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July 5, 2007

VIA HAND DELIVERY

Honorable Common Council
of the City of Milwaukee
City Hall, Room 205

Re: File No. 070328/a substitute ordinance relating to the removal of
construction and yard waste

Dear Council Members:

We are returning the above file unsigned as to legality and enforceability.

The proposed ordinance permits the Commissioner of Public Works to "tag" yard waste or construction waste with a notice to the property owner to remove the yard waste within five days.


We have previously issued opinions regarding the type of notice that must be given to property owners for litter removal, etc., in the absence of an emergency condition. The amount of time DPW must wait following an order is not specified, and we are not stating that five days is an unreasonable time. However, the courts have stated that a person must be given notice and a meaningful opportunity to be heard concerning the proposed action. The notice must be reasonably calculated to apprise interested parties of the situation. *Wilke v. City of Appleton*, 197 Wis. 2d 717 (Ct. App. 1995); *Towers v. City of Chicago*, 173 F.3d 619 (7th Cir. 1999).

In our prior opinion, we were asked whether an order could be placed on an individual's garbage cart. We stated that, in our opinion, affixing an official order to a garbage cart did not constitute proper notice as it was not posted in a conspicuous place, particularly when we remember that the purpose of the posting is to provide notice reasonably calculated to reach the targeted person. (Opinions of the City Attorney, 10/13/2003 and 1/29/2001, attached). We believe the same is true with affixing an order that contains,


Honorable Common Council
July 5, 2007
Page 2

among other provisions, a description of appeal rights, to an exposed pile of yard waste or construction waste that could be on a remote part of the property.

Very truly yours,



GRANT F. LANGLEY
City Attorney



LINDA ULISS BURKE
Deputy City Attorney

GFL;LUB:wt:121051

Attachments

c: Ronald D. Leonhardt, City Clerk

CITY OF MILWAUKEE

Form CA-43

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Assistant City Attorneys

October 13, 2003

Mariano A Schifalacqua, Commissioner
Department of Public Works
Municipal Building, Room 516

Re: Issues regarding DPW authority

Dear Mr. Schifalacqua:

You posed several questions in connection with the creation of inspector positions for enforcement of ordinances within the purview of the Environmental Services Division. Specifically, you asked:

1. Can DPW personnel issue citations regarding garbage-cart return and tree trimming?

Yes, as to garbage-cart returns; no, as to tree trimming.

Section 79-5-5, Milwaukee Code of Ordinances, mandates that owners and tenants must return their carts from the alley or curb line to the proper storage location before 10:00 p.m. on the day the carts are serviced. Section 79-15 states: "The police department, department of neighborhood services and the department of public works shall enforce this chapter." (Emphasis added). Section 79-16 specifies the penalties for violating the provisions of Chapter 79, and provides a forfeiture. It also provides for a special charge for DPW's cost of returning the cart to the proper location, which charge can be placed on the tax roll.

Most important to your question, section 79-16 allows for all the officers listed in section 79-15 (including the department of public works) to issue a citation to any person violating section 79-5, relating to the return of garbage carts.

Tree trimming is governed by section 116-55, Milwaukee Code of Ordinances, which makes it a property owner's duty to trim trees so as to conform with the section. Section 116-56 states that if a property owner fails to trim overhanging branches more than 30 days after being

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Mariano A. Schifalacqua
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October 13, 2003

notified by you (or immediately, if the branches interfere with traffic-control devices), you may cause the branches to be trimmed, and the cost is considered a special assessment. The ordinances provide for a forfeiture for violation of other sections in Chapter 116, but not for violating the tree-trimming provisions. The general penalty provision for ordinance violations, section 50-14, permits a fine of between \$1 and \$500 in cases where no penalty is provided in the specific ordinance. An ordinance amendment would be needed, however, to permit DPW inspectors to issue a citation in this regard.

2. How can DPW enforce garbage-cart return?

A citation, as described above, may be issued any time a garbage cart is standing in violation of section 79-5-5. In order to permit DPW to return the cart and impose a special charge, the owner must first receive a written notice. Failure to comply following the notification results in a special charge of \$10, and the second and each subsequent failure to comply within a calendar year results in a special charge of \$25. Section 79-16-1-a-1-d.

3. Does DPW have any authority over litter on private property? If not, how may DPW obtain authority to enforce ordinances involving litter on private property?

Section 79-12, Milwaukee Code of Ordinances, prohibits the deposit of litter upon any premises, and holds the premises owner and any person in possession of the premises responsible for maintaining the property in a litter-free condition. Both the tenant and the owner may be cited. As with garbage-cart return, section 79-15 permits your department to enforce the provisions of Chapter 79. In addition to issuing citations, your department may remove the litter after an order is issued, and impose a special charge. Section 79-16.

4. What constitutes an "emergency" so that litter on private property may be cleaned up faster?

Enclosed is an opinion written on January 29, 2001 to the Commissioner of Neighborhood Services on this issue.

5. How much notice must be given to property owners, before enforcing garbage-cart, tree-trimming, and litter ordinances?

Citations may be issued upon violation. Actually removing litter, trimming the trees, returning the garbage carts, and charging the owner requires notice, unless an emergency condition exists. There must be an order from the Department of Public Works or Department of Neighborhood Services before removing the litter or returning the cart, pursuant to section 79-16-2. The amount of time you must wait following the order is not specified. We discuss this

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Mariano A. Schifalacqua


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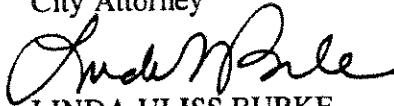
October 13, 2003

issue, particularly the reasonableness of the notice, in the attached opinion. Any such order must contain notice of appeal rights, and we will be happy to provide assistance with the drafting.

There must be 30 days notice before trimming trees, pursuant to section 116-56, unless they interfere with traffic-control devices.

Very truly yours,


GRANT F. LANGLEY
City Attorney


LINDA ULISS BURKE
Deputy City Attorney

LUB:wt:73493
Attachment
1047-2003-2697

0623

CITY OF MILWAUKEE

Form CA-43

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Assistant City Attorneys

January 29, 2001

Mr. Martin G. Collins, Commissioner
Department of Neighborhood Services
Room 1008, Municipal Building

Re: Notice requirements for Chapter 79 orders/garbage and litter

Dear Mr. Collins:

By letter, you indicated that failure of citizens to provide a path through the snow to their garbage carts led to a potentially hazardous situation because uncollected garbage can become a food source for rats.

You stated that sections of Chapter 79 of the Milwaukee Code of Ordinances allows you to order the shoveling out of carts and the abatement of litter nuisances. You currently post the order on the premises and mail a copy to the owner's last known address. You ask three questions.

1. Can you dispense with mailing the notice?
2. If no, can ordinances be changed to allow for posting of the order without mailing it?
3. If the answer to the first question is yes, can the order be posted on the garbage cart?

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First, whenever you find that an emergency exists that requires "immediate" action to protect the public health, safety, or welfare, you are empowered to act under section 200-12-5 of the Code. Although posting and mailing is still required, you may identify an appropriate time for compliance and an appeal and, if necessary, you may attempt contact by telephone before you enforce the order. This gives you great leeway in acting quickly to avert a public-health danger.

Turning to Chapter 79, the solid-waste regulations, section 79-5-3 requires owners and tenants to provide a clear and unhindered path to all containers. The path shall be a width specified by the commissioner of public works and must be free of three or more inches of snow. The penalty provision of that chapter provides for a forfeiture and the issuance of a citation for violation of the section. Sec. 79-16-1 and 3.

Section 79-12 prohibits the littering of any premises and places the responsibility on the owner or the tenant, if he or she is culpable. The penalty provision permits the division of sanitation or the department of neighborhood services to take the necessary steps to remove the litter if an owner or agent refuses to obey an order, and impose a special charge against the subject property "for the services provided for litter removal."

The police department, sanitation division, and your department are all empowered to enforce the solid-waste regulations. Sec. 79-15.

Your authority to issue orders to correct conditions on private property that violate code provisions over which you have enforcement jurisdiction is found in sec. 200-12 of the Code. It requires service of the order personally or by mail. There is no authority to dispense with personal service.

In addition, posting of a notice must be "in a conspicuous place." Sec. 200-12-3-c. The garbage cart, particularly in the event of a large snowfall, would not appear to be a conspicuous place, particularly when we remember that the purpose of posting is to provide notice reasonably calculated to reach the targeted person.

You have asked whether the ordinance can be changed so that the requirement of personal service in a nonsummary abatement situation can be eliminated.

Due process requires that a person be given notice and a meaningful opportunity to be heard concerning the proposed action. *Wilke v. City of Appleton*, 197 Wis. 2d 717 (Ct.App. 1995). The notice must be "reasonably calculated, under all the circumstances, to apprise interested parties" of the situation. The notice must be reasonable. If the

Mr. Martin G. Collins

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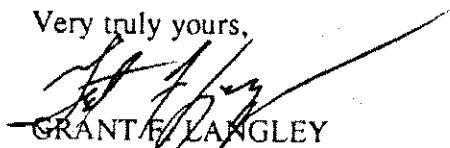
January 29, 2001

authorities have information easily available to them sufficient to provide actual notice, they are expected to use it. *Towers v. City of Chicago*, 173 F.3d 619 (7th Cir. 1999)

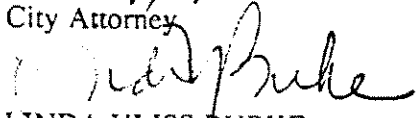
This seems to be particularly true in situations where the property owner may be absent and may ultimately be held responsible through an addition to his or her tax bill or by court action to enforce the order.

Therefore, in our opinion, you may act prior to receipt of a mailed notice should the circumstances require quick action to avert a health hazard. Current ordinances require personal or mail notice in nonsummary situations and, in our opinion, this method should be retained. Finally, under no circumstances does affixing an official order to a garbage cart appear to constitute a posting in a conspicuous place on the premises.

Very truly yours,



GRANT E. LANGLEY
City Attorney



LINDA ULISS BURKE
Assistant City Attorney

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