

Mayor Anthony Foxx

John Autry
Michael D. Barnes
Warren Cooksey
Andy Dulin
Claire Fallon

Mayor Pro Tem Patrick D. Cannon

David L. Howard
Patsy Kinsey
LaWana Mayfield
James Mitchell, Jr.
Beth Pickering

CITY COUNCIL WORKSHOP

Tuesday, January 3, 2012

- | | |
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| 4:00 p.m. | CLOSED SESSION – Room 267 |
| 5:00 p.m. | Dinner |
| 5:15 p.m. | Transportation: CDOT'S FY12 Snow and Ice Plan |
| 5:30 p.m. | Environment: Multifamily Collection Service Options |
| 6:00 p.m. | Community Safety: DNC Ordinance Briefing |
| 7:30 p.m. | Citizens Forum
Room 267 |

1. Closed Session

Action: Adopt a motion pursuant to NCGS 143-318.11(a)(1) to go into closed session in order to prevent the disclosure of specific details of public security plans and arrangements regarding the Charlotte-Mecklenburg Government Center, which information is not considered a public record according to NCGS 132-1.7(a).

COUNCIL WORKSHOP AGENDA ITEM SUMMARY

TOPIC: CDOT'S FY12 Snow and Ice Plan

COUNCIL FOCUS AREA: Transportation

RESOURCES: Phil Reiger, Assistant Director-CDOT
Ken Martin, Deputy Street Superintendent

KEY POINTS:

- The objective of this presentation is to review the Snow and Ice Removal Plan.
- Plan elements to be presented include:
 - How storms are categorized
 - The level of service provided during storm events
 - Interagency coordination
 - Storm route priorities
 - Equipment and materials
 - Preparation and training
 - Media and public communication
- The Snow and Ice Removal Plan is tested and ready to be executed.

COUNCIL DECISION OR DIRECTION REQUESTED:

None. This presentation is for informational purposes only.

ATTACHMENTS:

None.

COUNCIL WORKSHOP AGENDA ITEM SUMMARY

TOPIC: Multifamily Collection Service Options

COUNCIL FOCUS AREA: Environment

RESOURCES: Victoria O. Johnson, Solid Waste Services Director
Michelle Moore, Solid Waste Services Deputy Director
Thomas E. Powers III, Assistant City Attorney

KEY POINTS:

- In 2005, the City Council approved a reduction in garbage, recycling and bulky item contract collection service for multifamily properties, from twice per week to once per week. This action resulted in budgetary savings of \$645,959 in FY 2006.
- The City's current contract is with Republic. Republic provides once per week pick-up of garbage, recycling, and bulky items at multifamily properties with 30 or more residential units. Properties can independently contract with Republic (or another waste hauler) for a second ("supplemental") collection at their total expense.
- The provision for a second weekly pick-up at multifamily properties was in direct response to Charlotte Apartment Association concerns about the reduction in service. Republic can offer a lower rate for the second pick-up at multifamily properties because the City agrees to pay the disposal costs for any multifamily property which uses Republic. The contractor must use dedicated vehicles in order to accurately track the "City" waste.
- The City does not pay for disposal of waste collected by other private haulers. A multifamily property is responsible for paying the landfill waste disposal cost if it uses other private haulers.
- The practice of paying disposal costs only for waste collected by the City's contractor was implemented because the City does not have the resources available to sufficiently monitor the waste collection and disposal operations of all waste haulers serving multi-family properties operating within the City.
- The practice was recently challenged in a lawsuit, *Cedar Greene, LLC and O'Leary Group Waste Systems v. City of Charlotte*. On December 14, 2011, Superior Court Judge William Constangy ruled in favor of the plaintiffs finding

that the City's practice of paying the disposal fee for supplemental collections only to Republic is discriminatory and in violation of State law. The Court Order further requires the City to begin offering to pay the disposal fee for other haulers within 30 days. The City Attorney's Office has asked the Court to modify the order to give the City additional time and to allow the City to either: (1) offer to pay the disposal fee for all haulers; or (2) stop the practice of paying the disposal fee for supplemental collections entirely.

- At the Workshop, staff from Solid Waste Services and the Attorney's Office will provide additional background about services to multifamily properties and outline options for the City's response to the Court order.

COUNCIL DECISION OR DIRECTION REQUESTED:

This briefing is for Council information and discussion. Council action will be requested at the January 9 Business Meeting.

ATTACHMENTS:

December 14, 2011 Memorandum from City Attorney

CITY OF CHARLOTTE
OFFICE OF THE CITY ATTORNEY

Memorandum

TO: Mayor and Council

FROM: DeWitt F. McCarley, City Attorney *DFM*
Robert E. Hagemann, Senior Deputy City Attorney *REH*
S. Mujeeb Shah-Khan, Senior Assistant City Attorney *MSK*
Thomas E. Powers III, Assistant City Attorney *TEP*

DATE: December 14, 2011

RE: Court Decision in *Cedar Greene, LLC and O'Leary Group Waste Systems v. City of Charlotte*

This afternoon, Mecklenburg County Superior Court Judge William Costangy issued an order in the case of *Cedar Greene, LLC and O'Leary Group Waste Systems v. City of Charlotte* (copy attached). The case challenged the City's practice of paying the landfill disposal charges for supplemental collection services provided to multi-family properties (such as apartments and condominiums) by Republic Waste Services (the City's multi-family contractor). The Judge's Order stated that the City's practice of paying landfill disposal charges is a violation of North Carolina General Statutes Section 160A-314 by discriminating against those multi-family properties that do not use Republic Services for supplemental collection and other solid waste haulers who do not receive a payment of landfill disposal charges from the City. The order did not result in a money judgment against the City, or an award of attorney's fees. However, it does require that the City consider changing its practice and begin paying disposal costs to other solid waste haulers providing supplemental collection.

In light of the decision, we want to take the opportunity to discuss supplemental collection's background, the decision, and what happens next.

BACKGROUND

In an attempt to reduce costs during the FY2005 budget discussions, Council considered a reduction in the amount of weekly solid waste collections at multi-family properties. The adopted FY2006 budget reduced multi-family waste collection from twice-a-week to once-a-week. This reduction saved the City approximately \$645,959.00 in FY 2006.

Ken Szymanski, Executive Director of the Charlotte Apartment Association ("CAA"), contacted the City with concerns that multi-family properties would be taken advantage of by private haulers as a result of the City's action, and asked the City to assist. The City's discussions with CAA and Allied Waste Services (the City's contractor for primary multi-family collection) resulted in a supplemental collection program where Allied would provide supplemental collection to multi-family properties at a lower total cost than the market rate, but

that the City would pay the landfill disposal costs for multi-family supplemental waste collected by Allied. If a multi-family property picked a company other than Allied, it would be responsible for landfill disposal costs. This arrangement was incorporated into the City's existing multi-family contract with Allied. Allied was eventually bought by Republic Services, which continues to provide this service under a 2010 Council-awarded contract.

The O'Leary Group, through its attorney Richard Vinroot, contacted City staff in August of 2010, to express his client's concerns about the inclusion of payment of landfill disposal costs for multi-family supplemental waste collection in the Multi-Family RFP. Mr. Vinroot argued that the program was unfair to companies like his client. Ultimately, the O'Leary Group and Cedar Greene, LLC filed a lawsuit against the City challenging the supplemental collection program.

THE ORDER

As noted above, Judge Costangy decided in favor of the O'Leary Group and Cedar Greene, LLC and against the City. Judge Costangy's Order states that the City's supplemental collection program violates Section 160A-314 by discriminating in how the City provides solid waste collection. Judge Costangy also ordered the City to begin paying the disposal costs for supplemental collection for all solid waste haulers that agree to meet the City's requirements for supplemental collection within the next thirty days. Judge Costangy did not order the City to pay any damages (damages are not available in this type of case) or attorney's fees.

NEXT STEPS

The City will have thirty days to either appeal or comply with the Order. Our office is working with Solid Waste Services and the City Manager's Office to develop options and recommendations for your consideration in earlier January.

If you have any questions, please contact any one of us. Mac can be reached by phone (704/336-4112) or by e-mail (dmccarley@charlottenc.gov); Bob can be reached by phone (704/336-2651) or by e-mail (rhagemann@charlottenc.gov); Mujeeb can be reached by phone (704/336-5803) or by e-mail (mshah-khan@charlottenc.gov); and Thomas can be reached by phone (704/336-5877) or by e-mail (tpowers@charlottenc.gov).

FILED

NORTH CAROLINA

2011 DEC 14 PM 1:48

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

MECKLENBURG COUNTY

MECKLENBURG COUNTY, N.C.

11-CVS-10050

CEDAR GREENE, LLC and
O'LEARY GROUP WASTE SYSTEMS,
LLC,

Plaintiffs,

v.

CITY OF CHARLOTTE,

Defendant.

SUMMARY AND
DECLARATORY JUDGMENT

This matter came before the undersigned Presiding Judge on November 15, 2011, pursuant to cross-motions for summary judgment filed by Plaintiffs Cedar Greene, LLC ("Cedar Greene") and O'Leary Group Waste Systems, LLC ("O'Leary," and collectively with Cedar Greene, "Plaintiffs") and Defendant City of Charlotte (the "City"), and a Motion to Dismiss filed by the City.

After considering the pleadings, briefs, depositions, affidavits, and citations of authority submitted by the parties, as well as the arguments of counsel presented during the hearing, the Court finds that Plaintiffs' Motion for Summary Judgment should be **GRANTED** and the City's Motion to Dismiss and Motion for Summary Judgment are **DENIED**.

STATEMENT OF UNDISPUTED FACTS

The Court finds that the following facts are undisputed:

1. Cedar Greene owns and operates a 224-unit residential apartment complex in the Charlotte, North Carolina, known as Cedar Greene Apartments, that pays the City for and is entitled to receive solid waste disposal services from the City.

2. O’Leary is a private contractor that provides collection and removal of solid waste services to apartment complexes, condominiums, and businesses in the greater Charlotte metropolitan area.

3. By local ordinance, and pursuant to authority to engage in “public enterprises” under Article 16, Chapter 160A of the General Statutes, N.C. GEN. STAT. § 160A-311, *et seq.* the City furnishes solid waste services to apartment complexes, condominiums, and trailer parks that maintain dumpsters or compactors for the storage and collection of solid waste within its corporate limits (“Multi-Family Complexes”), including Cedar Greene Apartments. The City acknowledges that its provision of services for the disposal of solid waste to Multi-Family Complexes is a “public enterprise” subject to the above statutes.

4. Pursuant to the City’s ordinances, Cedar Greene has paid and does pay the City an annual fee for the disposal of all solid waste collected from Cedar Greene (the “Annual Disposal Fee”). *See* Charlotte Code § 10-141. The City levies the Annual Disposal Fee along with annual property taxes on each separate Multi-Family Complex in the City. *Id.* The amount of the Annual Disposal Fee levied by the City corresponds to the annual cost the fees charged by the City’s designated landfill (as further defined below, “Disposal Fees”) to dispose of the total amount of solid waste that a unit in a Multi-Family Complex produces during a year. Based on such calculations, the City assesses an Annual Disposal Fee on Multi-Family Complexes, including Cedar Greene, in the amount of \$27 per residential unit (*i.e.*, per each apartment or condominium).

5. The City provides weekly collection to Multi-Family Complexes through a private contractor, Republic Services, Inc. (“Republic”). Through that contractor, the City provides each Multi-Family Complex a fixed number of collections per week in accordance with

a formula based upon the ratio of residential units to dumpsters at the complex (the “Primary Collection”). The City does not provide for any additional weekday collections to such Multi-Family Complexes (“Supplemental Collection”), and any Multi-Family Complex which desires to receive such Supplemental Collection must privately contract for such services.

6. The City has entered into a contract with Republic to provide Primary Collection to all Multi-Family Complexes; this agreement does not cover Supplemental Collection, which it states shall be the “sole . . . responsibility” of the Multi-Family Complexes.

7. Cedar Greene qualifies as a Multi-Family Complex and, accordingly, receives Primary Collection on a once-per-week basis from the City through Republic.

8. The City provides for disposal of solid waste collected from Multi-Family Complexes through the reimbursement of fees charged at the City’s designated landfill for the disposal of residential solid waste (again, “Disposal Fees”). The current Disposal Fee is \$ 27.50 per ton of solid waste. The City has agreed to reimburse, and does reimburse, Republic for all the Disposal Fees it pays on account of both Primary and Supplemental Collection for the disposal of Multi-Family solid waste at the City’s designated landfill.

9. The City, despite the fact that it levies the Annual Disposal Fee based on the total amount of all solid waste each Multi-Family Complex produces a year, does not provide for disposal of solid waste collected during Supplemental Collection to all Multi-Family Complexes. Instead, the City, pursuant to its current policy and practice, only reimburses the Disposal Fees of those Multi-Family Complexes that hire Republic to provide Supplemental Collection, but not those who hire providers other than Republic for such Supplemental Collection.

10. Cedar Greene has sought to engage O’Leary to provide Supplemental Collection to Cedar Greene, and O’Leary has agreed to provide such Supplemental Collection at a lower

rate than the rate Republic charges, provided that the City provides for the disposal of supplemental waste from Cedar Greene through the reimbursement of its Disposal Fees. Yet, because the City will only reimburse Disposal Fees for the disposal of Cedar Greene's supplemental waste if Cedar Greene hires Republic to provide Supplemental Collection, and not to O'Leary or any other provider, Cedar Greene would have to forego the disposal services for which it has already paid through the Annual Disposal Fee in order to hire O'Leary. Cedar Green has thus been effectively precluded from hiring O'Leary to provide for Supplemental Collection service at a lower rate than that charged by Republic for the same service.

11. O'Leary has repeatedly represented to the City that it is prepared and willing to meet all uniformly applicable requirements the City may impose on providers of Supplemental Collection in order to receive reimbursement from the City of Disposal Fees collected from Multi-Family Complexes, including those requirements imposed on Republic in the Republic Agreement, such as (i) using designated vehicles for Supplemental Collection of solid waste from Multi-Family Complexes and (ii) disposal thereof in the County's designated landfill. Despite such representations, the City has informed O'Leary that it will continue its practice of only reimbursing Disposal Fees for supplemental waste from Multi-Family Complexes that hire Republic, and not to O'Leary or any other provider of such services.

12. The City acknowledges and the Court finds that, with regard to the City's provision of services for the disposal of solid waste, there is no substantial difference between the services provided to Multi-Family Complexes that hire Republic to provide Supplemental Collection, and those, such as Cedar Greene, that hire other providers, such as O'Leary, for such service, nor any substantial difference among such Multi-Family Complexes as customers for such supplemental disposal service.

13. The City's policy of only providing reimbursement of Disposal Fees for supplemental waste from Multi-Family Complexes to Republic—but not O'Leary or any other provider—has injuriously affected both Cedar Greene and O'Leary. As the City has made clear in response to O'Leary and Cedar Greene's inquiries, were Cedar Greene to hire O'Leary to provide Supplemental Collection, the City, under its current policy, would refuse to reimburse the Disposal Fees for Cedar Greene's supplemental waste. This policy discriminates against both Cedar Greene, which would have to forego the disposal services for which it pays, and O'Leary, whose customers would not receive such disposal services. Accordingly, both Cedar Greene and O'Leary are threatened with an immediate injury as a result of the City's policy regarding disposal of supplemental waste.

CONCLUSIONS OF LAW

Based on the foregoing facts, the Court makes the following determinations as a matter of law:

1. By operating, or contracting for the operation of, facilities to provide collection and disposal of solid waste to Multi-Family Complexes within its boundaries, the City is engaged in a "public enterprise" pursuant to and subject to the limitations contained in Article 16, Chapter 160A of the General Statutes. *See* N.C. GEN. STAT. §§ 160A-311(6) (defining the term "public enterprise" to include "[s]olid waste collection and disposal systems and facilities"); 160A-312(a) (granting the City "authority to . . . operate []and contract for the operation of, any or all of the public enterprises as defined in this Article to furnish services to the city and its citizens.").

2. N.C. GEN. STAT. § 160A-314(a), which authorizes the City to set rates for public enterprise services and make classifications as to types of services provided thereunder, prohibits

the City from engaging in unreasonable discrimination in the establishment of those rates or classification of such services. *See Ricks v. Town of Selma*, 99 N.C. App. 82, 84-85, 392 S.E.2d 437, 438 (1990) (“The statutory authority of a city [pursuant to N.C. GEN. STAT. § 160A-314(a)] to set rates for its services and to classify its customers is not a license to discriminate among customers of essentially the same character and services”); *Cabarrus Cnty. v. City of Charlotte*, 71 N.C. App. 192, 195, 321 S.E.2d 476, 479 (1984) (“It is a fundamental principle that a public utility, whether publicly or privately owned, may not discriminate in the distribution of services or the establishment of rates There must be substantial differences in service or conditions to justify differences in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service.”); *Town of Taylorsville v. Modern Cleaners*, 34 N.C. App. 146, 148, 237 S.E.2d 484, 486 (1977) (“Classification must be based on a ‘substantial difference’”); *accord Wall v. City of Durham*, 41 N.C. App. 649, 255 S.E.2d 739 (1979).

3. With regard to the City’s provision of services for the disposal of supplemental solid waste collected from Multi-Family Complexes, there is no substantial difference between the services provided to Multi-Family Complexes that hire Republic for Supplemental Collection, and those that hire O’Leary, nor any substantial difference among such Multi-Family Complexes as customers for such supplemental disposal service.

4. The City’s policy of providing disposal to only those Multi-Family Complexes that hire Republic to provide Supplemental Collection, and not O’Leary or any other collection provider, constitutes unlawful, unreasonable, and arbitrary discrimination in the provision of a public enterprise service and rates charged for such service, in violation of N.C. GEN. STAT. § 160A-314. Accordingly, the Court **GRANTS** Plaintiffs’ Motion for Summary Judgment on their claim under N.C. GEN. STAT. § 160A-314.

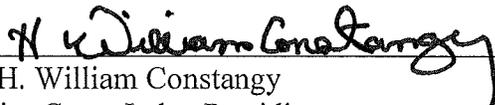
5. In addition to their claim that the City's policy of providing services for the disposal of solid waste to only those Multi-Family Complexes that hire Republic for Supplemental Collection violates, N.C. GEN. STAT. § 160A-314, the Plaintiffs also contend that such policy also contravenes their right to equal protection of the laws under Article I, Section 19 of the North Carolina State Constitution. However, because the Court finds that such policy exceeds the City's authority to set rates and classify its customers under N.C. GEN. STAT. § 160A-314, the Court need not address Plaintiffs' constitutional claims and makes no ruling in that regard.

6. The Court hereby orders that the City commence within 30 days of entry of this judgment the provision of disposal services for supplemental waste through the reimbursement of Disposal Fees for the benefit of all Multi-Family Complexes equally, without regard to the provider the Multi-Family Complex may choose to hire to provide Supplemental Collection, so long as that collection provider agrees to and complies with those uniformly-applicable requirements the City may prescribe for such service.

7. Consistent with the preceding paragraphs, the Court **DENIES** the City's Motion to Dismiss and Motion for Summary Judgment

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the Plaintiffs' Motion for Summary Judgment is **GRANTED** and the City's Motion to Dismiss and Motion for Summary Judgment is **DENIED**, and the Court enters summary and declaratory judgment as set forth above.

This the 14th day of December 2011



Hon. H. William Constangy
Superior Court Judge Presiding

COUNCIL WORKSHOP AGENDA ITEM SUMMARY

TOPIC: DNC Ordinance Briefing

COUNCIL FOCUS AREA: Community Safety

RESOURCES: Deputy Chief Harold Medlock, CMPD
Bob Hagemann, City Attorney
Mark Newbold, Deputy City Attorney-Police

KEY POINTS:

- In preparation for the Democratic National Convention (DNC), City staff has undertaken a review of the City ordinances that pertain to parades, festivals, and demonstrations to determine if they meet the City's needs during an event of the magnitude of the DNC.
- The review has included extensive research into the experiences of other cities that have routinely had mass demonstrations and/or hosted political conventions and the ordinances that have supported police actions in those locations.
- Staff is currently preparing revisions to several existing ordinances and adding some additional provisions to the City Code.
- The intent of the revisions to the City Code is to ensure that Charlotte has ordinances in place that protect the First Amendment rights of citizens while providing police with the tools to maintain public order and the safety of the community during special events.
- Staff will provide Council with an update on the proposed ordinance revisions, including the key provisions of the proposed changes.

COUNCIL DECISION OR DIRECTION REQUESTED:

None. This presentation is for informational purposes only.

ATTACHMENTS:

None.