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File No.

MEMORANDUM

Date: June 13, 2001

To: Councillor Betty Disero
Co-Chair, Waste Diversion Task Force 2010

From: Jim Anderson
Director, Municipal Law

Cc: H.W.O. Doyle, City Solicitor

Reference: **Waste Diversion Task Force 2010 Report- Requests for Opinions**

I understand that during the course of the public meetings you chaired for the Waste Diversion Task Force, a number of questions were asked about various powers of the City related to waste management. You have asked me to respond on the following issues which you have summarized from those questions.

The ability of the City to use its purchasing power to require that only firms that have a recycling program in effect may do business with the City

The City may discriminate for commercial or business reasons that are incidental to the powers to carry on business or acquire property. Different considerations apply to discrimination for non-commercial, non-business reasons that are not grounded in promoting the health, safety and welfare of the inhabitants of the City. It is unlikely that a court would uphold the proposed requirement as it is not a business reason, and is not otherwise within the City's statutory powers (the health, safety and welfare provision would not apply for a number of reasons, one being that the waste management powers of municipalities are already set out in detail in sections 208.1-208.11 of the *Municipal Act*).

The ability of the City to grant Seals of Approval to corporations for having a recycling program

If the issue is simply recognizing corporations which recycle, the bestowing of the seal of

approval might fall under section 114 of the *Municipal Act* which provides:

The Council of every municipality may provide for,

- (a) offering awards and gifts to persons whose actions or achievements are, in the opinion of council, worthy of note; and
- (b) establishing competitions and awarding prizes therefor.

The bestowing of a seal might also fall under section 208.3(1)(e) of the *Municipal Act*, if the corporations are using the City's waste management system to any extent. That section provides:

208.3(1) the power under section 208.2 includes the power to,
e) provide educational programs and otherwise promote the waste management system.

If, however, the intent is to establish a mandatory rating program of some kind, then see the comments below in relation to dealing with “persons or businesses that refuse to recycle” and using Public Health’s food rating system.

The ability of the City to deal with persons or businesses that refuse to recycle

The City’s powers are constrained by sections 208.1 to 208.11 of the *Municipal Act*. In particular, the City’s ability to pass by-laws in relation to waste management only relate to the establishment, maintenance and operation of a waste management system. Subsection 208.6(3) states that a by-law of the municipality to prohibit or regulate the use of any part of a waste management system applies only to a waste management system of the local municipality.

Should the City, for example, wish to regulate private businesses not serviced by the City’s waste management function, then it would have to request Provincial legislation.

The ability of the City to use its licensing powers to require businesses to recycle

The City has general authority to licence, regulate and govern a business as defined in the *Municipal Act* and to impose conditions for obtaining or renewing a licence. The term “business” is defined in the Act to mean a “trade, business or occupation”. The definition also refers to specific types of businesses and excludes certain others. While the licensing power is quite broad, its application will depend on specific fact situations. Some common issues were recently canvassed in the recent report to Works Committee on licensing of food courts.

In addition, the City must bear in mind that the Province has retained a residual power to enact regulations restricting the power of municipalities to licence. As an example, the Province enacted an amendment to Ontario Regulation 27/96 as follows:

- 6. A municipality, including a regional municipality, does not have the power under any Act to impose, as a requirement of obtaining, continuing to hold or renewing a licence, any condition respecting containers for alcoholic beverages, including a condition requiring the vendor of alcoholic beverages to establish, operate or

maintain a system or facilities for the return of containers for alcoholic beverages.

The Province therefore has not hesitated to pass regulations circumscribing municipalities' use of the broad licensing power.

The ability of the City to impose a surcharge (i.e., an increased fee) on businesses for their garbage (this only relates to businesses to which the City is providing collection services)

As indicated above, this question only relates to the ability of the City to impose a fee surcharge on the businesses to which the City provides waste management services. While there are broad powers to impose fees under section 220.1 of the *Municipal Act*, Ontario Regulation 26/96, as amended, provides that such fees can only be imposed on "...a person who, directly or by means of an agent, discards the waste, (a) through a waste collection service or at a waste management facility of the municipality or local board, as the case may be."

Subsection 208.6(1) of the *Municipal Act* provides:

208.6(1) For the purposes of section 208.2, a local municipality may pass by-laws to prohibit or regulate the use of any part of a waste management system.

The City's ability to charge fees related to waste management is specifically set out in subsection 208.6(2) of the *Municipal Act*, which provides:

(2) A by-law passed under subsection (1) may,
(b) establish fees for the use of any part of the waste management system.

Section 208.6(2)(c) provides that a by-law passed under subsection 208.6(1) may:

(d) establish different rules, fees and incentives for different defined areas of the local municipality, different classes of premises and different classes of waste;...
(e) establish fees and incentives that vary based on the volume, weight or class of waste or on any other basis the council considers appropriate and specifies in the by-law;

The City may therefore enact a by-law establishing various businesses as a class of premises and charge fees for that class. However, in order for the fee to be considered a fee and not a tax, the City should ensure that there is a relationship between the fee charged and the cost to the City to provide the service, although the fees need not correspond precisely to the cost of the service (See *Re Eurig Estate* and *Urban Outdoor Trans Ad v Scarborough (City)*).

The ability of the City to add recycling to the Public Health's rating system (i.e., you only get a green pass if the restaurant has a recycling system in effect)

The City's restaurant disclosure system is closely linked to the Food Premises Regulation (Regulation 562) made under the *Health Protection and Promotion Act*. After a food premises is inspected, operators are required to post a Pass, Conditional Pass or a Closed sign at the entrance to the food premises. The type of sign that is posted is determined by the degree to which the premises complies with the Food Premises regulation.

Toronto Public Health (TPH) has categorized infractions under the Food Premises Regulation into three categories: minor, significant and crucial.

Minor infractions of the regulation are infractions which are not likely to present a significant or immediate risk to the health of the public.

A Significant Infraction is an infraction that presents a potential health hazard.

A Crucial Infraction presents an immediate health hazard.

There is no requirement in the Food Premises regulation that requires operators to recycle waste. There is a general provision (section 11) that addresses sanitation and maintenance issues. For instance, if garbage is not stored in a sanitary manner or if washroom cleanliness is not maintained, the premises would be considered in breach of the Food Premises Regulation. An infraction of this nature would be considered a Crucial Infraction for purposes of the Restaurant Disclosure System.

A food premises operator who does not recycle may or may not be 'caught' by the Food Premises Regulation. If the operator doesn't recycle but maintains the food premises in a sanitary manner the operator would comply sanitary requirements of the regulation. If there were no other infractions he would be given a Pass sign to post at the entrance to his premises. If the operator doesn't recycle and fails to maintain his premises in a sanitary manner the operator would be in breach of the Food Premises Regulation and would most likely have a Conditional Pass sign posted at the entrance of the food premises.

In conclusion, there would be no statutory basis for adding to the rating system the requirement to recycle.

The ability of the City to require source separation of kitchen waste for an area and as part of that program to provide green containers and to charge back the cost to the area through a benefiting assessment

The City can require separation of waste, which would include kitchen waste if desired, pursuant to the following provisions of the *Municipal Act*:

- 208.6(2) A by-law passed under subsection (1) may,
(a) require the separation of any class of waste at the point of collection.

The City could charge back the cost of providing green bins and collecting the kitchen waste pursuant to section 208.5(1) of the *Municipal Act* which provides:

- (1) A by-law under section 208.2 includes the power to provide waste management facilities and services to all or any defined area of the local municipality at the expense of the owners and occupants of the land in that area, and impose upon that land, according to its assessed value, a special rate to defray the expense of the waste management facilities and services.

Subsection 208.5(5) is also relevant:

- (5) A special rate to defray the expense of providing waste management facilities and services may be levied on all the rateable property in the local municipality or the defined areas.

Subsection 208.5(6) provides:

- (6) The council may by by-law provide for a monthly rate to be charged to the owners, householders or occupants of any building in the local municipality instead of the special rate for the waste management system.

Subsection 208.5(7) provides:

- (7) The monthly rate may be collected or recovered in the manner provided under section 326.

Section 326 provides, among other things, that the monthly rate could be collected in a like manner as municipal taxes.

Accordingly, it would appear that the City could charge the fee for collection of kitchen waste either to the owners of the property within the area benefiting from the service, or could charge the fee to all rateable property within the municipality, whether those properties benefit from the service or not. The City could charge the fee as a monthly fee and recover it in a like manner as municipal taxes.

Should you have any questions with respect to the above, please do not hesitate to contact me.



Jim Anderson