

Colclasure, James

From: Moore, Lynn
Sent: Monday, February 24, 2014 1:56 PM
To: 'Krivit, Dan'; Gates, Jim
Cc: Eiler, Jim; Williams, Deborah; Larson, Kim
Subject: City attorney review of SWMP
Attachments: Solid Waste Review_SJohnson 031314.docx

Dan/Jim-

Sandy's review is attached. She is fine lifting "pending Legal review" in any cover memo to council for the draft plan and instead referencing how some steps to implement strategies of the plan may require Legal's input after the plan is adopted.

Sandy and Ann's main concerns:

1-Do not like the Negotiated Consortium. Fine to leave in the plan as an option, but if council selects this Sandy will provide a warning of the problems. Basically she wants nothing to do with this at all.

2-Enforcement – neither see a day when criminal charges will be brought against a home owner for not recycling or for example, a business where a customer tosses the soda bottle into the trash instead of the recycling container. The City will continue to ensure businesses and multiple family rental properties have the code complying facilities for trash and recycling as we do now as part of the development review process/plan review. Any reference to enforcement in the plan must be toned down or removed from the plan. Like me, they realize our Chapters 10 and 11 need to be redone on solid waste and recycling and do not want parts of these old ordinances quoted in the plan. Sandy confirmed that despite the current 1988-1989 era ordinance discussing fines, none have been issue nor will she allow any to be issued.

Both were glad to hear the input from Hennepin County's staff on the legal tests of applying MS 115A.94. And both are fine if enforcement is through contractual clauses, meaning to include requirements in contracts where appropriate as we do now for public entity waste to the HERC.

We spent most of the time just talking about the next steps, the process to this point, County's organics resolution and what other cities are doing.

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Solid Waste Review – Sandy 2-13-14

Appendix to Include:

The appendix needs to include all current regulations and policies, including:

Page 6 referenced new county, regional and state programs

The City's ordinance at Chapter 10 and other provisions relating to recycling.

Page 7 references to state law.

Enforcement:

At page 10, it is stated that the City needs to update its ordinances and improve enforcement. Consider the practicality of the proposed manners of enforcement.

- The City does not license businesses in town, hence licensing sanctions are not an option.
- Many businesses do not own the property from which they operate, hence should the City use civil fines as an enforcement mechanism, it has no real manner of enforcement in that unpaid fines cannot be assessed against the non-offending owner's property.
- The criminal justice system is not equipped to handle recycling offenses, in addition to the proof problems.

At page 29, the plan references the current criminal fines in the existing ordinance for failure to recycle. That code section has not been enforced because the criminal system requires 'proof beyond a reasonable doubt' that the offender committed the violation and it also requires an element of mens rea, or criminal intent. I would suggest that these penalty provisions be removed.

Page 43 – Organized Collection. Just a caution if we go to organized collection there must be a very strong hold harmless and indemnification clause in the agreement with the hauler. Waste hauling is layered with liabilities.

Page 44, Negotiated Consortium. This proposal is fraught with problems.

- First and foremost, it opens up the City to liability to claims of an unfair process and allegations of favoritism. The statute also opens up the City to liability on claims that its administration impaired the preservation and development of recycling and markets for recyclables.
- The system set forth in Minn. Stat. Sec. 115A.94 may result in price fixing by removing the current market competition.
- City staff does not have the expertise and technical background to administer solid waste hauling or to coordinate the bidding process by which organized collection for solid waste is contracted out.

Page 57, Organized Recyclables Only Collection. This does not appear to be addressed in the current statute. There is also no caselaw that I could find on this issue. Therefore, it is not possible to render a

legal opinion on this option at this time. I would suggest that Public Works contact cities that currently have this program so that the details by which the service is bid out is better understood as well as the manner in which collection occurs. It would also be helpful to know what opposition organized collection of recycling faced. Again, the City Attorney's office cannot render an opinion for a concept that is not well defined in practical terms.

Page 58, Enforcement. Because the City licenses multi-family rental housing, the recycling services requirement could be enforced through that licensing process.

Page 58-59 Organized Collection Strategy. This appears to meet the statutory requirements.

Page 59 – Alternative plan. The proposed requirement that imposes pricing schedules of licensed haulers does not appear to have any legal authority for it. Also, re-consider the use of recycling penalties, knowing that these will not meet criminal standards and that there is little leverage for the collection of civil fines in most cases.

Page 66 – Without elaboration on the County "supply assurance policies and programs for public entity waste" there can be no legal review of the feasibility of City ordinances and enforcement. This does not appear to be a legal question, but more of a practical one.