners affected by the Draft Ordinance. The City should assume that the notices of violation will be contested by property owners.² Analysis of how many people disputing the WMAC bills because they did not create the nuisance and the cost to the City for address these types of abuses should be provided to the City Council and the public before action on the amendment is taken.

The Draft Ordinance will not discourage, and might actually *encourage*, illegal dumping.

Another stated goal of the Proposed Amendments is to reduce illegal dumping. The Draft Ordinance is poorly designed for this purpose, however, because it does not ensure that the people who dump materials on public lands are the ones punished. Instead it targets abutting occupants and owners, whether they actually caused the dumping or not. Indeed, it is not clear what basis the City would have for assuming that abutting property owners are a significant part of the dumping problem. Notably, a report by the Public Health Department of Imperial County, California concludes that the experience of its Environmental Health Services personnel “demonstrates that the majority of illegal dump sites in our County are not created by the owners of the property where the illegal site is located.” The County report goes on to say that “[t]his is the reasoning that has fueled the need to create a local ordinance that targets illegal dumpers directly.”³ Through the Draft Ordinance, the City is taking the completely different, and seemingly illogical, approach of imposing penalties for dumping without any regard for whether those who have to pay the penalties are the ones who did the dumping.

Under the Draft Ordinance, no responsibility for clean-up is imposed on a person who discards waste or debris in a road or park that is not next to his or her own property. Nor, apparently, does the Draft Ordinance impose any obligation on the source of the materials that are discarded, even if that source is fairly evident. For example, read literally, the Draft Ordinance would require the owner and occupant of property that abuts the section of street or park where litter comes to rest to clean it up, but would impose no obligation on the original source of the littered items.

Likewise, the people who discarded the litter would not face liability under the Draft Ordinance, although they could presumably be charged with violations of anti-littering laws if caught. If the City is able to get an innocent property owner or occupant who abuts the dump site to clean up the discarded material, however, the City has less incentive to investigate who actually did the dumping and bring appropriate charges. The Draft Ordinance is not well designed to target the causes of dumping on public property. It merely shifts the cost of clean-up from the City’s taxpayers as a whole to the unlucky owners or operators who happen to abut the public lands and right-of-ways where dumping occurs.

The additional burden and cost that the Draft Ordinance would impose on abutters to a dumping incident might even serve to perpetuate the dumping problem. No doubt, some abutters will react to

² October 23, 2012 staff report to the Hayward City Council regarding the amendment (“Staff anticipates a substantial increase in the number of calls and/or other communications from property owners that may be impacted by the ordinance and required to pay the disposal fees[.]”).

³ “Illegal Dumping, An Imperial County Discussion,” Imperial County Public Health Department, at 20 (2007), available at http://www.icphd.org/menu_file/EHS-ILLEGAL_DUMPING_DOC_1-8-08.pdf?u_id=1.

the prospect of having to pay disposal costs by simply moving the debris to a different location down the street or around the corner, where it can become someone else's problem.

The Proposed Amendments are simply and grossly inequitable.

The Draft Ordinance is highly inequitable because, as described in the October 23, 2012 staff report, it will hold individual private property owners and occupants liable for trash and debris on adjacent public property, regardless of who actually caused the dumping. The City's concept of holding particular individuals financially responsible for nuisance conditions on public property that those individuals had no part in creating is, quite simply, extraordinary and extremely bad public policy. Under the City's scheme, landowners will get stuck, unfairly, with the burden and financial responsibility of remediating conditions that they did not create. It defies logic to assume that dumping incidents would be equally distributed around the City so that the burden of the Draft Ordinance will eventually even out with the passage of time. Instead, dumping typically follows patterns, and certain locations become favored spots for illegally discarding waste and debris. We can therefore reasonably assume that the owners and occupants of a relatively small number of properties in those locations where the dumping problem is the worst will bear the vast amount of the burden of cleaning up materials discarded on public lands. Conversely, the owners and occupants of the vast majority of properties, which do not abut common dumping sites, will share little or none of the burden created by the Draft Ordinance.

A more equitable approach would be to focus on prohibiting illegal dumping by stepping up efforts to investigate dumping incidents, identify those responsible, and pursue vigorous enforcement of existing laws that target littering, illegal dumping, and creating public nuisances. The California Department of Resources Recycling and Recovery's "Illegal Dumping Resources Toolbox" has good information on how communities can implement an enforcement program for illegal dumping. It notes that "[o]rdinances, permits, and licenses are only effective if they are enforced *and offenders are prosecuted*. Without an active enforcement program, illegal dumpers are unlikely to change their behavior and the community will not see a reduction in illegal dumping."⁴ Some municipalities have found benefits to applying a "rebuttable presumption" to identify the party that is presumed to be responsible for illegal disposal. For example, in Butte County, California, the anti-dumping enforcement program includes a rebuttable presumption of the party responsible for illegal dumping based on the presence at a site of two pieces of addressed mail or other identifying items like photos or receipts.⁵

⁴ California Department of Resources Recycling and Recovery (CalRecycle), "Illegal Dumping Resources Toolbox," <http://www.calrecycle.ca.gov/illegaldump/Enforcement.htm> (italics added).

⁵ See Butte County California, "Presentation on the Illegal Dumping Program," available at <http://www.buttecounty.net/Public%20Works/Divisions/Solid%20Waste/Illegal%20Dumping.aspx>. See also New Mexico Environment Department Solid Waste Bureau, "How to Establish and Operate an Illegal Dumping Clean-up Program," at 4-3, available at <http://www.nmenv.state.nm.us/swb/pdf/NM%20Illegal%20Dumping%20manual%2005-2004.pdf>.

The Draft Ordinance is impractical.

The City has not anticipated and accounted for obvious practical flaws in its proposal to make "any person owning, leasing, renting, occupying, or having charge or possession of any private property in the City" responsible for abating illegal dumping on "adjacent or contiguous public property."⁶ One practical concern is how this requirement will apply to someone whose land abuts a public park, school yard, public parking lot, or other large tract of public land. Read literally, the abutter would be liable for cleaning up any waste or debris that comes to be located anywhere on the public property in question. This would be an extraordinarily unfair burden to impose on the property owner and would greatly exacerbate the already significant inequities in the City's proposed scheme.

A second practical concern is how the City will determine responsibility for clean-up in a situation where numerous people fall within the language of the Draft Ordinance. For example, who is responsible for clearing debris in front of a multi-unit building? Will the City notify all of the tenants and other occupants as well as the owner and consider all of them to be in violation of the Draft Ordinance and subject to fees if the debris is not cleaned up in a timely way? How does the City intend to determine who is "occupying" a building and how will it determine which of the occupants will be held responsible for the clean-up of abutting public property? In giving the Draft Ordinance such broad and sweeping application when it is read literally, the City only reinforces how unfair and what ill-advised policy the entire scheme of the Proposed Amendments is.

The Draft Ordinance creates potential safety and liability issues for property owners, occupants and tenants.

The Proposed Amendments also are intended to promote public health and safety. The Draft Ordinance, however, could increase risks of injury or harm to private property owners or occupants who undertake to remove large or hazardous debris without the experience, training, or equipment to do so properly. The Draft Ordinance would require all property owners, occupants, tenants, or managers to clean up any discarded waste or debris, or remove any condition that unlawfully obstructs the free use of a public right-of-way, street, or sidewalk.⁷ This sweeping language makes no exception for potentially dangerous waste, debris, or conditions, such as poisonous and otherwise hazardous substances, highly flammable or explosive items, contaminated debris, and the like.

Heavy or bulky items that need to be hauled away, such as mattresses and furniture, will be difficult for many individuals to handle. The Draft Ordinance contains no exemptions for the elderly or disabled. It is particularly unwise to encourage abutters to take on responsibility for handling hazardous materials or other materials that pose a potential health risk. If the City engaged WMAC or another experienced disposal company to routinely handle the removal of such items from public right-of-ways and other public lands, rather than relying on abutters to do so, it would have much greater certainty that materials are handled in a way that protects public health and safety.

The Draft Ordinance also does not address the liability issues it creates for property owners or occupants. To the extent that it creates responsibility for disposing of materials, like hazardous substances, that require special handling, it puts those deemed responsible at peril of incurring liability for any harm that results if something goes wrong in their efforts to dispose of those

⁶ Draft Ordinance § 5-7.25.

⁷ Draft Ordinance § 5-7.25.

materials. Many requirements related to disposing of hazardous materials are strict liability requirements in which a person assuming or having handling and disposal responsibility thrust upon them are presumed to have knowledge of, and are required to abide by, detailed requirements about how, where, and when such substances can be handled, transported, and disposed of. Hazardous waste or contaminated debris that is transported for disposal may require manifests. Does the City expect the abutting property owner who has not generated or dumped these materials to nonetheless assume the status of a “generator,” “transporter,” or “arranger” (and the ensuing potential liability and regulatory obligations) for purposes of transporting and disposing of them?

It is not clear that the fees and penalties set forth in the Proposed Amendments qualify for exemptions from CEQA requirements.

The Draft Resolution lists the five exemptions from Section 15273 of the California Environmental Quality Act (“CEQA”) and concludes summarily that this action is exempt from CEQA. However, the Draft Resolution does not state which specific exemption applies, and it is not clear that the fees imposed by the Resolution and Updated Fee Schedule would qualify under any of these exemptions. Further, CEQA § 15273(c) states that the public agency is required to “incorporate written findings in the record of any proceeding in which an exemption under this section is claimed setting forth with specificity the basis for the claim of exemption.” It does not appear that the City has made *any* findings in support of its conclusion that revising the fee schedule is exempt from CEQA.

It is not clear that the fees and special assessment set forth in the Updated Fee Schedule conform to the requirements of Proposition 218.

Property-Related Fees

California passed Proposition 218, or the “Right to Vote on Taxes Act,” in 1996. It requires that property-related fees not exceed the cost of the service that the fees are providing to the particular parcel.⁸ Property-related fees are fees that are incident to property ownership.⁹ Not only property owners are subject to the fees set forth in the Updated Fee Schedule, because occupants, tenants, and managers are all subject to incurring these fees by virtue of the Draft Ordinance. All owners of private property in the City are subject to being charged fees when the City abates a “violation” of the Draft Ordinance on adjacent public property or rights-of-way, however, and the October 23, 2012 staff report confirms that the Proposed Amendments are intended to place responsibility on private property owners.

Assuming that the fee paid by an abutting property owner when the City abates a “violation” would be considered a property-related fee, there is no indication that the fees imposed by the Updated Fee Schedule are based on the City’s cost of removing the trash, debris, or other obstructions that is reason for imposing the fee. It is noteworthy that the Updated Fee Schedule applies the same fee and penalty amounts for all violations, regardless of whether the City is removing, for example, a few cardboard boxes, a truck bed load of furniture, construction debris, or containers of used motor oil or

⁸ Sean Flavin, Taxing California Property § 2:39 (2012) (“New or increased fees will be valid only if the property owner’s fee is no greater than the proportionate cost of providing the property related service to the parcel.”).

⁹ Sean Flavin, Taxing California Property § 2:39 (2012).

other hazardous substances. This indicates that the fees are not tied to the cost of providing a service to the particular parcels.

Furthermore, in addition to the fees, the City is simultaneously imposing a special assessment on each parcel to pay for the costs of removing waste and obstructions on public property. The October 23, 2012 staff report states that “[t]he cost recovery process would be through a special assessment collected through property taxes.” The existence of a special assessment that is already supposed to cover the costs of the City removing illegal dumping from public right-of-ways and public lands further indicates that the “fee” is not connected to the cost of the service.

A well regarded treatise on California property taxes and fees explains that “no property related fee may be levied to pay for a general governmental service (such as police or fire), imposed for a service not used or immediately available to the property owner, or used to finance programs unrelated to property service.”¹⁰ (Non-property fees and taxes can exceed the cost of a service provided, but might be subject to other requirements and procedures.) The service at issue in this case, cleaning up waste on public property, is arguably available to the public at large because it benefits the public generally and takes place on public property, and the program is structured so that the City is called upon to clean up the waste any time the abutting private property owner or occupant does not. The City must explain why it believes this fee is permissible under Proposition 218 prior to any further action regarding the amendment.

The Special Assessment

The Updated Fee Schedule also includes a special assessment of \$342 to be charged annually on each parcel. An “assessment” is a levy or charge upon real property by an agency for a “special benefit” conferred upon the property.¹¹ To constitute an assessment, the properties required to pay must receive a “special benefit,” meaning a “particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large.”¹² “General enhancement of property value is **not** a ‘special benefit[,]’” but “[a] special and particular enhancement of property value is a traditional measure of special benefit.”¹³ Here, it is not clear that there is a special benefit being conferred on the parcels paying the special assessment, because the special assessment is imposed on all parcels, regardless of whether the property directly benefits from the City removing illegal dumping. Indeed, when the City cleans up public property like a road, sidewalk, or park, all the members of the public that use the public property reap the benefit, not the adjacent property owners in particular. The City must also explain what special benefit is being conferred on particular private property here that would justify and warrant imposing a special assessment.

¹⁰ Sean Flavin, *Taxing California Property* § 2:39 (2012) (citing Cal. Const. Art. XIII D, § 6(b)).

¹¹ Cal. Const. XIII D, § 2 (definition of assessment); California League of Cities, *Proposition 218 Implementation Guide 25* (2007), available at <http://www.cacities.org/UploadedFiles/LeagueInternet/c2/c2f1ce7c-2b14-45fe-9aaa-d3dd2e0ffecc.pdf> (“The key feature that distinguishes an assessment from a tax, fee or charge is the existence of a special benefit to real property. Without identifying a special benefit, there can be no assessment.”) (citing cases).

¹² California League of Cities, *Proposition 218 Implementation Guide 23* (2007), available at <http://www.cacities.org/UploadedFiles/LeagueInternet/c2/c2f1ce7c-2b14-45fe-9aaa-d3dd2e0ffecc.pdf>.

¹³ California League of Cities, *Proposition 218 Implementation Guide 23* (2007), available at <http://www.cacities.org/UploadedFiles/LeagueInternet/c2/c2f1ce7c-2b14-45fe-9aaa-d3dd2e0ffecc.pdf> (bold in original).

In addition, assessments cannot exceed the reasonable cost of the “proportional special benefit” being conferred on the parcel.¹⁴ To impose an assessment, Proposition 218 requires a calculation of benefits, justified by an engineer’s report (as well as notice, hearing, and ratification by a majority of the property owners).¹⁵ There is no indication in the October 23, 2012 staff report that the \$342 special assessment is based on the reasonable cost of conferring a “special benefit” on the properties paying the assessment. The City simply hasn’t proved this special assessment is permissible under Proposition 218.

Through the Proposed Amendments, the City is proposing to impose fees on private property owners when they fail to clean up waste and debris on public right-of-ways or public property, and the City has to step in and do so. It is also intending to impose a “special assessment” on each parcel in the City, also ostensibly to cover the City’s cost of removing such waste and debris from public right-of-ways and property. What is the justification for putting forward apparently duplicative cost recovery proposals? The City must reveal the costs it incurs on an annual basis to remove waste and debris from public lands and right-of-ways, and how those costs compare to the revenues that the City expects from the cost recovery mechanisms proposed in the Draft Ordinance. It should provide that information for public review and comment before it imposes any “special assessment” or fee under the Proposed Amendments.

The Proposed Amendments create an unusual, if not unprecedented, approach to allocating the costs and burdens of providing public services.

The underlying policy premise of the Proposed Amendments is straightforward and simple: make all private property owners and occupants liable for trash and debris on public right-of-ways adjacent to their properties, regardless of what it is, how much of it there is, or who actually dumped or spilled it.¹⁶ The concept that adjacent private property owners should be charged with the responsibility for providing this service to the public rather than the City or another public agency is unusual, if not unprecedented. Municipalities and other government entities do not typically single out abutters to public spaces to assume, involuntarily, responsibility for maintaining those public spaces. The closest analogy might be to “Adopt-a-Highway,” park sponsorship, and similar programs, in which private funding or labor is used to maintain a public facility to reduce or eliminate the need for public funding. The significant difference here is that those programs are voluntary – the clean-up responsibility is not imposed by law on an unwilling private individual. Many jurisdictions do have programs where private individuals are required to clean-up public right-of-ways and parks, but those

¹⁴ California League of Cities, Proposition 218 Implementation Guide 23 (2007), available at <http://www.cacities.org/UploadedFiles/LeagueInternet/c2/c2f1ce7c-2b14-45fe-9aaa-d3dd2e0ffecc.pdf>.

¹⁵ Sean Flavin, Taxing California Property § 2:39 (2012) (“Local governments must review each assessment to determine whether it is exempt, and if not, decide whether the property owner would receive a ‘special benefit’ from the project or service. A professional engineer must then estimate the amount of the benefit and individual charges will be set based on the proportion of total cost. After a mailing to all property owners of a notice of hearing and a ballot, the agency will tabulate the vote and approve the assessment only if 50% or more of ballots weighted by the amount of the assessment approve it.”) (citing Cal. Const. Art. XIII D, § 4).

¹⁶ October 23, 2012 staff report to the Hayward City Council regarding the amendment (explaining that the Draft Ordinance would “place[] responsibility on private property owners to keep the public right-of-way adjacent to their properties free of trash and debris . . .”) and (“Upon approval of an amendment to the Community Preservation and Improvement Ordinance, if trash and debris is left on the public right-of-way, the property owner adjacent to the trash and debris would be responsible for removal of the item(s).”).

those individuals are singled out to provide this public service because they have been sentenced for criminal activity, not because they happen to own or live on abutting property.

Finally, one could conceive of many ways that the City's approach to the illegal dumping issue might be replicated for other public services commonly provided by a municipality. There is no principled distinction between the City's approach in the Draft Ordinance to abating illegal dumping on public property and, for example: requiring an abutting private property owner to provide and/or pay for an ambulance and emergency services if an auto accident happened to occur in front of his or her residence; requiring an abutting private property owner to provide or pay for janitorial services for an abutting school; or making a private property owner or occupant liable for and responsible for driving away criminal activity that occurs on public property adjacent to his or her home.

We urge the City of Hayward to carefully consider each of these concerns prior to taking any further action regarding this proposed ordinance.

Sincerely,

A handwritten signature in cursive script, appearing to read "David C. Stark".

David C. Stark, Public Affairs Director
Bay East Association of REALTORS®

CC:

Mayor and City Council