GRANT F. LANGLEY
City Attorney

RUDOLPH M. KONRAD
LINDA ULISS BURKE
VINCENT D. MOSCHELLA
Deputy City Attorneys

CITY OF MILWAUKEE
Office of the City Attorney

THOMAS O. GARTNER
BRUCE D. SCHRIMPF
SUSAN D. BICKERT
STUART S. MUKAMAL
THOMAS J. BEAMISH
MAURITA F. HOUREN
JOHN J. HEINEN
DAVID J. STANOSZ
SUSAN E. LAPPEN
JAN A. SMOKOWICZ
PATRICIA A. FRICKER
HEIDI WICK SPOERL
KURT A. BEHLING
GREGG C. HAGOPIAN
ELLEN H. TANGEN
MELANIE R. SWANK
JAY A. UNORA
DONALD L. SCHRIEFER
EDWARD M. EHRLICH
LEONARD A. TOKUS
MIRIAM R. HORWITZ
MARYNELL REGAN
G. O'SULLIVAN-CROWLEY
KATHRYN Z. BLOCK
MEGAN T. CRUMP
ELOISA DE LEÓN
ADAM B. STEPHENS
KEVIN P. SULLIVAN
BETH CONRADSON CLEARY
THOMAS D. MILLER
HEIDI E. GALVÁN
JARELY M. RUIZ
ROBIN A. PEDERSON
DANIELLE M. BERGNER
Assistant City Attorneys

July 13, 2009

Preston D. Cole, Chair
Recycling Task Force
Zeidler Municipal Building, Room 619

Re: Recycling Enforcement

Dear Mr. Cole:

By letter dated May 6, 2009, as Chair of the Recycling Task Force you requested an opinion regarding the legality of City of Milwaukee employees performing searches of garbage and recycling carts on private property and at the curbside. As discussed below, DPW and DNS employees may lawfully search garbage and recycling containers placed at the curb, containers located adjacent to the alley and accessible to the public, and containers placed for routine collection on the occupant's private property where collection occurs neither at the curb nor at the alley line. However, in many cases, there may be practical proof problems involved in prosecuting "failure to separate" or "failure to clean recyclable container" violations arising from searches in the absence of direct evidence of a violation.

To be designated as an "effective recycling program" and therefore qualify for financial assistance from the State of Wisconsin, the City's recycling program must meet certain requirements set forth in the State statutes and administrative regulations governing municipal recycling programs. Wis. Stat. § 287.11(g) requires that a municipal recycling ordinance provide for "[a]dequate enforcement." *See also* Wis. Admin. Code § NR 544.04(9) (requiring "[a] means of adequately enforcing" the ordinance). The DNR regulations issued pursuant to the statute require that a recycling ordinance include provisions for enforcement including "appropriate penalties,"...authorization for use of citations for ordinance violations, and "[a]dequate inspection authority to ascertain compliance with the ordinance." § NR 544.06(2)(e).

Pursuant to these requirements, Milwaukee Code of Ordinances (MCO) § 79-43 authorizes DPW and DNS employees to "use any lawful means to adequately enforce the requirements" of the recycling ordinance including "inspections to ascertain proper separation, preparation, collection and disposition of recyclable materials." The City of Madison adopted this same language in its recycling ordinance. Madison Gen. Ord. § 10.18(7)(b)3.

Though each case is fact-specific, in general, DPW and DNS employees may not conduct a warrantless search of garbage and recycling carts located within the curtilage[1] of the home and not exposed or accessible to the public. *United States v. Redmon*, 138 F.3d 1109, 1111-1115 (7th Cir. 1998) (warrantless search of garbage placed for collection on common driveway in front of connected garages was lawful); *Ball v. State*, 57 Wis. 2d 653 (1973) (unlawful warrantless search of barrel used for burning trash where located in backyard and not placed in public view).

However, a person does not have a reasonable expectation of privacy with respect to trash left on the curb outside the curtilage of the home. *California v. Greenwood*, 486 U.S. 35 (1988). Accordingly, a warrantless search of garbage bags left at the curb for pick-up performed by a garbage collector at the request of the police did not violate the Fourth Amendment's proscription against unreasonable search and seizure. *Id.* Similarly, a person has no reasonable expectation of privacy in the contents of garbage containers located adjacent to the alley and where the containers were readily accessible and visible from the alley. *United States v. Shanks*, 97 F.3d 977, 979-980 (7th Cir. 1996). Further, where routine collection occurs neither at the curb nor at the alley line but within the curtilage of the home, DPW or DNS employees may search containers placed for anticipated collection. *Redmon*, 138 F.3d 1109, 1113-1114.

Though it is lawful for DPW and DNS staff to search garbage and recycling carts left for collection or located adjacent to the alley and readily accessible to the public, in many cases, prosecuting "failure to separate" or "failure to clean recyclable container" violations on the basis of such searches raises practical proof problems. MCO § 79-25 requires "occupants" of residential and non-residential properties to separate recyclables from waste. MCO § 79-29 requires that the separated recyclable materials be clean and free of contaminants. The penalties

[1] Though a difficult concept for courts to apply, "curtilage" is defined in the cases as "the area outside the home itself but so close to and intimately connected with the home and the activities that normally go on there that it can reasonably be considered part of the home." *United States v. Shanks*, 97 F.3d 977, 979 (7th Cir. 1996) (*quoting United States v. Pace*, 898 F.2d 1218, 1228 (7th Cir. 1990).

sections of the recycling ordinance, MCO § 79-47-1-a (failure to clean) and § 79-47-2-b (failure to separate), specifically describe the violations as "a person who fails to comply..."

To effectively prosecute a violation of these sections the City must prove, to a level of clear, satisfactory, and convincing evidence, that the person cited was the actual person who violated one of these sections of the ordinance. Because the containers would be accessible to the public, it would be very difficult to prove that the cited "occupant" committed the offense and to disprove the defense that someone else threw the material in the wrong container. However, this concern is lessened where DPW or DNS employees lawfully search a container after observing a person dispose of material in violation of the ordinance.

If you have any comments or concerns or require any additional information, please do not hesitate to contact the undersigned.

Very truly yours,

GRANT F. LANGLEY
City Attorney

JAY A. UNORA
Assistant City Attorney

THOMAS D. MILLER
Assistant City Attorney

TDM:tdm
1047-2009-1348:147334