A STUDY OF COMPENSATION FOR SOLID WASTE HAULERS DISPLACED BY ORGANIZED COLLECTION

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Executive Summary

The 1989 Legislature directed the Legislative Commission on Waste Management to study the issue of whether and to what extent solid waste haulers should be compensated when displaced by organized collection.

Section 115A.94 of the Waste Management Act defines organized collection as a "system for collecting waste", in which a city or county specifies a hauler or a member of an organization of haulers, and authorizes that hauler to pick up some or all waste from a defined area of the city or county. Thus the act of organizing collection requires that the city or county define or specify the haulers, the geographic area and the types of waste to be collected. Under Minnesota Statutes Section 115A.94, Subd. 3, organized collection may involve a wide range of government action, including municipal service, ordinance, franchise, license and negotiated or bidded contract.

Organized collection is a tool for cities to achieve specific public purposes. Currently, approximately five hundred independent haulers operate in the state of Minnesota. In most areas, the haulers solicit business and service customers without restriction from local government, except for licensing requirements. As a result, many haulers may serve the same neighborhood. The public interests in organizing collection include: increased safety (fewer trucks result in fewer accidents), reduced noise and air pollution, less wear and tear on streets, increased efficiency and lower costs, and finally, improved potential for recycling.

While achieving these goals through organized collection, the city may cause haulers to lose part or all of their business in the city, depending on the organized collection mechanism chosen by the city. The issue underlying this study is whether the city should be required to compensate the haulers for that loss of business.

Part One of this Report examines the existing case law and statutes governing issues of compensation. The legal analysis concludes that compensation is <u>not</u> constitutionally required for displaced haulers nor does this type of regulation constitute an unconstitutional impairment of contract. Part One next summarizes statutory methods of compensation adopted in other states. Part One then discusses possible methods of compensation, including judicial determinations and statutory formulas based on amortization. Finally, the legal analysis discusses procedural safeguards as alternatives to compensation.

Part Two of this Report examines the policy issue of whether the legislature should create a statutory right to compensation for displaced haulers, even absent a constitutional right.

Many of the policy considerations surrounding these issues were raised in discussions with hauler and local government representatives. A summary of a roundtable discussion of the issues held on October 16, 1989, is provided in Appendix H. To obtain views from a broader base of government and hauler representatives, a telephone survey was conducted following the meeting. The results of the survey are included in Appendix I. The roundtable meeting, the survey and discussions with other interested parties form the basis of the policy analysis contained in Part Two.

Part Two summarizes the advantages and disadvantages of providing for compensation. It next discusses possible circumstances under which compensation should be granted, examines possible eligibility criteria and analyzes four alternative methods for determining the amount of compensation, including statutory formulas, judicial determination, arbitration, and statutory formulas with specific criteria.

The next section of Part Two looks at three potential sources of revenue to collect the funds necessary to pay the compensation. This section discusses collection surcharges, property taxes and the winning hauler(s) as potential revenue sources and analyzes each in terms of administrative ease, equity and revenue potential. It should be noted that the amount of money required could be very substantial and, in the end, the consumer always pays.

The final portion of Part Two examines alternatives to compensation. This section considers the advantages and disadvantages of strengthening the existing organized collection planning process to ensure consideration of all options, requiring contract negotiations with existing haulers and providing a reasonable amortization or notice period.

Part Three of this Report contains the report recommendations. Specifically, this report recommends that the Legislature not adopt a statutory right to compensation. Secondly, this report recommends specific modifications to the organized collection process to require hauler participation in planning and to require contract negotiations with willing existing haulers in the affected area.

TABLE OF CONTENTS - PART ONE

TOPIC	PAGE NO.
EXECUTIVE SUMMARY.	1-i - 1-iv
I. INTRODUCTION	1-1
A. Summary of the Issues	1-1
II. SUMMARY OF ORGANIZED COLLECTION PROCEDURES	1-2
III. EMINENT DOMAIN AND INVERSE CONDEMNATION IN MINNESOTA.	1-3
A. Definition of "Just Compensation" and "Taking".	1-3
B. "Inverse Condemnation" and "Regulatory Takings".	1-5
IV. COMPENSATION OF SOLID WASTE HAULERS AFFECTED BY ORGANIZED COLLECTION UNDER THE STATE AND FEDERAL CONSTITUTIONS.	1-7
A. There is Judicial Precedent for Awarding Compensation to Solid Waste Haulers as a Result of Municipal Regulation.	1-7
B. The Majority Rule Denies Compensation to Solid Waste Haulers Due to Governmental Regulation.	1-9
C. Compensation Under the Fifth Amendment is More Likely When the Government Physically Occupies the Property of Another.	1-12
D. The General Rule Denying Compensation for Damages to Intangible Property is Subject to Limited Exceptions.	1-14
E. Comparable Industries Have Not Been Awarded Compensation Due to Increased Competition Resulting from Governmental Action.	1-16
F. Organization of an Industry in the Public Interest has Been Upheld as Valid	1-20
G. Solid Waste Haulers are not Entitled to Compensation for the Value of Trucks, Equipment or Other Assets	1-21

V. ORGANIZED COLLECTION AS A POSSIBLE UNCONSTITUTIONAL INTERFERENCE WITH CONTRACTS . . 1-22

VI. COMPENSATION TO SOLID WASTE HAULERS UNDER EXISTING STATE STATUTES AND JUDICIAL DECISIONS. . 1-23

A. Right to Compensation 1-24

B. Method of Compensation. 1-26

VII. DISCUSSION OF PROPOSED METHODS OF COMPENSATION. . 1-27

A. Compensation to be Determined by the Courts Without Specific Guidance from the Legislature 1-27

B. Statutory Formula for Compensation Based Upon the Value of the Business for a Period of Depreciation or Amortization 1-28

VIII. PROCEDURAL SAFEGUARDS FOR SOLID WASTE HAULERS SUBJECT TO ORGANIZED COLLECTION 1-30

A. Licensed Solid Waste Haulers are Entitled to Procedural Due Process and the Constitutional Guarantee of Equal Protection 1-30

B. Additional Procedure Requirements for the Organized Collection Process. 1-33

IX. CONCLUSION. 1-35

TABLE OF CONTENTS: PART TWO

TOPIC		PAGE NO.
I.	INTRODUCTION	2-1
II.	ADVANTAGES AND DISADVANTAGES	2-3
	A. Advantages	2-4
	Fairness	2-4
	Protection of Small Haulers	2-6
	Promotion of Organized Collection Options that Do Not Result in Displacement	2-7
	B. Disadvantages	2-9
	Infringement on Local Decision Making	2-9
	Floodgates	2-10
	Chilling Effect	2-11
III.	CIRCUMSTANCES UNDER WHICH COMPENSATION SHOULD BE GRANTED	2-12
	A. Municipal Service	2-13
	B. Bidded Contract	2-14
	C. Negotiated Contract	2-15
	D. Summary	2-17
IV.	ELIGIBILITY REQUIREMENTS	2-18
	A. Extent of Existing Business in the Area.	2-18
	B. Length of Service.	2-21
V.	ALTERNATIVE METHODS FOR PROVIDING JUST AND REASONABLE COMPENSATION	2-24
	A. Statutory Formula for Compensation	2-24
	B. Judicial Determination of Compensation	2-27
	C. Arbitration.	2-29
	D. Statutory Formula with Specific Criteria	2-30
VI.	WHO PAYS, SOURCES OF REVENUE	2-33
	A. Collection Surcharges	2-33
	B. Property Taxes	2-35
	C. Winning Hauler	2-36
VII.	ALTERNATIVES TO COMPENSATION	2-38
	A. Strengthening the Existing Organized Collection Process	2-38
	B. Requiring Good Faith Contract Negotiations	2-40
	C. Providing a Reasonable Notice Period	2-42

TABLE OF CONTENTS: PART THREE

TOPIC	PAGE NO.
RECOMMENDATIONS	3-1
Recommendation #1. It is recommended that a statutory right to compensation for displaced haulers not be adopted	3-1
Recommendation #2. It is recommended that the organized collection process be modified to require contract negotiations with existing haulers	3-3

APPENDICES LIST

Appendix A - Chapter 325, Section 73, Authorizing Collector Compensation Report

Appendix B - Minnesota Statutes Section 115A.94: Organized Collection

Appendix C - Glossary of Terms

Appendix D - Minnesota Statues Section 117.045: Compelling Acquisition in Certain Cases

Appendix E - Coeur D'Alene Garbage Service v. City of Coeur D'Alene, 759 P2d 879 (Idaho 1988)

Appendix F - Compensation Statutes from other states:

F-1: Missouri Statute Section 260.247
F-2: Washington Statute Section 35.13.280
F-3: Montana Statute 7-2-4736
F-4: North Carolina Statute 160A-37.3

Appendix G - California Statute Sections 4270-4273

Appendix H - Summary of Roundtable Discussion

Appendix I - Survey Results

PART ONE
BACKGROUND STUDY:
LEGAL ANALYSIS OF POSSIBLE COMPENSATION FOR SOLID WASTE HAULERS DISPLACED AS A RESULT OF ORGANIZED COLLECTION

EXECUTIVE SUMMARY OF CONCLUSIONS OF BACKGROUND STUDY

Minnesota Statutes §115A.94 sets forth a procedure allowing a local government to organize the collection of solid waste. The Background Study considers whether or not implementation of these procedures violates the constitutional prohibition against the taking of private property for public use without just compensation. The Study also considers whether or not organized collection constitutes an unconstitutional impairment of contracts in violation of Article One, Section 10, of the United States Constitution. The Study contains a survey of statutory mechanisms to compensation solid waste haulers displaced by governmental action. Finally, the Study considers alternatives to compensation to safeguard the interests of solid waste haulers.

This is the first part of a three-part study. In addition to the Background Study, a Draft Report and a Final Report will also be submitted to the Legislature. The Draft Report will include a summary of different compensation models and will reflect municipal and hauling industry experience which will be determined through a survey and meetings. Policy recommendations will be set forth in the Final Report.

The Study concludes that there is no established right to compensation for solid waste haulers displaced as a result of organized collection. Although one court in Idaho upheld the right of a solid waste hauler to compensation as a result of a

municipal annexation, the majority rule denies compensation to solid waste haulers for alleged interference with established rights under contracts or a municipal license. Although Minnesota courts have recognized a right to compensation under limited circumstances for damages to licenses or other intangible property, compensation is rare absent an actual physical intrusion onto private property, or a finding that the governmental action is unreasonable and unrelated to the stated public purpose. A survey of previous court decisions uncovers numerous instances in which regulations of comparable industries have been upheld despite claims for compensation.

The Study also concludes that a claim by a solid waste hauler under the impairment of contracts provision of the state and federal constitutions would not likely be upheld. As summarized in the Study, actions by government affecting contractual obligations have been upheld where the regulations are reasonably related to an important public purpose. In the event that organized collection proceeds in a manner that is unreasonable or discriminatory, however, a constitutional violation may be found.

Several states have enacted compensation mechanisms or other protection for solid waste haulers in the context of municipal annexation despite the absence of court decisions compelling compensation. Statutes in Washington, Missouri, Montana and North Carolina establish notice provisions based upon a concept of depreciation or amortization of the value of a

business. Under these statutes, solid waste haulers are granted a right to continue operation for a certain period after a municipality announces its intent to replace the hauler as a result of annexation. The Study discusses the precedent for amortizing the value of an asset, and concludes that measuring the useful value of an intangible asset, such as a contract or a license, is extremely difficult.

The Study summarizes and evaluates several possible compensation mechanisms. Several states have allowed compensation based upon a hauler's income for a specific period of time. Another option available to states is to leave the issue of compensation to a determination by the courts. The Study concludes that basing compensation upon a company's income for a given period of time may be too speculative and may not fairly reflect the actual damages to the company. The Study also concludes, however, that leaving the issue of compensation to the courts would result in uncertainty and delay. Additional compensation mechanisms may be suggested by municipalities and haulers for inclusion in the Draft Report.

The Study suggests the implementation of additional procedural safeguards to protect the rights of solid waste haulers. It concludes that solid waste haulers are entitled to procedural due process and the guarantee of equal protection in the organized collection process.

The Background Study is a legal analysis and not a summary of public policy concerns. During the next month, input will be received from solid waste haulers and government officials. The

concerns of the interested parties will be reflected and summarized in the final report. It must be stressed that compensation for solid waste haulers could be considered appropriate public policy even absent a constitutional requirement. The authors of the Study welcome the input of all interested parties on the issues discussed in the Background Study.

BACKGROUND STUDY: COMPENSATION FOR SOLID WASTE HAULERS DISPLACED AS A RESULT OF ORGANIZED COLLECTION OR OTHER GOVERNMENTAL ACTION

I. INTRODUCTION

A. Summary of the Issues.

The 1989 Legislature directed the Legislative Commission on Waste Management to study the issue of whether and to what extent solid waste haulers should be compensated when displaced by organized collection (see Appendix A). This background study will attempt to provide the legislators with a basic understanding of case law and statutes governing this issue.

First, this report will consider the issue of whether compensation is constitutionally required. This analysis includes a consideration of decisions in other jurisdictions on compensation for haulers, and a discussion of previous judicial decisions affecting comparable industries. The analysis stresses the present scope of the just compensation clause of the Fifth Amendment as interpreted at the federal and state level.

Second, this report briefly discusses the constitutional limitation on impairment of contracts, and concludes that this limitation is not likely to affect the courts in evaluating the necessity for compensation.

Third, this report summarizes methods of compensation that have been enacted in other states, as well as methods utilized

by the courts in determining compensation for displaced industries. It evaluates whether or not statutory formulas for compensation meet the standards previously established by the courts. It also considers the possibility of procedural safeguards as an alternative to compensation, and comments on the extent to which such safeguards are constitutionally required.

This background study is intended as a summary of the case law and statutes relevant to these issues. This study does not attempt to address the public policy concerns or to recommend appropriate compromises between those concerns. The Legislature could determine that compensation is appropriate even in the absence of a conclusion that it is constitutionally required.

II. SUMMARY OF ORGANIZED COLLECTION PROCEDURES

Minnesota Statutes §115A.94 sets forth a procedure for authorizing a specific collector, or a member of an organization of collectors, to collect all of the waste from a defined geographic service area (see Appendix B). Under Subdivision 3(a), a local government may organize collection as a municipal service or, as is more frequently the case, it may organize collection by "ordinance, franchise, license, negotiated or bidded contract, or other means." As a part of organized collection, the local authority may require that solid waste be delivered to a waste facility identified by the local governmental unit, only when organized through contract or municipal service.

Organized collection was a response by the Legislature to the need for municipalities to monitor and regulate the collection of waste in order to better manage waste collection. Advocates of organized collection stress increased efficiency, and a reduction in noise and other disturbances in the community. Recycling programs and other waste reduction programs are promoted and benefitted by organized collection.

The present statutory scheme does not provide for a compensation mechanism. The present statute, however, does include certain procedural safeguards to facilitate the participation of interested persons in planning and establishing organized collection. Subdivision 4 of Minnesota Statutes §115A.94, requires a city or town to pass a resolution "announcing its intent to organize collection" at least ninety days before proposing an organized collection ordinance. The statute requires that all solid waste haulers in the city or town be notified by mail of the hearing to consider the resolution. Unlike numerous other statutes governing municipalities, such as those governing zoning and land use regulations, there are no specific criteria that must be considered in order to proceed with an organized collection plan.

III. EMINENT DOMAIN AND INVERSE CONDEMNATION IN MINNESOTA

A. Definition of "Just Compensation" and "Taking".

Article 1, Section 13 of the Minnesota Constitution states as follows: "Private property shall not be taken, destroyed, or

damaged for public use without just compensation therefor, first paid or secured." This language mirrors the Fifth Amendment to the United States Constitution which provides that ". . . nor shall private property be taken for public use, without just compensation." The right of eminent domain is an inherent and essential attribute of federal, state or local sovereignty. Freeborn County v. Bryson, 210 N.W.2d 290 (Minn. 1973). The general rule is that a constitutional taking does not occur unless the property owner is denied "all reasonable use" of his or her property. See Hay v. City of Andover, 436 N.W.2d 800 (Minn. App. 1989). "Just compensation" means the full monetary equivalent of the property taken and gives consideration to the cost of reproducing the property, its market value, and the resulting damage to the remaining property of the owner. U.S. v. Reynolds, 397 U.S. 14, 90 S.Ct. 803, 235 L.Ed.2d 12 (1970) (see, generally Glossary of Terms, Appendix C).

In the majority of condemnation proceedings, the acquiring authority submits a petition to the court, describing the interest in land to be taken and setting forth the public purpose for the project. See Minnesota Statutes §117.055. In any such inverse condemnation action, the landowners must be notified by certified mail no less than ninety days prior to the date upon which the acquiring authority intends to take possession of the property. Payment in the amount of the approved appraised value must also be made at the time possession is taken. Since organized collection is not the

intentional taking of an interest in land by a governmental agency, this procedure would not be followed by a municipality commencing organized collection.

B. "Inverse Condemnation" and "Regulatory Takings".

In some cases, the courts have held that governmental regulations are so onerous as to constitute a "taking" under the Fifth Amendment. If a landowner believes that certain regulations are confiscatory, the landowner may bring an action under Minnesota Statutes §117.045 to compel the governmental agency to acquire the interest subject to the regulation (see Appendix D). This is known as inverse condemnation. Such an action requires the agency to use its power of eminent domain to acquire an interest essentially destroyed by its action, and to provide compensation to the owner. The statute authorizes the court to award attorney's fees and all other expenses to an individual successfully maintaining an action to compel acquisition of a property interest.

In the event a solid waste hauler elects to demand compensation from a governmental agency, the action to obtain that compensation would be an action in inverse condemnation. A solid waste hauler would be claiming that the city or county, through organized collection, has denied the hauler all reasonable use of his or her "property." In this case, the "property" would be the license held by the hauler to operate in a given municipality, or the oral or written contracts between the hauler and the waste generators.

It is important to distinguish between "regulatory takings" and takings which involve the actual physical intrusion upon an owner's property. The concept of "regulatory takings" was first recognized by the United States Supreme Court in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). In Mahon, the Court held that Pennsylvania's prohibition of mining where surface rights to property were held by others constituted a taking under the Fifth Amendment. More recently, the Supreme Court held that the adoption of an ordinance barring the construction or reconstruction of any buildings in a designated flood protection area constituted a taking under the Fifth Amendment. In First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304 (U.S. 1987), the Court stressed that the regulation prevented any use of the property during the effective period of the ordinance and that as a result, compensation was required.

Historically, courts have been concerned that expansion of the concept of "regulatory taking" would result in dangerous limitations on the police powers of local government. The police power grants cities wide latitude in enacting regulations for the purpose of preserving the public health, safety, and morals or to abate public nuisances. State v. Crabtree, 15 N.W.2d 98 (Minn. 1944). In the context of organized collection, the legislature, and ultimately the courts, must consider the proper balance between the state's police power and the rights of individuals affected by governmental regulation.

IV. COMPENSATION OF SOLID WASTE HAULERS AFFECTED BY ORGANIZED COLLECTION UNDER THE STATE AND FEDERAL CONSTITUTIONS

The possibility of a constitutionally guaranteed right to compensation for solid waste haulers will be considered in several different respects. Case law directly relating to claims of solid waste haulers in various states will be analyzed, and it will be concluded that although there is precedent for awarding compensation, the majority rule has denied compensation to solid waste haulers as a result of government regulation. The discussion below will also consider other circumstances where compensation has been awarded for damages to "intangible property", such as licenses and contracts. The importance of an actual physical intrusion onto physical property will be discussed, and previous cases regarding regulations of other comparable industries will be summarized. This section concludes that there is no recognized right to compensation for solid waste haulers affected by organized collection, and further that the Minnesota courts are not likely to recognize such a constitutionally guaranteed right.

A. There is Judicial Precedent for Awarding Compensation to Solid Waste Haulers as a Result of Municipal Regulation.

In the landmark case of Coeur D'Alene Garbage Service v. City of Coeur D'Alene, 759 P.2d 879 (Idaho 1988), (see Appendix E) the Idaho Supreme Court held that a garbage company was entitled to compensation as a result of governmental action

precluding the company from continuing to service an area exclusively serviced by the company. The City, holder of an exclusive contract with a different solid waste hauler, annexed suburban areas and granted the right to operate to that hauler. As a direct result of the City's action, the company went from having a monopoly in those areas to having no business at all.

The Court emphasized that property of all classifications may be taken for public use under the just compensation clause. It concluded that the right to conduct a business constitutes property. Id. at 882. The Court noted that its decision was not based on the just compensation clause of the Fifth Amendment, but rather on the Idaho State Constitution.

The Idaho Court anticipated concerns that the decision would unduly restrict the City's police power. The Court emphasized that its previous decisions had held that a harmful effect upon a property owner alone is insufficient to justify an award of damages. See Johnston v. Boise City, 390 P.2d 291 at 295 (Idaho 1964). The Court stated as follows: "Here we conclude that garbage service suffered an unreasonable loss occasioned by the exercise of governmental power by the City and excluding garbage service from continuing its business in the annexed areas." Id. at 883.

It appears the Idaho case is the only case in which compensation has been ordered for a solid waste hauler as a result of government regulation. Even in the Coeur D'Alene case, however, the Court implies that its decision might have

been different if the rationale underlying the annexation was more closely tied to a significant public concern. The Court stressed that "(Determination) of whether damages are compensable under eminent domain or noncompensable under the police power depends on the relative importance of the interest affected." Id. at 883, citing Smith v. State Highway Commission, 346 P.2d 259 at 268 (Kansas 1959). Since the balance between the public and private interest may be quite different, a challenge to organized collection in Idaho could meet with a different result.

B. The Majority Rule Denies Compensation to Solid Waste Haulers Due to Governmental Regulation.

A number of other jurisdictions have considered the issue of compensation for solid waste haulers displaced as a result of municipal annexation of areas previously serviced by the haulers. Other jurisdictions have denied compensation under circumstances nearly identical to those confronted by the Idaho Court. Courts in Oregon, North Carolina, Washington and Arizona have all denied claims of compensation by solid waste haulers due to the annexation of previously established serviced areas. See City of Estacada v. American Sanitary Service, Inc., 599 P.2d 1185 (Or. 1979), Stillings v. City of Winston-Salem, 319 S.E.2d 233 (N.C. 1984), Metropolitan Services, Inc. v. City of Spokane, 649 P.2d 642 (Wash. App. 1982), and City of Phoenix v. Superior Court, 762 P.2d 128 (Ariz. App. 1988). In each of these cases, the courts stressed that regulation of waste

collection and hauling is a proper exercise of the police power. Although acknowledging that a solid waste collection franchise constitutes a valid property interest, the Court in Stillings, supra, stress that the franchise "was at all times subject to the prior constitutional right of the City to exercise its police power and its statutory right of annexation." Id. at 237, citing Metropolitan Services, supra, at 645.

Organized collection can be distinguished from annexation on several grounds. In the case of an annexation, the city's action is not motivated by any specific need to promote recycling or prevent nuisances resulting from multiple haulers in a given area. To the contrary, the affect on the solid waste haulers is merely incidental to the decision to annex neighboring areas. Presumably, the annexation is completely unrelated to any concerns for a safer and more efficient method of handling solid waste. As a result, annexation presents a stronger case for compensation than the commencement of organized collection.

Unlike annexation, organized collection does not automatically preclude any hauler from operating in a given municipality. Organized collection will inevitably, however, substantially change the rules of the marketplace. As a general rule, reasonable regulations may influence economic competition without constituting a taking without compensation. In United States Disposal Systems, Inc. v. City of Northglenn, 567 P.2d

365 (Colo. 1977), the Court considered an ordinance authorizing the City to provide trash removal services to houses, mobile homes and apartment buildings containing five (5) units or less without a fee. The garbage company sued, claiming that its public utility certificate, granted by the City, had been taken without compensation. The Court stressed that the City's action was an exercise of its police powers, and was presumptively reasonable so long as it was enacted for the public health, safety and welfare. The measure was upheld despite the fact that the result of the regulation was to eliminate 99% of the hauler's business without any compensation.

The Colorado Court stressed that trash collection is a regulated industry. The public utility certificates, similar to licenses granted in the State of Minnesota to garbage haulers, constitute a non-exclusive right to engage in trash collection and disposal. "It has been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and although no compensation is made." California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 26 S.Ct. 100, 50 L.Ed. 204 (1905).

The Minnesota Supreme Court has not considered the issue of compensation for a solid waste hauler affected either by annexation or organized collection. If presented with this issue, the Minnesota Court would no doubt consider the annexation cases from other jurisdictions. More often than not, a state court which has not considered an issue, will follow the

majority rule from other jurisdictions. If, however, the Minnesota courts decided to follow the minority rule set forth in the Idaho decision, the courts would not necessarily make a similar ruling in a case involving organized collection. To a great extent, the courts would look to general principles of eminent domain previously set forth in Minnesota courts as well as the federal courts.

C. Compensation Under the Fifth Amendment is More Likely When the Government Physically Occupies the Property of Another.

The courts have continuously attempted to distinguish between permanent physical occupations, physical invasions short of an occupation, and regulations that merely restrict the use of property. These distinctions were most recently clarified in the case of Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (U.S. 1982). In Loretto, the Court held in favor of a landlord who sued for compensation as a result of a law requiring landlords to permit the installation of cable television facilities and prohibiting the imposition of any fees for permitting cable television. In holding that a constitutional taking had occurred, the Court stressed the importance of a "physical occupation" of the property. Citing an earlier case, the Court stressed that "a taking may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public

program adjusting the benefits and burdens of economic life to promote the common good." See Penn Central Transportation Company v. New York City, 438 U.S. 104 at 124, 57 L.Ed.2d 631, 98 S.Ct. 2646 (U.S. 1978).

In Loretto, the Court stressed that any physical invasion will automatically result in compensation to the property owner. When the government does not physically occupy the property, a "multi-factor inquiry" will be undertaken. In distinguishing the case from other cases, the Court stressed that physical occupation of the property is "qualitatively more intrusive than perhaps any other category of property regulation." Id. at 441. The Court listed a large number of previous decisions by the United States Supreme Court upholding rental regulations, including anti-discrimination legislation, fire regulation, rent control, mortgage moratoriums and emergency housing laws.

Both the federal and state courts have attempted to limit compensation, except in extreme circumstances, to cases involving physical occupation or direct affects on real estate which essentially preclude any reasonable use of the property. One of the primary reasons for this distinction, is that it provides the court with a more definite rule or standard in considering just compensation claims. "Regulatory takings", as opposed to actual physical intrusions, require the court to balance numerous factors including the economic impact of the regulation, the extent to which the regulation interferes with

an investment-backed expectation, the character of the governmental action and the public policies underlying the action. See Penn Central Transportation Company v. New York City, supra at 124. Requiring local governments to compensate haulers as a result of organized collection would alter the existing balance under current law between private property rights and the police power.

D. The General Rule Denying Compensation for Damages to Intangible Property is Subject to Limited Exceptions.

The general rule in Minnesota is that one is not entitled to recover compensation for a "going concern" as a part of a compensation award. City of Minneapolis v. Schutt, 256 N.W.2d 260 at 261-62 (Minn. 1977). This rule would normally preclude a hauler's claim for damage to existing routes and business contracts. Certain limited exceptions to this rule have been established, however. In order to obtain compensation for going concern value in a condemnation matter, the interest holder must establish: (1) that the going concern value will in fact be destroyed as a direct result of the condemnation, and (2) that the business cannot be relocated as a practical matter or that relocation will result in irreparable harm to the interest. Housing and Redevelopment Authority of the City of St. Paul v. Naegele Outdoor Advertising Company of the Twin Cities, Inc., 282 N.W.2d 537 at 538-39 (Minn. 1979).

The Minnesota State Constitution has been interpreted to include compensation for the taking of "intangible property"

under certain circumstances in eminent domain actions. For example, in the matter of State v. Saugen, 169 N.W.2d 37 (Minn. 1969), the Court held that the owner of a liquor lounge was entitled to compensation for the "going concern value" of the property in addition to the value of the land and other tangible assets. A liquor license, by implication, "constitutes a definite economic asset of monetary value for its owner." Nelson v. Naranjo, 395 P.2d 228, cited at Saugen at 40. Crucial to the Court's decision, however, was the fact that the very nature of the business was tied to a specific location and that the owner had attempted to transfer the license unsuccessfully. The "intangible interest" in the going concern value of the business was one element of damages suffered as a result of a taking of a particular parcel of land.

In the context of organized collection, compensation under the Fifth Amendment would be a significant expansion of the rule allowing compensation for intangible property. Unlike a liquor licensee, a solid waste hauler owns no specific parcel of land which is adversely affected by organized collection. A solid waste business, as opposed to a liquor establishment, is a mobile, transferable business. Since the business is not by definition tied to a specific parcel of land, previous cases allowing compensation for intangible property are not applicable.

Minnesota courts have not recognized the right to compensation for the "taking" of an intangible interest in

property separate from a taking of real estate. The Court of Appeals most recently considered this issue in the matter of Hay v. City of Andover, 436 N.W.2d 800 (Minn. App. 1989). In that case, the property owner admitted that the City's action did not constitute a taking of the real estate since alternative uses of the property were available. The owners claimed, however, that a special use permit had been taken without compensation. The Court held that "the special use permit given by the City of Andover is not private property and therefore not subject to a taking claim." Id. at 804.

E. Comparable Industries Have Not Been Awarded Compensation Due to Increased Competition Resulting from Governmental Action.

The commencement of organized collection changes the rules of the market place governing the collection of solid waste. Companies, previously free to operate in all areas of the city, may find the area they can serve is reduced or eliminated. Organized collection permanently alters the manner in which a solid waste hauler can compete for business. The intent of Subdivision 4 of Minnesota Statutes §115A.94 is that all solid waste haulers be provided an opportunity to participate in the process of organized collection. An essential question is whether or not governmental action can permanently change the rules of economic competition without providing compensation.

Many regulations impact differently upon various commercial enterprises as a result of economies of scale, location and the

overall ability of the enterprise to comply with the regulation. For example, numerous counties have enacted designation ordinances pursuant to Minnesota Statutes §115A.86. These ordinances have required solid waste haulers to deliver solid waste to specific solid waste facilities. The impact of these requirements depend upon the size of the solid waste operation and the geographic distance of the primary area of service to the designated facility. Nonetheless, the statute does not provide for compensation, nor has any court considered the issue of compensation under these circumstances. Of course, the impact of organized collection is qualitatively different in that it could possibly result in a total loss of business for a specific hauler.

At some point, it may be argued that governmental action has such a severe impact on a company's ability to compete, that a regulatory taking has occurred. Numerous courts have denied claims of compensation due to increased competition caused by government action on the grounds that the action was a proper exercise of the police power. In Larson v. South Dakota, 278 U.S. 429, 49 S.Ct. 196, 73 L.Ed. 441 (1929) the United States Supreme Court held that the grant by a state of an exclusive ferry lease for a specified distance along a river did not preclude the state from erecting a bridge which essentially destroyed the claimant's ferry business. The Court rejected the claim that the operator was entitled to damages for loss of business based upon the construction of the bridge. The claim

was rejected despite the fact that the company had invested significantly in the commercial enterprise which was rendered valueless by the bridge. The case was principally decided on the impairment of contracts clause which is discussed later in this report.

Several more recent state court decisions confirm this view. Interestingly, the Utah Court denied compensation in the case of Intermountain Electronics, Inc. v. Tintic School District, 377 P.2d 783 (Utah 1962). Intermountain Electronics sued the school district on the basis that the district installed a television translator station in an area serviced by Intermountain under an exclusive franchise from the town of Eureka. The Court rejected the claim that compensation was required due to the significant impact on existing contracts and due to Intermountain's substantial investment. Essentially, the Court ruled that Intermountain did not have a compensable interest in remaining free from competition.

Several other cases have held that the entry by a municipality into the marketplace in direct competition with a private party did not result in compensable damages. The general rule was set forth long ago by the United States Supreme Court in the case of Knoxville Water Company v. City of Knoxville, 200 U.S. 22, 26 S.Ct. 224, 50 L.Ed. 353 (1906). In that case, the Court held that the exclusive nature of the company's franchise did not prohibit the City from erecting a separate waterworks system. Compensation was not required

despite a substantial diminution in the value of the company's franchise. In the subsequent case of Union Rural Electric Association v. Town of Frederick, 629 P.2d 1093 (Colo. App. 1981), the Court rejected an electric company's claim for compensation under similar circumstances. The Court rejected the claimant's contention that competition with the company was "tantamount to a taking of its property without just compensation." Id. at 1094.

It is important to note that in each of these cases, the affected industry retained an opportunity to compete under altered market conditions. A much different situation is presented where municipal action affirmatively precludes the operation of an existing business. For example, the City of Provo, Utah passed an ordinance prohibiting "any person, firm, or corporation, other than the waste removal department of Provo City to collect, remove or dispose of garbage in Provo City on a commercial basis or for hire." Parker v. Provo City Corp., 543 P.2d at 769 (Utah 1975). The Court ruled that the City had exceeded its powers and declared the ordinance void. "By its prohibition of a legitimate endeavor, which is not shown to bear a reasonable relation to the public health, defendant cannot, under its power to protect the public health, invade a private property right." Id. at 770.

The crucial factors in the Parker case were the affirmative prohibition of private solid waste collection and the absence of any stated public purpose. In the event a city affirmatively

precludes one or more solid waste haulers for reasons unsupported by the public policies underlying organized collection, a regulatory taking might be established.

In summary, the cases are consistent with a right to compete but not with a right to be free from competition. When the rules governing competition are adjusted by government action, the action will be upheld unless it is considered arbitrary or unrelated to a public purpose.

F. Organization of an Industry in the Public Interest has Been Upheld as Valid.

Through organized collection, municipalities may require the solid waste haulers to coordinate their businesses under one joint enterprise. Of course, it has been recognized that certain industries, such as electricity, telephone and cable television, are natural monopolies. As a result, these industries have been granted the exclusive privilege to provide certain services. To some extent, organized collection reflects a recognition that, while not a natural monopoly, coordination of the solid waste industry may be essential to the public interest.

Regulation of the oil industry in numerous southern states provides an interesting case study. Numerous courts have upheld "compulsory pooling" or "unitization statutes." These regulations "communitize" all royalties received from a "common source of supply." Under these regulations, state commissions apportion the royalties based upon the size of the owner's

property in relation to the size of the entire "spacing unit", or common source of supply. These regulations have been challenged and upheld in Louisiana, Texas, Oklahoma, and New York. Panhandle Eastern Pipeline Company v. Isaacson, 255 F.2d 669 (10th Cir. 1958); Sylvania Corp. v. Kilborne, 322 N.Y.S.2d 678 (N.Y. 1971); Hunter Co., Inc. v. McHugh, 320 U.S. 222, 64 S.Ct. 19 (U.S. 1952). In Hunter, supra, the Court stressed that "a state has constitutional power to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landowners of the migratory gas and oil underlying their land, fairly distributing among them the cost of production and the apportionment." Hunter at 227.

The state's interest in regulating solid waste haulers is to some extent analagous to the interest underlying the regulation of oil production. A division of garbage hauling routes proportionate to the share of the market for each hauler prior to organized collection is similar to compulsory pooling in the oil industry. Duplication of routes results in wasted resources and arguably, increased cost to the consumer. Organization of collection assists in the promotion of recycling efforts, a common good, analagous to the desire to increase oil production.

G. Solid Waste Haulers are not Entitled to Compensation for the Value of Trucks, Equipment or Other Assets.

Presumably, if a solid waste hauler is no longer able to operate as a result of organized collection, the hauler will

retain certain trucks and equipment. The general rule governing compensation for "fixtures" in eminent domain matters precludes compensation for trucks or equipment under these circumstances. Even if a "taking" is established, presumably the trucks and equipment could be sold or utilized in another fashion. As a result, they would not attach to the property interest in the contracts or license. U.S. v. 967,905 Acres of Land, 447 F.2d 764 (8th Cir. 1971).

V. ORGANIZED COLLECTION AS A POSSIBLE UNCONSTITUTIONAL INTERFERENCE WITH CONTRACTS

The United States Constitution Article 1, Section 10 provides: "No state shall pass any law impairing the obligation of contracts." Minnesota Constitution Article 1, Section 11 states: "No law impairing the obligation of contracts shall be passed." At one time, the federal constitutional provision was cited frequently as grounds for overturning state action. However, the scope of the protection has been significantly limited by recent decisions.

A three-part test applies in determining whether or not an unconstitutional impairment of the contractual obligation has occurred. First, the court must determine whether or not the state law has operated as a substantial impairment of a contractual obligation. If a substantial impairment exists, a significant and legitimate public purpose for the legislative act must be established. Finally, the legislative action must be examined in light of the stated purpose to determine whether

the adjustment of rights and liabilities of the contracting parties is based upon "reasonable conditions and is of a character appropriate to the public purpose justifying the law's adoption." Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400 at 411-13, 103 S.Ct. 697 at 704-06, and 74 L.Ed.2d 569 (U.S. 1983).

Assuming that organized collection inevitably impairs and infringes upon prior contractual agreements, the legislation is still valid so long as it is "necessary to meet a broad and pressing social or economic need" and is "reasonably adopted for the solution of the problem involved, and is not overbroad or over harsh." White Motor Corp. v. Malone, 599 F.2d 283 at 287 (8th Cir. 1979) affirmed 444 U.S. 911, 100 S.Ct. 223, 62 L.Ed.2d 166 (1979). The Supreme Court has stated that the prohibitions of the contract clause "must be accommodated to the inherent police power of the state to safeguard the vital interest of the people." Home Building and Loan Associate v. Blaisdell, 290 U.S. 398 at 434, 54 S.Ct. 231 at 238, 78 L.Ed. 413 (1934).

Given this standard, it is unlikely that a Minnesota court would determine that organized collection constitutes an unlawful impairment of contracts. Such a ruling would severely limit the State's police power to address a recognized social and economic problem in the most effective manner.

VI. COMPENSATION TO SOLID WASTE HAULERS UNDER EXISTING STATE STATUTES AND JUDICIAL DECISIONS

A. Right to Compensation.

A recent survey by the Minnesota League of Cities of jurisdictions throughout the country, indicates that a number of jurisdictions have made a policy decision to implement legislation providing for the compensation of solid waste haulers displaced under certain circumstances. Washington, Missouri, Montana and North Carolina have all passed statutes providing either for compensation or for an extended notice requirement for solid waste haulers in the event of annexation by a municipality of an area serviced by the waste hauler (see Appendix F). The Missouri statute also protects solid waste haulers where the city itself provides solid waste services to areas previously serviced by private haulers. Compensation under these statutes is generally limited to haulers affected by municipal annexation. As previously discussed, annexation and organized collection are dissimilar. As a result, these state statutes are not necessarily precedent for the establishment of a compensation mechanism for damages due to organized collection. Nonetheless, each of these states has implicitly recognized that solid waste haulers have a compensable interest in established routes of service.

The statutes of these four states are quite similar. Each of these states establishes a statutory right to continue operation subsequent to an annexation for a certain period of time. Compensation would only be required in these states in the event that the city did not allow the continuation of operation. Washington Statute 35.13.280 entitles the holder of

a franchise to continue to operate for up to five (5) years subsequent to annexation unless there is a showing that the hauler refuses to service the annexed area at a "reasonable price." Missouri Statute 260.247, Subd. 2 requires a city to contract with the existing hauler for two (2) years or to postpone expansion of existing services into the serviced area for a period of two (2) years. North Carolina Statute 160A-37.3 also requires that the existing hauler be retained for two (2) years in the annexed area absent compensation. Finally, Montana provides the greatest protection for solid waste haulers. Under Montana Statute 7-2-4736, an existing hauler must be retained for five (5) years following annexation in the absence of a showing that the existing hauler is either "unable or unwilling to provide adequate service to the annexed area." Interestingly, the Montana Statute requires that a majority of the residents sign a petition requesting service from the municipality after the five (5) year period in order to change from the existing hauler.

California Statute §4270, governing solid waste enterprises, recognizes the right of solid waste haulers to continue as authorized by a franchise, contract, or permit (see Appendix G). The California law provides that any solid waste enterprise which has provided services for more than three (3) years under the authority of a franchise, contract, or permit may continue to provide those services for a period of not less than five (5) years after notice that an exclusive solid waste

handling service has been authorized. As defined in the statute, exclusive solid waste handling services would clearly include a consortium formed through organized collection. As a result, the California statute goes further in its operation than any other statute in establishing a continued right to operate under a franchise or contract.

B. Methods of Compensation.

The statutes from the various jurisdictions differ as to the proposed method of compensation. The Montana statute is silent as to the issue of compensation and the Washington statute allows the city to either purchase or condemn the franchise, business, or facilities. Compensation must include "a reasonable amount for the loss of the franchise or permit. Presumably, the legislatures in those states decided to allow the issue of compensation to be determined by the general rules of compensation in eminent domain matters, discussed below.

The only state that has attempted to specifically define the amount of compensation is North Carolina. Under the North Carolina law, a city may terminate a preexisting contract upon annexation if it pays "economic loss" to the hauler. Under North Carolina Statute §160A-37.3(f), economic loss is defined as "twelve times the average monthly revenue for the three months prior to the passage of the resolution of intent or resolution of consideration." The North Carolina law concludes that a displaced hauler is entitled to one year of revenue as damages from the city upon annexation of its service areas.

Although there is no Idaho statute governing the issue of compensation to solid waste haulers, it is likely that compensation would be ordered consistent with the decision in Coeur D'Alene Garbage Service v. City of Coeur D'Alene, supra. The Idaho Court awarded damages based on ten (10) years of future earnings discounted to present value. As a result, the City was required to pay the garbage service $262,754.00 as compensation.

VII. DISCUSSION OF PROPOSED METHODS OF COMPENSATION

Compensation can either be determined through a statutory formula or judicial determination based upon generally accepted rules governing damages and eminent domain proceedings. These alternatives are discussed in this section. A thorough evaluation of these alternatives will follow in the Draft Report. Additional methods of compensation may be uncovered as a result of municipal and industry input.

A. Compensation to be Determined by the Courts Without Specific Guidance from the Legislature.

As noted in the discussion above, several states have left the issue of compensation to be determined through the condemnation procedure rather than through a specific statutory formula. In eminent domain proceedings, a property owner is entitled to the "fair market value" of the property taken by the state. Fair market value has been defined as "the amount of money which a purchaser, willing but not obligated to buy, would pay an owner willing but not obligated to sell." Housing and

Redevelopment Authority of St. Paul v. Kieffer Brothers Investment and Construction Co., 170 N.W.2d 862 at 864 (Minn. 1969). A statute addressing compensation for organized collection could simply require the city to pay the hauler for the fair market value of the contract or franchise.

Leaving this determination to the courts would allow a case-by-case determination more sensitive to the unique factors governing compensation in each situation. For example, certain solid waste haulers may be able to immediately replace lost business whereas others will be totally unable to replace lost routes. A formula based on revenues or profits for a given period of time might ignore key differences among haulers. Unfortunately, leaving this issue to the courts results in delay and uncertainty.

B. Statutory Formula for Compensation Based Upon the Value of the Business for a Period of Depreciation or Amortization.

All of the statutes as well as the Utah Court's decision in Coeur D'Alene, supra, are based on the assumption that an interest in a franchise or contract can be amortized or depreciated over a given period of time. Also implicit in the statutes, is the assumption that certain commitments and investments are made in anticipation of some minimal period of return on that investment. A statutory formula with a specific period guarantees the satisfaction of certain expectations based on substantial investments.

In a different context, the Minnesota Supreme Court has

upheld the doctrine of amortization of a property interest affected by government action. In the matter of Naegele Outdoor Advertising Company of Minnesota v. Village of Minnetonka, 162 N.W.2d 206 (Minn. 1968), the Court held that a restrictive ordinance requiring the removal of preexisting billboards within three (3) years of the enactment of the ordinance was constitutionally permissible and did not give rise to a claim for compensation. In the absence of such a grace period, the ordinance would have constituted an unconstitutional taking and compensation would have been required. The court stressed that so long as the amortization period is reasonable, the ordinance was constitutional. The reasonableness of the amortization period depends upon the useful life of the property.

This theory of amortization has been limited in its application in the State of Minnesota to fixed assets rather than intangible property interests. Clearly, the concepts of "depreciation" or "amortization" are much easier to apply to fixed assets with a relatively standard useful life. It is difficult, if not impossible, to apply this concept to an interest in contracts or municipal licenses. Certain businesses may continue to operate successfully indefinitely whereas other businesses might fail in a very short period of time. Predicting the "useful life" of a solid waste hauler's contract is virtually impossible.

A statutory provision setting a specific time period over which compensation is to be paid is contrary to two accepted

concepts governing the determination of damages. First, damages are not to be overly speculative and must be reasonably certain to occur. Carpenter v. Nelson, 101 N.W.2d 918 (Minn. 1960). Second, a set statutory formula would disregard the normal duty of any injured party to mitigate or reduce his or her damages. Normally, an injured party cannot recover damages that might have been prevented by such efforts. State v. Pahl, 95 N.W.2d 85 (Minn. 1959).

VIII. PROCEDURAL SAFEGUARDS FOR SOLID WASTE HAULERS SUBJECT TO ORGANIZED COLLECTION

A. Licensed Solid Waste Haulers are Entitled to Procedural Due Process and the Constitutional Guarantee of Equal Protection.

Even in the absence of a judicial or legislative means to compensate solid waste haulers, the haulers are protected by the Fourteenth Amendment of the United States Constitution. The Fourteenth Amendment establishes that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Solid waste haulers are entitled to these protections during the process of organized collection. The protections of procedural due process have been extended to a wide range of individuals, including employees, students, prisoners and licensed automobile drivers. Rendleman, "The New Due Process: Rights and Remedies," 63 Ky.L.J. 531 (1975).

In order to be entitled to procedural due process, an

individual or business must have a protected property interest. In the context of solid waste collection, the issue then becomes whether or not the holder of a garbage license has a protected property interest entitling the hauler to procedural due process. The United States Supreme Court has stated that in order to have a protected property interest, an individual must have more than a "unilateral expectation" or "an abstract need or desire." There must be a legitimate claim of entitlement. Board of Regions v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

Most licenses held by haulers are for a limited period of time and are renewable at the discretion of the city council or the city manager. At the end of a license period, a licensee has no vested right to a license and is in the same position as an applicant for a new license. Mirtanarack Inn, Inc. v. City of Long Lake, 310, N.W.2d 474 (Minn. 1981). A holder of a license, or a new applicant, however, is entitled to proper notice and a fair hearing prior to the denial of a license. Jones v. State Board of Health, 221 N.W.2d 132 (Minn. 1974). The procedures that have been required in licensing matters include a notice of hearing, the right to cross-examine witnesses and to produce witnesses on one's behalf and "a full consideration and a fair determination according to the evidence of a controversy." Sabes v. City of Minneapolis, 120 N.W.2d 871 (Minn. 1963).

The contracts held by the haulers, as opposed to their

license to operate, have the most significant economic value. In refusing to renew a license, or in the revocation of an existing license, the City essentially precludes the hauler from performing under certain established contracts. It is in large part due to the economic significance of the licensing process that procedural due process has been historically safeguarded in those proceedings. It can be argued that the organized collection process is similar in its consequences to the licensing process and that as a result, similar procedural protections should apply.

To some extent, the organized collection statute already provides for procedural due process. Subdivision 4 of Minnesota Statutes §115A.94 requires notice to all interested parties and a public hearing. It should be noted, however, that the requirement of a public hearing is only as to the decision to undertake organized collection. There is no provision allowing solid waste haulers to present evidence at a public hearing to determine the nature of the organized collection system. It could be argued that the protections afforded solid waste haulers subject to organized collection should mirror the protections presently afforded to those subject to renewal or revocation of a license to operate.

If a municipality excludes a solid waste hauler from the organized collection system, such a hauler could potentially have a claim under the equal protection clause of the Fourteenth Amendment. Certainly, there may be valid reasons for excluding

certain solid waste haulers from a municipality. If it is shown, however, that a solid waste hauler is denied access to a municipality based upon a factor unrelated to the public purpose underlying organized collection, a constitutional violation may have occurred. "The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object to the legislation, so that all persons similarly circumstanced shall be treated alike." F.S. Royster Guano Co. v. Virgina, 253 U.S. 412 at 415 (1920). For example, a residency requirement for a solid waste hauler or other business would be unconstitutional under most circumstances. Wright v. May, 149 N.W. 9 (Minn. 1914).

B. Additional Procedure Requirements for the Organized Collection Process.

Presuming that solid waste haulers are entitled to procedural due process and equal protection, the question remains as to how these rights can best be implemented and safeguarded. Often, legislatures set forth with particularity the standards and criteria governing municipal action, as well as the procedures to be followed in arriving at a decision. As discussed previously, there are no specific criteria to be considered in the approval of an organized collection plan nor are any special protections afforded the haulers in the organized collection process.

The following is a brief list of procedural requirements that have been included in other statutes governing municipal

action. Such protections may or may not be appropriate to the organized collection process.

1. Some statutes create presumptions in favor of certain individuals specially affected by government action. For example, under the designation statute, the designation plan must consider "less restrictive methods" and also must consider "the effects of the alternatives on the costs to generators." There is no similar provision requiring an analysis of the effect on haulers under an organized collection scheme. In other words, the statute does not express any preference for minimizing the effect of organized collection on the industry.

2. Several statutes include advance notification provisions. As previously discussed, these provisions have been incorporated in other states in considering the issue of annexation. Similar notice provisions are common in Minnesota law. The designation statute provides for a sixty day delay between approval of the designation facility and enforcement of the designation ordinance. See Minnesota Statutes §115A.86, Subd. 3.

3. Numerous statutes require that a municipality makes specific findings of fact prior to taking a specific action. Cities are accustomed to making specific findings in licensing and zoning matters. For example, in considering a conditional use permit to allow the use of property in a manner normally prohibited, cities must find that <u>standards</u> and <u>criteria</u> set forth in their ordinances have been satisfied.

Standards and criteria are often found in municipal ordinances rather than in state statutes. As to organized collection, standards and criteria could include minimizing displacement, ensuring the input of all parties, maximizing efficiency, guaranteeing a fair selection process, and the promotion of recycling.

IX. CONCLUSION

Based upon current federal and state law, a judicially enforceable right to compensation for solid waste haulers affected by organized collection is not likely. Legislative enactment of a compensation mechanism would place Minnesota with a very small minority of states creating such a right. This does not preclude the development of additional procedural safeguards to protect the interests of the solid waste industry. In addressing this issue, the Legislature needs to fully consider the interest of the solid waste industry and the public interests underlying organized collection.

PART TWO
POLICY ANALYSIS OF COMPENSATION FOR SOLID WASTE HAULERS DISPLACED AS A RESULT OF ORGANIZED COLLECTION

PART TWO. POLICY ANALYSIS

I. INTRODUCTION

Although Part 1 concludes that haulers do not have a constitutional right to compensation, Part 2 examines the policy issue of whether the Legislature should nevertheless provide a statutory right to compensation for haulers displaced by organized collection. Part 3 will summarize the final recommendations and justifications as to whether displaced haulers should be compensated, and if so, under what circumstances and by what mechanisms. Alternatively, Part 3 will recommend other mechanisms to assist displaced haulers and propose appropriate circumstances for the use of such mechanisms.

Section II of this report (Part 2) first analyzes the advantages and disadvantages of adopting a collector compensation law. For the purpose of analysis, Sections III-VI assume that the Legislature decides that the benefits of providing for compensation outweigh the costs and explore different aspects of a collector compensation law. Section III discusses the circumstances under which compensation should be required. This section examines a range of organized collection options and discusses whether each option provides the hauler a fair opportunity to participate in the organized collection system and whether the option causes the hauler to be displaced.

Section IV discusses possible criteria for eligibility for compensation, including the extent of existing business in the area and length of service in the area, and analyzes the advantages and disadvantages of each approach.

Section V proposes four alternative methods for determining the amount of the compensation to be provided to displaced haulers. This section examines the advantages and disadvantages of a statutory formula, judicial determination, arbitration and a statutory formula with specific criteria.

Section VI looks at three potential sources of revenue to collect the funds necessary to pay the compensation. This section discusses collection surcharges, property taxes and the winning hauler(s) as potential revenue sources and analyzes each in terms of administration ease, equity and revenue potential. It should be noted that the amount of money required could be very substantial and, in the end, the consumer always pays.

The final portion of this report (Section VII) examines alternatives to compensation. If the Legislature determines that the costs of providing compensation to displaced haulers outweigh the benefits, it may want to consider alternate forms of assistance to haulers facing displacement. This section considers the advantages and disadvantages of strengthening the existing organized collection planning process to ensure consideration of all options, requiring contract negotiations with existing haulers and providing a reasonable amortization or notice period.

Many of the policy considerations surrounding these issues were raised in discussions with hauler and local government representatives. A summary of a roundtable discussion of the issues held on October 16, 1989, is provided in Appendix H. The participants in the discussion included representatives from the Minnesota Waste Association, the National Solid Waste Management Association, as well as large and small private haulers. Government representatives also participated; included were city and county officials, as well as representatives from the League of Minnesota Cities, the Association of Metropolitan Municipalities, and Legislative staff. A participant list is included in Appendix H. To obtain views from a broader base of government and hauler representatives, a telephone survey was conducted following the meeting. The results of the survey are included in Appendix I. The roundtable meeting, the survey and discussions with other interested parties form the basis of this analysis.

II. ADVANTAGES AND DISADVANTAGES

Organized collection clearly results in significant changes in the manner in which collection services are provided in a community. Certain methods of organizing collection, like negotiated contracts, need not result in the loss of business for existing haulers. Other methods, like municipal service and bidded contracts, will cause "displacement" or the loss of business for some haulers. Prior to a

city* organizing collection, those haulers losing business had the expectation that they would continue in business in that location until they decide to quit or sell out. The cities, on the other hand, have the expectation that they can freely exercise their police powers and organize collection in a manner provided for by law. This section will examine the public policy considerations for and against providing compensation for displaced haulers.

A. Advantages

1. Fairness

Even absent a constitutional right to compensation, there is an argument that it would be fair nonetheless to provide by statute for the compensation of haulers displaced by organized collection. The equity of providing for compensation depends in part on whether the hauler experiences a significant loss when he or she is displaced in a specific location as a result of organized collection. The asset lost by displaced haulers

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* Note: Although Part 2 uses the term "cities" throughout the discussion, it is important to note that counties and towns are also authorized by Minn. Stat. Section 115A.94 to organize collection. Part 2 uses "cities" because cities are the most likely unit of government to organize collection. The analysis would apply to counties and towns as well.

is the written or oral contracts to provide service to residents in a specific area. Haulers assert that this asset represents the primary asset of their business. Haulers' capital assets depreciate quickly and do not have strong resale value. In the private acquisition of a hauling business, according to a hauler representative, the purchase price reflects primarily the customer base of the business.

The hardship of the displacement is compounded by the fact that the personal nature of the business makes it very difficult to move to a new area and compete with existing haulers. Both city and hauler representatives agree that residential generators have strong loyalties to their existing haulers. Thus, the hauling business is far less mobile than it may appear. As a consequence of the value of customer contracts to haulers and the relative lack of mobility of the hauling business, displacement from a specific location may in fact result in a significant loss to haulers.

To examine the equity of providing compensation to haulers displaced by organized collection, an analogy may prove useful. Assume that a small law firm operates in the City of Red Wing. The law firm consists of a father who has practiced law for 40 years in Red Wing and a son who has practiced in Red Wing for 15 years. The lawyers have a general practice and have provided a variety of legal services to the citizens of Red Wing. As a result of quality service, the firm has established

a steady practice built on trust, and good will and a strong reputation.

Assuming the City has a valid public purpose in regulating the provision of legal services, the City decides that it will provide legal services to Red Wing residents. It allows all the attorneys in town to submit a bid, and the lowest bidder will provide all the legal services to the City. The father and son firm lose the bid and are not allowed to practice law in Red Wing any more. Starting a new practice in Minneapolis or Hastings would prove difficult and would, at minimum, take some time to re-establish their reputation and relationships.

In essence, the fairness concern is that, in organizing collection, a city or county decides to provide a service that has in Minnesota been traditionally provided by private enterprise. To change that now seems unfair, even though it is within a city's regulatory power. Compensation would help to alleviate that unfairness.

2. Protection of Small Haulers

A second reason to compensate displaced haulers is to protect small haulers. If a city changes from an open system to an organized collection system resulting in displacement, small haulers are the most likely to be hurt by the change and the least able to mitigate their damages.

Specifically, organizing collection pursuant to a bidded contract seems to favor larger haulers. A small hauler that services only part of a city may be unable to bid, because he or she does not have the resources (trucks and labor) to perform the required service. The larger haulers have greater resources and a broader economic base and may be able to submit a low bid and absorb a loss, in order to get their "feet in the door." A smaller hauler unable to bid or losing a bid may not have the resources to wait out the term of the bidded contract for the opportunity to bid again. Lack of mobility makes it difficult to cover the losses elsewhere.

Compensation for haulers displaced by a bid system would protect small haulers in two ways. First, because bidding generally results in displacement, a requirement of compensation for displaced haulers may discourage bidding. Second, since small haulers are more likely to be displaced in a bid system, compensation might provide them the necessary resources to overcome their lack of mobility or to wait out the contract period.

3. Promotion of Organized Collection Options that Do Not Result in Displacement

Hauler representatives contend that the haulers' primary concern is to stay in business. Haulers indicate that they are not opposed to organized collection, so long as they can participate in the collection system. Thus, from the haulers' perspective, a third advantage of a collector compensation law

is that it is likely to encourage cities to select organized collection mechanisms that do not necessarily result in displacement.

Moreover, even if a city chooses to negotiate a contract with a consortium of existing haulers, a collector compensation law would give the haulers more leverage in contract negotiations. The haulers' fear stems from experience with waste designation. The Waste Management Act provides that before a county can adopt a designation law, it must first negotiate for 90 days with haulers to attempt to get contracts for the delivery of waste. Following the contract negotiations, a county may adopt an ordinance requiring delivery to the designated facility. Minnesota Statute Sections 115A.80 through 115A.89. The consequence of this process is that the county has more leverage in the negotiations, because it can simply adopt an ordinance if the haulers don't agree to its terms.

Similarly, a city organizing collection has the option of rejecting a negotiated contract and choosing an alternate method like a bidded contract. A collector compensation law would make that a more difficult choice for the city and would thus increase the leverage of haulers at the bargaining table.

B. Disadvantages

1. Infringement on Local Decision-Making

One of the primary disadvantages of a collector compensation law is that it infringes on a local governmental unit's exercise of its police powers. As noted above, one of the underlying purposes of a collector compensation law is to steer cities away from the organized collection options that cause displacement toward options that allow existing haulers to continue collecting waste. In light of the potential cost to the city of compensating haulers, as discussed in Section V herein, it is likely that cities would avoid options that would give rise to compensation requirements.

Cities organize collection because of environmental and public safety concerns. A fundamental purpose of local government is to regulate and to promote these types of concerns. The right to organize collection through municipal service or bidded contract is clearly within a city's regulatory authority. The Legislature gave the cities protection from municipal anti-trust concerns by specifically providing the organized collection authority. Because a collector compensation law would likely limit the city's choices, it would restrict a city's ability to exercise its traditional powers.

City representatives further argue that each city currently has the right to determine the appropriate way to organize collection to best serve the needs of the community. Each community

is unique. Each community has different public purposes it is trying to achieve by organizing collection. Each community should be able to choose among the full panoply of organized collection options that are provided for in Minnesota Statute Section 115A.94.

2. Floodgates: Establishing a Precedent

A significant disadvantage of adopting a collector compensation law is that such a precedent would very likely give rise to requests by other industries affected by government regulation. The case law appears clear that haulers have no constitutional right to compensation when a city organizes collection. To require compensation by statute changes long-standing rules and may create a perception that the Legislature is willing to consider establishing statutory rights to compensation in similar circumstances.

Discussions with city representatives and the survey results clearly indicate that the cities feel that a collector compensation law would be dangerous precedent, because a city often makes similar decisions that affect the rules of the market place. Although the impact of organized collection on the hauling industry may be extensive, other city decisions about the manner in which services are provided have similar impacts on other industries.

Diseased tree removal in the City of Minnetonka provides a good example. In 1973, the City decided to provide tree removal

services to deal with the Dutch Elm disease crisis. Minnetonka divided the City into four districts and took bids from tree removal companies. One company was selected to provide tree removal service in each of the four districts, and the City no longer allows open competition in Minnetonka. Compensation was not provided to displaced tree removal services.

If the Legislature passes a collector compensation law, it may prove difficult for Minnetonka, other cities and the Legislature to distinguish organized collection from other similar regulations.

3. Chilling Effect: Impeding Progress Toward Waste Management Goals

A third disadvantage of a collector any compensation law is that it may deter cities and counties from organization of waste collection. The Legislature deemed organized collection to be an appropriate tool to reach solid waste management goals. The Metropolitan Council's Solid Waste Management Policy Plan and some county solid waste management policy plans promote the use of organized collection. Yet, according to city representatives, many cities are hesitant to organize collection, because of fear of lawsuits and the investment in time and money.

If a city faces the possibility of paying compensation to displaced haulers, it may be even less likely to pursue organized collection, because the cost to a city of compensat-

ing haulers could be astronomical. One city survey respondent noted that the expense would be unbearable for his or her city, since the potential total compensation could total 5.4 million dollars. Since the potential economic impact would be even greater for a county, it seems reasonable that a collector compensation law would also inhibit county organized collection. Thus, one negative effect of a collector compensation law may be to impede the state's progress in meeting recycling and other waste management goals.

III. CIRCUMSTANCES UNDER WHICH COMPENSATION SHOULD BE GRANTED

For the purpose of discussing <u>when</u> to provide compensation for displaced haulers, this report will assume that the Legislature decides that compensation should be required for one or more of the reasons discussed in Section II of this report. Thus, a determination that the benefits of providing compensation outweigh the costs assumes a determination that a hauler's interest in staying in business should be protected; and that a hauler displaced by organized collection experiences a significant loss, and he or she should be compensated even absent a constitutional right to compensation.

Section 115A.94 of the Waste Management Act defines organized collection as a "system for collecting waste", in which a city or county specifies a hauler or a member of an organization of haulers, and authorizes that hauler to pick up some or all waste from a defined area of the city or county. Thus the act of organizing collection requires that the city or county define or specify the hauler, the geographic area and the types of waste to be collected. Under

Minnesota Statute Section 115A.94, Subd. 3, organized collection may involve a wide range of government action, including municipal service, ordinance, franchise, license and negotiated or bidded contract.

Certain licensing and ordinance requirements like specifying the days or time of pick-up in a specific area, increasing insurance requirements, or requiring the pick-up of recyclables do not fall within the definition of organized collection. While such requirements might specify areas or waste types, this type of regulation does not specify a hauler or member of a consortium. It is in effect an open collection system that is more stringently regulated. Thus this type of regulation is beyond the scope of this study.

This section will examine a representative range of organized collection options and discuss whether the government action falls within the definition of organized collection, whether it allows the existing haulers a fair opportunity to participate in the organized collection system and whether a hauler experiences a loss as a result of the government action.

A. Municipal Service

Of all the methods of organizing collection, municipal service most clearly falls within the definition of organized collection and results in displacement. Municipal service means that a city decides to purchase the necessary trucks and equipment, hire the necessary personnel and provide garbage collection service "in-house". The city is the specified collector and the city is the

specified area. The result is that all private haulers operating in the city would be unable to continue collecting waste inside the city limits. Haulers would have no opportunity to compete for the business. Further, there would be no expectation that private haulers would be able to resume operations at any defined time in the future. Complete displacement results from government action; haulers would have no control over whether and to what extent they would be displaced.

B. Bidded Contract

A city may organize collection by taking bids from haulers, selecting one bid based on defined criteria and entering into a contract with the winning bidder. The bidded contract would specify the collector or member of an organization of collectors, the area to be served and the types of waste. Thus a bidded contract clearly falls within the definition of organized collection.

A bidded contract does provide the opportunity for existing haulers to compete. As discussed in Section II.B.2, however, a bid process is not a level playing field. Smaller haulers are at a competitive disadvantage. Smaller haulers that are incapable of providing the service and choose not to bid may in fact have suffered displacement but apparently made the decision themselves. A city could avoid this ambiguity by dividing the city into bid zones where the smallest zone matched the smallest hauler's capability. Displacement would occur as with the master bid situation. A specific hauler wins the bid; everyone else loses.

The issue of the hauler having control over whether government action causes displacement is slightly less clear under bidded contracts than under municipal service. The hauler has control over whether he or she submits a good faith bid and whether he or she decides to bid at all. Once a hauler submits a bid, however, the government unit decides who wins and who loses, and subsequently, displacement occurs.

C. Negotiated Contract

A third approach to organizing collection is to negotiate a contract with a consortium of haulers currently operating in the city. As with a bidded contract, the negotiated contract would specify the area, require that a member of the consortium provide the collection services and identify the waste.

Under this method, haulers are clearly given the opportunity to participate in the collection system. Issues of defining displacement should not arise if all existing haulers join the consortium, if the contract negotiations are conducted in good faith on both sides and if agreement is reached. A hauler voluntarily choosing not to join prior to negotiations cannot reasonably be said to have been displaced by government action.

The issue is whether failing to sign a negotiated agreement constitutes displacement. Haulers have full control over that decision. The fear of the haulers is that a city can negotiate a contract with the haulers but provide for a take-it-or-leave-it

price. For example, assume a hauler currently collects from 15% of the city at $10.00/household/month. The hauler, as a part of a consortium, would continue to collect 15%, but the city says that the price is now $6.25. When the bargaining power between the parties is disparate, a hauler's refusal to sign may or may not reflect the fairness of the agreement.

Summary

If the Legislature determines that compensation should be paid to displaced haulers, it must carefully consider the range of organized collection options and narrowly define the circumstances under which compensation is required. Circumstances under which compensation should be required should include government actions which specify a hauler to collect in an area and which results in other haulers losing their ability to do business in an area. Compensation should be required if a hauler has no opportunity to participate in the organized collection system. A more difficult issue is whether compensation should be required if a hauler is given an opportunity to compete for a bidded contract based on his or her ability and loses the bid. If, on the other hand, a hauler has a fair opportunity to continue in business pursuant to a negotiated contract but decides not to continue in business, displacement as a result of government action does not occur and compensation should not be required.

IV. ELIGIBILITY REQUIREMENTS

In order to properly frame the eligibility requirements, a determination must be made regarding those factors in support of compensation which are most compelling. Criteria for eligibility will reflect such concerns as the reasonable expectations of the haulers, the degree of harm, resulting debt or bankruptcy, or even the fairness of the process itself. The criteria should be drafted to the greatest extent possible, to reduce the possible disadvantages of compensation while limiting compensation to those instances where fundamental fairness requires compensation. The discussion which follows considers several possible criteria for determining eligibility for compensation for haulers displaced by organized collection, and examines the advantages and disadvantages of each approach.

A. Extent of Existing Business in the Area/Percentage of Haulers Business

1. Examples

A limitation on compensation based upon the amount of business in a given area attempts to emphasize the degree of harm as an important factor in determining compensation. It amounts to a specific determination that the loss of business must exceed a certain threshold in order to be compensable.

As discussed in Part 1, several states have enacted eligibility requirements for compensation in the event of annexation and based

the compensation in part on the amount of service provided to a particular area. North Carolina, for example, allows compensation only for those haulers with fifty or more residential customers or five hundred dollars or more in monthly revenue from nonresidential accounts. Missouri provides protection in the event of annexation for those haulers serving fifty or more residential accounts or fifteen or more commercial accounts.

Another measure of the degree of harm suffered by a hauler is the percentage of total business lost as a result of organized collection. As an example, compensation could be provided in statute for solid waste haulers where the business lost constitutes ten percent or more of the company's total business. Compensation could also be limited in statute to those haulers providing more than a certain percentage of collection services in a given municipality.

b. Advantages and Disadvantages

Basing eligibility on the amount of accounts in a given area or on the percentage of business has the advantage of being directly related to the degree of harm to the business. It is interesting to note that this criteria was the most favored by surveyed haulers. Where a minimum threshold is established, such a method would make the implementation of compensation more manageable. To some extent, eligibility requirements based on the amount or percentage of business assume that at some point damages suffered by some haulers would be

"de minimus". Such an approach would provide some limitation on the number of haulers that a municipality would be required to compensate.

Despite these advantages, however, these eligibility requirements are subject to several objections. First, to the extent virtually all haulers qualify for compensation under such a standard, it is of little value. Second, eligibility requirements based on amount of business may overlook important differences between haulers and municipalities. A very small hauler, for example, suffers to a much greater extent from the loss of fifty customers than an extremely large hauler. Crafting an eligibility requirement which accurately reflects these differences would be very difficult.

Third, the eligibility requirements based on amount or percentage of business do not adequately address the reasonable expectations of the haulers. For example, if the hauler is a newcomer providing service primarily to volatile commercial accounts, that hauler may have little or no guarantee of maintaining those accounts with or without governmental action. To the contrary, a hauler present in the area for a large number of years losing a smaller number of stable accounts may arguably suffer a greater or more definite loss. This criteria addresses the extent of loss but does not address the underlying reasons why that loss should be compensable.

service, as under the Washington statute, is the most inclusive and avoids the exclusion of haulers with legitimate interest. However, a minimal requirement for length of service prevents the possibility of speculative windfalls by haulers anticipating the commencement of organized collection. The North Carolina statute, as well as the statute proposed during the 1989 Minnesota Legislative Session, would prevent this form of speculation.

A longer requirement, such as in California, has the advantage of more accurately reflecting the nature of the industry. Haulers which have only recently commenced operation are subject to failure in an extremely competitive and volatile industry. Since some of these businesses might fail, municipalities may be required to compensate businesses for lost revenue which would never have been earned.

The difficulty with the three year California limitation, or any other time requirement, is that the length of time required to firmly establish a hauling enterprise is uniquely related to the abilities, resources and special circumstances of each individual operator.

V. ALTERNATIVE METHODS FOR PROVIDING JUST AND REASONABLE COMPENSATION

The method of compensation is crucial to the fairness and practicality of a compensation system. As discussed in Part 1, the Legislature has a choice between providing a statutory formula or leaving the issue of compensation to be decided on a case by case basis in the courts. This section will discuss the advantages and disadvantages of each of these approaches.

A. Statutory Formula for Compensation

1. Examples

As discussed in Part 1, North Carolina is the only state that has specifically defined the amount of compensation to be paid to a solid waste hauler displaced by annexation. Under the North Carolina law, a hauler is entitled to compensation equalling twelve months of average monthly revenue. The bill introduced by the 1989 Minnesota Legislative Session would have required compensation in an amount equalling "eighteen times the eligible collector's average gross monthly income during the three month period immediately prior to commencement of the new collection system."

B. Length of Service

1. Existing Statutes

There is wide variation among existing statutes as to the amount of time a hauler must be in operation to be eligible for compensation in the area of annexation. On one extreme, the State of Washington has no requirement that the holder of the franchise be established for any given period prior to the annexation to be eligible for the right to continue operation.

The North Carolina statute requires that a solid waste hauler be in operation no less than ninety days prior to a resolution of intent to provide services to an annexed area. A similar requirement was included in a bill proposed by the haulers and introduced during the 1989 Minnesota Legislative Session. Under that proposal, a collector would not have been eligible for compensation unless it was "operating within the local governmental unit for at least three months before the date of change of method."

In California, a solid waste enterprise which has provided services for more than three previous years may continue to provide services for up to five years after receiving notification that the city intends to provide exclusive solid waste handling

services.

2. Advantages and Disadvantages

A solid waste hauler who has been operating in a municipality for a substantial period of time has arguably developed a reasonable anticipation of continued operation in the area. This factor reflects two characteristics of the industry mentioned by several industry representatives: 1) As in many other businesses, the start-up period is "very volatile" and some operators do not survive; and, 2) Once an operator is firmly established, there is a significant degree of loyalty to the existing hauler. As a result, the length of service in a municipality is directly relevant to whether or not the hauler can reasonably anticipate continued service of existing accounts in the absence of organized collection. Whereas a new hauler may or may not survive, a hauler who has served residential accounts for a long period of time has a very stable and reliable source of revenue. City representatives surveyed indicated that length of service was as relevant a criteria as extent of business, while haulers did not seem to favor length of service as a criteria for eligibility.

The three statutes summarized above draw different conclusions as to when an operator has an established interest in maintaining routes of service. The exclusion of any requirement for previous

2. Advantages and Disadvantages

A statutory formula for compensation would allow municipalities to accurately predict the costs of converting to an organized collection system. Similarly, haulers could make investment decisions with the knowledge that they would be entitled to a fairly certain amount of compensation if displaced by organized collection. Arguably, this knowledge would provide haulers with some security in venturing into new markets and making new capital improvements. Financial institutions providing financing would be assured by a hauler's right to collect compensation if displaced.

The costs to municipalities of a statutory formula similar to that in North Carolina would be substantial, if used in Minnesota when displacement occurs as a result of organized collection. It would be substantial because compensation would be required not solely for haulers in a smaller annexed area, but all haulers displaced in an entire city.

To illustrate the potential costs of the formula, consider the following example. Assume a hypothetical hauler charges residential accounts $15.00/month and further that he had twelve thousand residential accounts in a particular municipality. This hauler would have gross monthly revenue totaling $180,000.00.

Based upon "economic loss" as defined in the North Carolina statute, this hauler would be entitled to compensation in the amount of 2.16 million dollars.

A statutory formula based upon average gross revenues would fail to consider other factors relevant to the value of an existing business. For example, a formula would not distinguish between a business with significant debt and a very profitable business with little debt. Arguably, a business with a smaller debt structure in relation to gross monthly revenue is actually more valuable, and arguably entitled to more compensation.

There are other significant differences that a formula would fail to consider. Some solid waste accounts may be more subject to competition then others. Some businesses may be more established and stable. Some haulers might have very new equipment, whereas the equipment of other haulers might need replacement. Finally, some haulers may be more capable of reducing or eliminating any damages by obtaining accounts in other municipalities.

Another significant disadvantage of a formula is that it is likely to either over or under compensate in every situation. According to one hauler, the average purchase price of a hauling business varies between ten and fifteen times the average monthly gross revenue. Based upon a factor of ten, compensation for the hauler discussed previously would have been reduced to 1.8 million.

Given a factor of fifteen, compensation would be 2.7 million. If compensation under the statute was 2.16 million, compensation might be either excessive or inadequate by as much as $500,000.00.

Finally, a statutory formula for compensation would ignore the possibility that a hauler might replace routes and reduce or eliminate his or her damages. Even if organized collection results in a significant impact on the hauler, it is not the same as a purchase of the entire business. All of the hauler's physical assets remain with the hauler even if all of his or her routes are taken. If the hauler is able to replace lost business, he or she will be unjustly enriched under a statutory formula which does not consider the ability to transfer assets or accounts. Similarly, a statutory formula which assumes some degree of transferability may be unfair to those haulers who have no ability to replace lost accounts.

B. Judicial Determination of Compensation

1. Washington Example

The Legislature could provide for a right to compensation without providing any guidance as to the method to determine compensation. This was the method adopted by the State of Washington. The Washington statute, discussed in Part 1: Legal Background Study, gives municipalities the option of either purchasing a solid waste

business or condemning the business through eminent domain. In the event of condemnation, of course, compensation will be the fair market value as determined by the courts.

2. Advantages and Disadvantages

The most significant weaknesses of a system for compensation determined through the courts are delay and expense. In the absence of a settlement, an eminent domain case may take several years to reach conclusion. In the meantime, the hauler may have filed for bankruptcy, and may have lost any hope to restore his business. A hauler displaced by organized collection will be confronted with an immediate economic impact, and delay might negate the purpose of compensation. Requiring that compensation be determined by the courts would also result in a substantially increased burden on the judicial system. In addition to the costs of compensation, the increased burden on the judicial system and increased costs for public attorneys will be borne by the taxpayers. Litigation expenses would reduce the amount of compensation ultimately received by the haulers.

Finally, judicial determination of damages may result in great uncertainty for both the municipality and the hauler. Since, as a general rule, there is substantial variance in jury verdicts, the city will be unable to gauge the actual costs of organized collection until the eminent domain matter is complete.

Similarly, the haulers will be unable to rely upon a specific level of compensation in making their business decisions.

Since a judicial determination of damages would allow the introduction of all evidence relevant to "fair market value", however, such a system is most likely to provide an accurate measure of damages to a hauler. Such factors as existing debt structure, loyalty of customers, a value of assets, and other intangibles which cannot be easily reduced to a formula, could be considered by a court or jury. In other words, different haulers would in fact be treated differently under a judicial method of determining compensation.

C. Arbitration

1. Explanation of Method

One alternative would be to provide for a system of arbitration, managed by the court system. Such a system might allow haulers and municipalities to waive their right to a jury trial and present the issue of compensation to an impartial panel. Presently, under the eminent domain statute, fair market value is determined by three court appointed commissioners, who are experts in real estate. (See Minnesota Statute Sec. 117.075). The landowner may appeal the decision of the court appointed commissioners to the district court for a trial by court or jury.

An arbitration system could be modeled after the court appointed commissioner system presently in effect in eminent domain matters. Presumably, the three court appointed commissioners would be experts in business, or the solid waste industry.

2. Advantages and Disadvantages

Due to the unique concerns requiring prompt resolution of these matters, the arbitration could be made mandatory by the statute. Arbitration is usually a faster and less expensive method resolving disputes than the courts. Mandatory arbitration, however, could be challenged on constitutional grounds as a denial of the right to trial by jury.

D. Statutory Formula With Specific Criteria

1. Explanation of Method

In order to address the weaknesses of the two possible compensation methods discussed above, the Legislature could enact a statutory formula with a larger number of variables. Such a formula would attempt to include criteria such as existing debt, loyalty of customers, length of service, age and value of equipment, and other tangible or intangible factors relevant to "fair market value". In theory, this method would result in a

determination of value which is less arbitrary and more closely tailored to each individual hauler.

Prior to the implementation of such a formula, significant research would be required. Sales of previous solid waste businesses would have to be evaluated to determine those factors most closely related to fair market value. In addition, an effort would have to be made to determine the actual impact of organized collection on existing businesses, and those factors most closely related to the ability of the business to mitigate or reduce its damages.

2. Advantages and Disadvantages

If, in fact, a truly accurate formula can be devised, this proposal would likely be superior to either of the first two proposals discussed. Since compensation would be determined by statute, there would be no delay or uncertainty. The delays and expenses resulting from a fact finding process as to each case would be avoided. Such a system would address important differences between solid waste haulers and would likely result in a more accurate determination as to the amount of compensation.

Unfortunately, such a system might be inherently unworkable. In order to be truly accurate, so many factors would have to be considered, that the method would be difficult to understand and

complex. Inevitably, haulers and municipalities would contend that there are additional factors or that the factors set forth in the statute must be weighed differently in each and every case. Finally, this method could not be implemented until an extensive study is completed.

VI. WHO PAYS, SOURCES OF REVENUE

If the Legislature decides to provide for collector compensation and determines when and how to compensate, it must then decide who will pay the costs of compensating haulers and how will the revenue be collected. The answer to the former, of course, is that generators will pay the costs. The more difficult issue is identifying the appropriate revenue collection mechanism to collect the very substantial amount of money that would be required. This section assumes that the unit of government organizing collection would be responsible for collecting the revenue. This section will evaluate potential revenue sources in light of the following criteria: administrative ease, equity and revenue potential. Possible revenue sources include collection surcharges or property taxes imposed by the city or county, or revenue collected by the "winning hauler" or haulers.

A. Collection Surcharges

A collection surcharge is an obvious and direct means to collect the revenue necessary to pay the compensation to displaced haulers. A city or county could require, as a term of a bidded contract or as a condition of doing business in the area, that the haulers that continue to operate collect a surcharge from generators in the area affected by organized collection. The amount of the fee would equal the total amount of the compensation divided by the total number of accounts and spread over a reasonable period of time.

To illustrate, assume a city has 30,000 residences that require garbage collection. Prior to organized collection, one hauler collects from 10,000 residences. Four other haulers split the remainder. The city organizes collection pursuant to a bidded contract and awards the bid to the hauler with 10,000 accounts. If the total amount of compensation for the four displaced haulers collecting 20,000 residences is determined by multiplying 20,000 times the average gross monthly charge per household (est. $16.00/ household) times 12 months, the total compensation amount would equal $3,840,000. The collection surcharge would equal $10.67/month/household for twelve months.

From an administrative perspective, a collection surcharge would be a fairly low cost option. The hauler would simply raise his or her fees, collect the revenue and pay it over to the city or county. One drawback, however, is that there is no ready mechanism to collect from non-payers. If charges get too high, customers may stop payment. The costs of instituting civil proceedings are likely to be far more than the $128.00 total household cost.

Equity does not seem to be served by a flat collection surcharge. The surcharge amount bears no relationship to the ability of generators to pay nor to the benefit of organized collection. If the organized collection extends to commercial generators as well, a second equity issue is whether commercial generators pay the same amount as residential generators. Since the benefit of

organized collection is not related to the volume of waste generated, it would be very difficult to differentiate charges.

The revenue potential of a collection surcharge is limited primarily by the generators' willingness to pay. Currently, waste generators in Minnesota are paying for increased tipping fees at resource recovery facilities and other new system costs, a 6% sales tax, landfill surcharges and, in some cases, waste management service charges. If the average monthly charge per household is $16.00, a household in the hypothetical city described above would face, for one year, an increase of 67%. Skyrocketing charges also give rise to increased illegal dumping.

B. Property Taxes

A second potential revenue source is property taxes. A city or county could budget the amount required to pay the compensation likely to be awarded and collect it as part of its property tax levy. This alternative would require advance planning, so that the city or county could include the amount in the budget process and collect it the following year or years.

The administrative costs of raising taxes is very low, since the mechanism for collection and enforcement is in place.

The equity of using property taxes is again a difficult issue. The benefit to a community of organized collection is not clearly related to property value. Homeowners, of expensive homes on

large lots do not appear to benefit more from organized collection than the owner of a smaller home in a more crowded neighborhood.

A major drawback of using property taxes is the limited revenue potential of taxes. Property taxes are subject to levy limits. Although availability of taxing potential within the levy limits varies across political subdivisions, it is extremely unlikely that a city of 30,000 residences would be capable of levying nearly 4 million dollars in one year. If jurisdiction has the capability to increase its levy, it is politically difficult to do so in light of competing needs. If a jurisdiction is unable to increase its levy, reducing existing services is also a formidable task.

3. Winning Hauler

Another potential revenue source is the private haulers providing the collection services in a city or county with organized collection. In an open collection system, if a hauler buys out another hauler's routes, he or she spreads the purchase price of the business over the customer base. Because it is not good business sense to immediately raise customers' rates following the change in ownership, the costs of the purchase are covered by savings due to increased efficiency or a temporary reduction in profits. The proposal here is that the "winning" hauler would pay the costs of compensating the "losing" haulers the fair market value of their business in a similar manner. The hauler would pay the required amount to the city over a reasonable period of time and the city would compensate the displaced haulers.

The administrative costs of having the winning hauler pay are also very low. The responsibility for payment lies with the hauler so the city would have a clear remedy for failure to pay; the city could simply provide in the haulers contract that failure to pay will give rise to a right to terminate on the part of the city.

Requiring the "winning" hauler to pay appears equitable. One of the primary beneficiaries of an organized collection system is the hauler that continues to operate. He or she is given an exclusive right to operate in an area, is allowed to continue his or her business and presumably will profit by the expanded business. Under a bid system, for example, the effect is to at least temporarily transfer part of the assets of the displaced haulers (the contracts with customers) to the winning bidder. It may be fair to have the winner pay the price of that transaction.

It is difficult to evaluate the revenue potential of this alternative. The profitability and cash flow of haulers' businesses vary widely depending on the number of customers, geographics, efficiency, extra services offered and so on. If a business did not have an attractive cash flow, the winning hauler would then have to cover the costs of compensation through his or her profits. Haulers are unlikely to bid on contracts or participate in organized collection if they are required to operate at a significant loss.

VII. ALTERNATIVES TO COMPENSATION

If the Legislature determines that the costs of adopting a collector compensation law outweigh the benefits, it may want to consider alternatives to compensation to assist haulers facing displacement by organized collection. As discussed throughout this report, the haulers' primary interest is apparently that they be allowed to continue their business in a specific location. Given that, the issue is what mechanisms are available to adequately protect the haulers' interest short of a cash payment. This section will evaluate a range of alternatives, including: strengthening the existing organized collection process, requiring good faith negotiations with existing haulers, and providing a reasonable notice period.

A. Strengthening the Existing Organized Collection Process

Minnesota Statutes Section 115A.94 gives the local unit of government relatively unrestricted authority to organize collection by a variety of means. The city or town may organize collection after complying with the following process:

> The city must first mail and publish notice of a public hearing. Two weeks after the pubic notice, the city must hold a public hearing. Following the public hearing, the city must adopt a resolution of intent to organize collection. Ninety days following the adoption of the resolution, a city may propose a specific means of organized collection.

The organized collection statute further provides that the local governmental unit "may invite and employ the assistance of haulers in developing plans and proposals for organized collection system" Minn. Statute Section 115A.94, Subd. 3.

Ways to strengthen the process to protect haulers include the following:

1. The statute could require that the city invite and employ the assistance of haulers in developing an organized collection proposal;

2. The statute could include a requirement that in developing an organized collection plan, the city must analyze all the organized collection options, including the effect on haulers under the different organized collection systems and whether the city could achieve its goals by the less restrictive or intrusive mechanisms; and

3. Finally, the statute could require that the city make certain findings of fact when it proposes a specific organized collection scheme. These findings could include the following types of concerns: minimizing displacement, ensuring the input of all parties, maximizing efficiency, guarantee fair selection process and achieving specific city goals like recycling and public safety.

The advantages of tightening the planning process are that it provides some assurance that the haulers have input into the planning process and that all the options will be considered in light of the impact on haulers. At the same time, there is minimal infringement on the local governmental unit's policy-making. Because the planning process is similar to that already in the designation process, it does not create a dangerous precedent and open the floodgates for claims from similar industries.

The primary disadvantage is that the hauler has limited remedies if a city fails to adequately consider contract negotiations or regulatory controls. A hauler could sue for an injunction to require consideration, but haulers fear that lawsuits can create ill will and distrust, possibly even decreasing the likelihood that a city would choose one of the less intrusive options.

A second disadvantage, from the perspective of the hauler, is that strengthening the planning process only gives some comfort that alternatives will be considered. It does not provide haulers the opportunity to actually participate in the collection system. Thus it does not fully meet the haulers' interest in staying in business.

B. Requiring Good Faith Contract Negotiations

A second alternative to compensation is to require good faith contract negotiations with existing haulers in the affected area. The process could be similar to the designation process. Follow-

ing a planning process like that detailed above, the city would be required to negotiate with existing haulers in an attempt to reach a negotiated contract. The statute would specify a minimum period of time in which to negotiate and would prohibit the city from choosing another organized collection option, unless the negotiations fail.

The advantage of a required negotiation alternative is that it provides haulers with the fullest opportunity to participate in collection in the area.

The disadvantages are twofold. First, required negotiations represents a greater infringement on local decision-making. Second, haulers' experience in waste designation has given them the perception that it is difficult to negotiate in good faith when one party at the table has more leverage. In designation, unless exempt or excluded, the haulers either sign a contract for waste delivery or deliver pursuant to a designation ordinance. In organized collection, the perception would be that haulers either sign the contract the city offers or the city will choose a different organized collection option. In other words, the issue is whether required negotiations go far enough to protect the haulers' interest. Some haulers believe that only a right to compensation will result in equal bargaining power and a fair agreement.

C. Providing for a Reasonable Notice Period (Amortization Period)

As discussed in the Part 1, there is precedent for requiring a delay in governmental action to allow for an "amortization period." In essence, an amortization method accepts the fact that certain assets, tangible or intangible, have an anticipated life span. To the extent that governmental action does not reduce that life span, no compensation is required. If such a method was established for organized collection, the municipalities would grant the solid waste haulers the right to continue operation for a certain period of time as an alternative to monetary compensation. The length of the amortization period should, to the greatest extent possible, reflect the actual anticipated duration of the business and its assets.

Three states have adopted an amortization method in the context of annexation. Montana and California require municipalities to allow eligible haulers to continue operation for a minimum of five years following annexation. Missouri guarantees the right to continue operation for a period of two years. These statutes are essentially a recognition that solid waste haulers have a reasonable expectation or right to continue operation for a certain period of time.

There are a number of important advantages to an amortization system. First, it will reduce the economic impact on the haulers by allowing a business to gradually depreciate the value of its contracts and assets. Since the cities will not have to pay compensation awards, financial considerations will not discourage organized collection efforts.

There are also several significant disadvantages. First, an amortization period only delays displacement; it does not protect a hauler's interest in staying in business. Second, the amortization method is used for fixed assets which have a specific life span. Whereas it may be possible to appropriately amortize trucks and other physical assets, it is virtually impossible to accurately measure the useful life of business accounts or other intangible assets. Third, it infringes on local decision-making by prohibiting the commencement of organized collection for a substantial period of time. During the amortization period, many of the inefficiencies and environmental concerns addressed by organized collection would be unresolved.

Finally, if the city fails to select upfront the haulers that will continue to collect in the organized collection system, a long amortization period could have undesirable effects. During the amortization period, some haulers will decide to continue investing in new equipment and to otherwise prepare for possible

inclusion in the organized collection system. These investments would be risky in the absence of any guarantee that the hauler will ultimately be included in the new system. An unintended consequence might be that only the large haulers remain at the time the organized collection system is put into place.

PART THREE
RECOMMENDATIONS

PART THREE: RECOMMENDATIONS

The final Part of this Report contains the recommendations of the consulting team, based on the legal research and policy analysis contained in Parts One and Two. Although the interests underlying a claim of compensation are compelling, the team does not recommend providing a statutory right to compensation for haulers displaced by organized collection. This section will first discuss the reasons that the team does not recommend providing for compensation and will then discuss an alternative mechanism that more directly protects the haulers' interest in remaining in business, without unduly restricting local decision-making.

Recommendation #1. It is recommended that a statutory right to compensation for displaced haulers not be adopted.

The reasons for this recommendation include the following:

1. Dangerous Precedent: A collector compensation law would be the first statutory right to compensation for a taking in Minnesota. As long as issues of compensation are left to the court's constitutional determination, clear lines and distinctions can be drawn. Creation of statutory rights to compensation places these issues squarely in the political realm. If an affected industry loses in the courts, it will simply lobby the Legislature. Except for the extent of disruption caused by organized collection, it is difficult to distinguish the waste hauling business from other services provided for or regulated by local government. Once the precedent of providing compensation is set, other service industries will undoubtedly expect similar treatment.

2. Compensation an Undesired and Inappropriate Remedy: Many haulers said that their primary interest is continuing in business. Specifically, the haulers' concerns were that fair negotiations take place and that haulers be given an equal opportunity to compete. A just compensation law is intended to give haulers greater leverage in the negotiations and to make it costly for cities to choose other organized collection options. Statutory compensation, however, as a means to ensure fair negotiations is an extreme and overbroad remedy. Other less onerous remedies are available to ensure greater fairness, as discussed in Recommendation #2, below.

3. Problems of Implementation: Placing a value on a right to operate in a given municipality is extremely difficult. Such a determination differs from the more conventional eminent domain question of placing a value on land, because land is a more static interest. It is for this reason that courts have historically been very reluctant to compensate for "going concern value", the value of customers, etc. Unquestionably, any compensation mechanism will unjustly enrich some while inadequately compensating others.

Moreover, some haulers may decide to accept the compensation without any real effort to continue. Despite language in a statute precluding from compensation those unwilling to participate in negotiations, in practice such a clause would be difficult to interpret and almost impossible to enforce. Haulers who could relocate may decide not to attempt relocation but to accept the compensation. The municipality would have great difficulty establishing that the hauler could have started up elsewhere.

4. Impediment to Attainment of Waste Management Goals: It is likely that the cost of compensating haulers displaced by organized collection would be overwhelming. It is also clear that the generator is the source of the revenue regardless of the collection mechanism. In light of competing demands for local dollars for waste management and other services, it seems likely that this cost of compensation could result in the sacrifice of some service and possibly in a reduction in the public financial support for recycling and other issues related to the safe and efficient management of waste.

   It is even more likely that a compensation law would discourage cities from organizing collection. Consequently, the goals of organized collection, such as increased recycling, lower costs and improved public safety could suffer.

Recommendation #2. It is recommended that the current organized collection process be modified to require contract negotiations with existing haulers.

Discussions with haulers seemed to indicate that the haulers' primary interest is remaining in business. Thus, a primary purpose of the just compensation law proposed by the haulers was to encourage less disruptive forms of organized collection by attaching extreme financial consequences to those organized collection options that cause displacement.

Because of the difficulties outlined above, it seems that a better public policy would directly address the compelling interests of haulers. There are at least two ways to achieve this goal, including: 1) prohibiting the organized collection options that cause the most severe displacement, such as municipal service or bidded contracts; or 2) tightening the planning

process and requiring contract negotiations with willing, existing haulers. This section discusses the advantages and disadvantages of each approach and recommends the latter.

1. Prohibiting Certain Organized Collection Options. If the public purpose is to protect the hauler's interest in continuing in business, one alternative is to prohibit the organized collection options that are most likely to cause displacement, including bidded contracts and a change to municipal service. As Section II of Part Two discussed, certain organized collection options are more disruptive than others. These disruptive options provide little or no opportunity for haulers to compete for business. Further, displacement results from government action and not by choices made by the hauler. The organized collection option that is most disruptive according to these standards is the change from an open system to municipal service. Similarly, a bidded contract system results in displacement, although haulers have some opportunity to compete.

   The primary disadvantages of this approach, however, are that it may unduly restrict local decision making and, like compensation, it may be an over-broad remedy. While it is important to protect the haulers' interests, there is no guarantee that contract negotiations or licensing restrictions will work in every locality. In those areas with less willing or cooperative haulers, the goals of organized collection may be achieved only by means of a more disruptive option.

2. Requiring Contract Negotiations with Existing Haulers. A second option is to require greater hauler participation in planning for organized collection and to provide a fair opportunity for the hauler to remain in

business. This could be accomplished by providing for specific procedural safequards in the organized collection statute, Minnesota Statutes, Section 115A.94.

Specifically, the following modifications are recommended:

A. The organized collection statute should require that the city invite and employ the assistance of haulers in developing an organized collection proposal. Currently, the city has the option to work with the haulers, but it is not mandatory. The purpose of introducing this requirement is to ensure that the haulers have an opportunity to provide comments early in the process, prior to the city finalizing its organized collection plans. The benefits of this requirement are twofold. First, discussions with haulers during the preparation of this Report clearly demonstrated that their experience in collection would be very valuable in establishing organized collection. Second, an important lesson learned in the implementation of waste designation is that contract negotiations are less successful if haulers perceive that plans are finalized and that, as a consequence, the city is not really open to negotiations.

B. The organized collection statute should require that in developing an organized collection plan, the city must analyze all the organized collection options, including the effect on haulers under the different organized collection systems and whether the city could achieve its goals by the less restrictive or intrusive mechanisms. This step ensures that the city, the haulers and the public understand the range of options and the extent of displacement occurring as result of each option. Discussions with haulers and city repre-

sentatives demonstrated how persuasively haulers state their case. It is important that they be given the opportunity to do so as early as possible.

C. The organized collection statute should require good faith contract negotiations with existing haulers in the affected area. The statute should specify a period of time in which to negotiate (e.g. 90 days) and should prohibit the selection of another organized collection option, unless the parties fail to reach agreement fail. If the negotiations fail, the city may then choose another form of organized collection.

The benefit of mandatory contract negotiations is that it provides the haulers with a fair opportunity to continue in business. It is not a perfect remedy, however, because of the perceived disparity in bargaining power between the city and the haulers. It is important to recognize, however, that this disparity is inherent in all government regulation. Nevertheless, mandatory contract negotiations give haulers the opportunity to work seriously with the city to achieve the city's waste management goals, while protecting their own business interests.

Mandatory contract negotiations lengthen the process for the city and increase the costs of adopting an organized collection system. Note, however, that these costs are minimal relative to the potential costs of compensation. The modified process also restricts local decision-making by injecting additional procedural steps. It is recommended, nonetheless, because of the potential severity of the impact on haulers resulting from the city's decision. In other words, fairness

to haulers seems to justify the restriction on the city's decision-making process.

D. Finally, if the parties fail to reach agreement, the statute should require that the city make certain findings of fact when it proposes a alternate organized collection scheme. These findings could include the following types of concerns: minimizing displacement, ensuring the input of all parties, maximizing efficiency, guaranteeing fair selection process and achieving specific city goals like recycling and public safety.

There is precedent for requiring findings of fact as to issues ranging from a judicial determination of child support to municipal land use regulations. If the finder of fact, in this case the local agency organizing collection, is arbitrary and capricious in making those findings or fails to make the required findings, the action of the local agency may be reversed. Courts will likely be reluctant to invalidate a municipal determination as to the organization of solid waste collection if the action is reasonable, fair and nondiscriminatory. Specific statutory requirements, however, will give local agencies a vested interest in ensuring that the haulers' rights are safeguarded to the greatest extent possible.

APPENDICES

Sec. 73. COLLECTOR COMPENSATION REPORT.

The legislative commission on waste management with the participation of representatives of local government and of the solid waste collection industry shall prepare a report which examines whether and under what circumstances a local unit of government shall ensure just and reasonable compensation to solid waste collectors who are displaced when a local unit of government organizes solid waste collection under Minnesota Statutes, section 115A.94. The commission shall complete its report and recommend for legislative action any compensation mechanism found necessary by January 31, 1990.

Sec. 74. EVALUATION OF GREATER MINNESOTA LANDFILL CLEANUP FUND.

The legislative commission on waste management shall evaluate the effectiveness of the greater Minnesota landfill cleanup fund and the fees deposited in the fund to meet the needs for closure and post-closure care and provide recommendations for any legislative changes regarding the fee or the fund.

Sec. 75. USE OF GREATER MINNESOTA LANDFILL CLEANUP FEE UNTIL JULY 1, 1990.

Notwithstanding section 21, subdivisions 2 and 3, and section 22, the entire amount of the fee imposed under section 21, subdivision 1, until July 1, 1990, shall be paid by the operator of facilities to the county where the facilities are located. The fees received by the counties may be spent only as provided in Minnesota Statutes, section 115A.919.

Sec. 76. APPROPRIATION.

$10,000 is appropriated for fiscal year 1990 from the general fund for the purposes of section 73.

Sec. 77. REPEALER.

Minnesota Statutes 1988, sections 115A.98 and 115B.29, subdivision 2, are repealed.

Sec. 78. INSTRUCTION TO REVISOR.

The revisor of statutes is directed to change the words "hazardous substance" whenever they appear in Minnesota Statutes 1988, sections 13.771 and 115B.28 to 115B.33, to "harmful substance" in the 1990 edition of Minnesota Statutes and subsequent editions to the statutes.

Sec. 79. EFFECTIVE DATE; APPLICATION.

Section 6 is effective January 1, 1990.

Sections 20 and 22 to 25 are effective August 1, 1989.

Section 21 is effective January 1, 1990.

Section 8 is effective August 1, 1990.

Section 28 is effective June 30, 1989.

Sections 29 and 50 are effective the day following final enactment and apply to all response actions initiated or pending on or after that date.

Section 31 is effective the day following final enactment and section 31, paragraph (l), applies to expenditures resulting from emergencies that occur after January 1, 1988.

Sections 51 to 66 apply in the counties of Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington and are effective August 1, 1989; except sections 60 to 63 are effective January 1, 1990; and section 59 is effective the day following final enactment.

Section 69 is effective the day following final enactment.

Presented to the governor May 30, 1989.

Approved June 1, 1989.

1987 Legislation

Laws 1987, c. 348, § 26 revised this section. For former text see the main volume.

1988 Legislation

The 1988 amendment increased the fee cap to 35 cents per cubic yard from 25 cents and authorized the use of revenue produced by ten cents of the fee for any general fund purpose.

Effective date. Laws 1984, c. 644, § 85, was amended by Laws 1987, c. 348, § 50. The effective date segment appearing in the main volume relating to this section was changed to read as follows:

"Sections 46, 47, and 73 to 77 are effective January 1, 1985, except that the fees imposed in sections 46, 47, and 73 shall be effective January 1, 1990, with respect to nonhazardous solid waste from metalcasting facilities. Prior to January 1, 1990, an operator of a facility that is located in the metropolitan area for the disposal of mixed municipal solid waste shall deduct from the disposal charge for nonhazardous solid waste from metalcasting facilities the fee imposed under sections 46, 47, and 73."

115A.931. Land disposal of yard waste

(a) Except as authorized by the agency, in the metropolitan area after January 1, 1990, and outside the metropolitan area after January 1, 1992, a person may not dispose of yard waste:

(1) in mixed municipal solid waste;

(2) in a disposal facility; or

(3) in a resource recovery facility except for the purposes of composting or co-composting.

(b) Yard waste subject to this subdivision is garden wastes, leaves, lawn cuttings, weeds, and prunings.

Laws 1988, c. 685, § 21.

115A.94. Organized collection

Subdivision 1. Definition. "Organized collection" means a system for collecting solid waste in which a specified collector, or a member of an organization of collectors, is authorized to collect from a defined geographic service area or areas some or all of the solid waste that is released by generators for collection.

Subd. 2. Local authority. A city or town may organize collection, after public notification as required in subdivision 4. A county may organize collection as provided in subdivision 5.

Subd. 3. General provisions. (a) The local government unit may organize collection as a municipal service or by ordinance, franchise, license, negotiated or bidded contract, or other means, using one or more collectors or an organization of collectors.

(b) The local government unit may not establish or administer organized collection in a manner that impairs the preservation and development of recycling and markets for recyclable materials. The local government unit shall exempt recyclable materials from organized collection upon a showing by the generator or collector that the materials are or will be separated from mixed municipal solid waste by the generator, separately collected, and delivered for reuse in their original form or for use in a manufacturing process.

(c) The local government unit may invite and employ the assistance of interested persons, including persons operating solid waste collection services, in developing plans and proposals for organized collection and in establishing the organized collection system.

(d) Organized collection accomplished by contract or as a municipal service may include a requirement that all or any portion of the solid waste, except (1) recyclable materials and (2) materials that are processed at a resource recovery facility at the capacity in operation at the time that the requirement is imposed, be delivered to a waste facility identified by the local government unit. In a district or county where a resource recovery facility has been designated by ordinance under section 115A.86, organized collection must conform to the requirements of the designation ordinance.

APPENDIX C

GLOSSARY

Annexation - The acquisition of additional territory by a municipality by incorporating another city into the municipality.

Condemnation - Process of taking private property for public use through the power of eminent domain.

Constitutional - Rights or actions authorized by the constitution as opposed to those rights or actions authorized by statute.

Due Process - An exercise of the powers of the government consistent with safeguards for the protection of individual rights. Due process has been described as both procedural and substantive. Procedural due process guarantees notice and an opportunity to be heard in an orderly proceeding. Substantive due process protects an individual against arbitrary or capricious action.

Eminent Domain - The power to take private property for public use. The power may only be exercised for a public purpose and to the extent necessary to further that public purpose.

Equal Protection - The guarantee of equal protection requires that no individual or class of individuals shall be denied the same protection of the laws enjoyed by similarly situated individuals or class of individuals. Equal protection requires equal treatment for all those in similar circumstances.

Impairment of Contracts - An unnecessary or arbitrary interference with an existing contractual relationship by the government.

Inverse Condemnation - The cause of action brought by the owner of real property against a government agency to recover the value of real property the land owner claims has been taken or damaged by the agency. Inverse condemnation can be distinguished from other condemnation proceedings in that they are commenced by the land owner rather than by the state.

Just Compensation - The full monetary equivalence of property taken for public use through eminent domain. Just compensation can be determined either by the market value of the property, the replacement cost of the property, or the cost of remedying the damage.

Police Power - The authority granted by the United States Constitution to individual states and their subdivisions to adopt and enforce laws to secure the comfort, safety, morals, health and prosperity of its citizens. Exercise of this power

often places restraints on personal freedom and property rights, and therefore the power must be balanced against the individual protections outlined in the federal and state constitutions.

Regulatory Taking - An action by government which so reduces or eliminates the value of private property as to constitute a seizure or assumption of ownership of that private property.

Note 6

Return which satisfies requirements of just compensation may be more, less, or equal to return allowed by § 334.01(1). Id.

Landowner is entitled to that return on condemned land which would have been available if landowner had been timely paid for land and had made reasonable and prudent investments. Id.

7. —— Duty of depository to pay, interest

County, as depository, did not have constitutional duty to pay interest to landowners on funds deposited for city's condemnation of land under this section prior to the 1976 amendment. Fine v. City of Minneapolis, App. 1985, 368 N.W.2d 324, affirmed in part, reversed in part on other grounds 391 N.W.2d 853.

County, as a mere depository subject to orders of trial court, did not have statutory duty to pay interest on funds deposited by city as payment for condemned land which were not collected by landowners for three-month period where 1976 amendment to this section providing for payment of interest earned on court-deposited funds had not yet taken effect. Fine v. City of Minneapolis, App.1985, 368 N.W.2d 324, affirmed in part, reversed in part on other grounds 391 N.W.2d 853.

8. Abandonment of proceedings

Where landowners surrendered possession and it was accepted by condemnor and landowners accepted three-fourths of amount of award, right of condemnor to abandon proceeding was lost. Hennepin County v. Mikulay, 1972, 292 Minn. 200, 194 N.W.2d 259.

117.045. Compelling acquisition in certain cases

Upon successfully bringing an action compelling an acquiring authority to initiate eminent domain proceedings relating to a person's real property which was omitted from any current or completed eminent domain proceeding, such person shall be entitled to petition the court for reimbursement for reasonable costs and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred in bringing such action. Such costs and expenses shall be allowed only in accordance with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970,[1] Statutes at Large, volume 84, page 1894 (1971), any acts amendatory thereof, any regulations duly adopted pursuant thereto, or rules duly adopted by the state of Minnesota, its agencies or political subdivisions pursuant to law.

Laws 1971, c. 595, § 7. Amended by Laws 1985, c. 248, § 70; Laws 1986, c. 444.

[1] 42 U.S.C.A. § 4601 et seq.

Law Review Commentaries

Zoning and the law of eminent domain: Minnesota adopts the enterprise-arbitration test. 1981, 3 Wm. Mitchell L.Rev. 781.

Library References

Eminent Domain ⇐269 et seq.
C.J.S. Eminent Domain § 398.

Notes of Decisions

Construction with other laws 1
Mandamus 6
Order 5
Prelitigation expenses 3
Purpose 2
Trial, in general 4

1. Construction with other laws

Section 117.195, providing, inter alia, that when condemnation proceeding is dismissed or discontinued by petitioner, owner may recover from petitioner reasonable costs and ex-

contract amount or by bidding such amount at the sale when under the terms of the contract at the time of summary judgment the purchaser was delinquent only to the extent of two installment payments.

We reverse and remand to the district court for further proceedings. The district court is instructed to determine the amounts then due, owing and unpaid, and enter summary judgment in that amount. The district court is further instructed to, by order, permit Energy Systems a reasonable time, not to exceed 120 days, to remedy its default and tender such amount into court. In the absence of such payment made in timely fashion, the district court is directed to again order the imposition of a lien on the property, and the foreclosure of that lien by judicial sale. In the absence of compliance by Energy Systems the district court is directed to consider whether this appeal and the further proceedings upon remand have been pursued by Energy Systems in good faith or for the purpose of delay and harassment. In the event the district court concludes that this appeal and any subsequent proceedings upon remand were not brought and pursued in good faith the court is authorized to award Rickels attorney fees upon this appeal, and upon the remand proceedings.

Under the exceptional circumstances no costs on appeal are awarded to Energy Systems.

HUNTLEY, J., concurs.

BAKES, J., concurs in result.

DONALDSON, J., sat, but did not participate in voting due to his untimely death.

BISTLINE, Justice, specially concurring.

I am in agreement with the judgment of this Court reversing the judgment of the lower court. I am also in agreement with the view of the Chief Justice that the absence of an acceleration clause precluded the entry of judgment for an amount over and beyond the payments and obligations which were in default.

Accordingly I concur in the holding that the trial court erred in entering judgment for any amount other than that which was due and owing at the date of entry of judgment. Beyond that I cannot go, because I do not believe that prior to judicial sale the purchaser had any obligation to tender any amount other than what had been adjudged due and owing by the district court's judgment. Above all, I do not agree with giving of specific directions to the district court to govern proceedings on remand, although I do not doubt that they are given with a benevolent intent; 120 days may be a larger time than the seller is contractually required to extend.

Purely by way of comment, because it is not an issue, I question at the advisability of the district court's resolution of this controversy on a motion for summary judgment. The suggestion strongly appears that such a procedure resulted in the district court taking the cause under advisement without either party bringing to its attention the absence of an acceleration clause in the contract, and accordingly was brought into error in entering a judgment which encompassed payments due and unpaid—plus the unmatured balance of the contract purchase price.

114 Idaho 588

COEUR D'ALENE GARBAGE SERVICE, a sole proprietorship, Plaintiff-Respondent,

v.

CITY OF COEUR D'ALENE, a municipal corporation, Defendant-Appellant,

and

Lake City Disposal, Inc., an Idaho corporation, Defendant.

No. 16712.

Supreme Court of Idaho.

May 20, 1988.

Garbage company brought inverse condemnation suit arising from city's annexa-

tion of property in which garbage service provided service. The First Judicial District Court, Kootenai County, Watt E. Prather, J., entered partial summary judgment in favor of garbage company and awarded just compensation with interest. City appealed. The Supreme Court, Johnson, J., held that city's annexation of areas in which garbage company operated its business, resulting in exclusion of garbage company in annexed territory due to city's exclusive service contract with competitor, was taking entitling garbage company to just compensation under State Constitution.

Affirmed.

Shepard, C.J., concurred and dissented and filed opinion.

Bistline, J., filed specially concurring opinion.

1. Eminent Domain ⇐2(1.1)

City's annexation of areas in which garbage company operated its business, resulting in exclusion of garbage company in annexed territory due to city's exclusive service contract with competitor, was taking entitling garbage company to just compensation under State Constitution; garbage company's license from health district granted it lawful authority to provide garbage collection service in areas annexed prior to annexation and no evidence indicated that excluding garbage company from annexed areas furthered preservation of health in those areas. Const. Art. 1, § 14.

2. Municipal Corporations ⇐597

Police power of city to accomplish objectives of maintaining health of those who reside in and frequent city is broad, but not unlimited; when exercise of police power by city comes in conflict with interest of owner in preserving property interest, there must be balancing of these interests. Const. Art. 1, § 14.

3. Damages ⇐226

Eminent Domain ⇐149(7)

Trial court's conclusion that garbage company was entitled to $262,574 as just compensation for taking as a result of city's annexation of areas in which garbage company had previously provided service, based on "discounted future earnings method," was supported by evidence; evidence was conflicting as to number of years and discount rate to be used, but some evidence supported trial court's use of ten-year period of projecting revenue and 10% discount rate. Const. Art. 1, § 14.

4. Eminent Domain ⇐247(2)

Garbage company whose right to provide service in areas annexed by city was taken was entitled to interest on damages awarded from date of taking. Const. Art. 1, § 14.

5. Eminent Domain ⇐303

In inverse condemnation case, party whose property has been taken is entitled to interest on value of property from date of taking; otherwise, party from whom property was taken would have been deprived of both property taken and use of just compensation during period from taking until amount of just compensation is determined. Const. Art. 1, § 14.

Hull, Hull & Branstetter, Michael K. Branstetter, (argued), Wallace, for defendant-appellant.

Scott W. Reed, Coeur d'Alene, for plaintiff-respondent.

JOHNSON, Justice.

This is an inverse condemnation case. The primary issue presented is whether the actions of the City of Coeur d'Alene (the City) constituted takings of property of Coeur d'Alene Garbage Service (Garbage Service) requiring just compensation pursuant to art. 1, § 14 of the Idaho Constitution and the fifth amendment of the United States Constitution. We affirm the decision of the trial court that there were takings and the award of just compensation by the trial court, together with prejudgment interest from the dates of taking.

THE FACTS

For several years prior to 1982 Garbage Service provided garbage collection service to suburban areas outside the corporate limits of the City. In 1981 the City contracted with Lake City Disposal, Inc. (Disposal) to provide garbage service for every structure in the City that was occupied. By ordinance the City prohibited collection of garbage within the limits of the City except by Disposal, and made it a crime for anyone else to attempt to provide garbage service within the City. The contract between the City and Disposal was for a fixed five-year term with a two-year option to renew. The contract also required Disposal to extend its garbage collection service to any area annexed by the City within ninety days after annexation.

Garbage Service was licensed as a hauler or collector of garbage by Panhandle Health District No. 1. This license required compliance with all state regulations for the sanitary procedures of hauling and handling garbage, but did not provide Garbage Service with a franchise to serve a particular territory. Garbage Service enjoyed a *de facto* monopoly in the areas it served outside the limits of the City.

In 1982 the City began the process of annexing some areas in which Garbage Service was operating. Before the annexation was completed Garbage Service obtained written contracts with its customers in the areas proposed for annexation. These contracts were for a period of three months with automatic renewal for additional periods of three months unless cancelled by either party by giving notice ten days prior to the expiration of each three-month term.

Following the completion of the annexation Disposal began providing garbage collection service within the annexed areas that had previously been served by Garbage Service. Garbage Service filed suit for injunctions against the City and Disposal, to obtain just compensation for the taking of property, and for damages for interference with contracts. While the suit was pending, in 1983 the City annexed other Garbage Service sought a preliminary injunction to prevent the City and Disposal from servicing Garbage Service's customers in the areas annexed in 1983. The trial court denied the preliminary injunction. Garbage Service then filed a supplemental complaint seeking the same relief as sought in the complaint with regard to the areas encompassed in the 1983 annexation. The trial court granted partial summary judgment to Garbage Service, determining that there had been takings of Garbage Service's property by the elimination of its right to serve its customers in the areas annexed. Following a trial the trial court awarded Garbage Service $262,574 as just compensation, together with interest from the dates of taking.

The City has appealed the trial court's ruling that there were takings. The City has also raised as issues whether the trial court improperly received evidence concerning damages that was not based on fair market value, whether the trial court awarded an improper amount of just compensation, and whether prejudment interest was properly awarded.

II.

THE ACTIONS OF THE CITY CONSTITUTED TAKINGS REQUIRING JUST COMPENSATION

[1] Both the Idaho Constitution and the United States Constitution provide that if private property is taken for public use, there must be just compensation. Id. Const., art. 1, § 14, U.S. Const., Amend. 5. We conclude that the protection of the just compensation clause of our state constitution provides a sufficient basis for our decision in this case. We refrain from premising our opinion on the just compensation clause of the fifth amendment.

Garbage Service does not question the authority of the City to annex the areas within which Garbage Service operated its business. Garbage Service contends that it was the effect of the exclusive service contract between the City and Disposal that brought about the takings of the property

of Garbage Service entitling it to just compensation. Garbage Service acknowledges that if it had been permitted to continue to serve its customers in the annexed areas, there would have been no takings. We agree.

The essence of our holding here is that the City went too far by excluding Garbage Service from continuing to service its customers in the annexed areas. Garbage Service's license from Panhandle Health District No. 1 granted it lawful authority to provide garbage collection service in the areas annexed prior to annexation. The trial court found that Garbage Service was not endangering or threatening any public health or welfare in the annexed areas. If the City had merely regulated the operation of Garbage Service in the annexed areas by requiring it to comply with reasonable standards established by the City, there would have been no taking. Instead, the City chose to take from Garbage Service any opportunity to continue to service its customers in the annexed areas. It was this exclusion that entitles Garbage Service to just compensation.

The City has disputed whether Garbage Service's business in the annexed area constituted property that is subject to the just compensation clause of art. 1, § 14. This Court has stated that private property "of all classifications" may be taken for public use under the just compensation clause. *Hughes v. State*, 80 Idaho 286, 293, 328 P.2d 397, 400 (1958). It is also established that the "right to conduct a business is property." *Robison v. H. & R.E. Local # 782*, 35 Idaho 418, 429, 207 P. 132, 134 (1922). *See also, O'Connor v. City of Moscow*, 69 Idaho 37, 42–43, 202 P.2d 401, 404 (1949); and *Winther v. Village of Weippe*, 91 Idaho 798, 803, 430 P.2d 689, 694 (1967). Garbage Service had a property interest in the business it conducted in the areas annexed by the City. The City chose to take this property in order to allow Disposal to provide exclusive garbage service to the annexed areas.

[2] We recognize that there are competing interests at issue here. The City has an interest in insuring that the garbage collection service that is provided to its residents is uniform and accomplishes the purpose of maintaining the health of those who reside in and frequent the City. The police power of the City to accomplish these objectives is broad, but not unlimited. When the exercise of the police power by the City comes in conflict with the interest of an owner in preserving a property interest, there must be a balancing of these interests. There is no showing here that the actions of the City in excluding Garbage Service from the annexed areas furthers the preservation of health in those areas. In the absence of such a showing, the balance tips in favor of the protection of Garbage Service's property interest. *Cf. Parker v. Provo City Corp.*, 543 P.2d 769 (Utah 1975) (Ordinance prohibiting private waste material collector from removing or disposing of garbage in the city declared void where there was no showing that the material collected or the method of hauling it was detrimental to the public health).

This Court has previously said in cases involving the conflict between the exercise of a city's police powers and the protection of private property that a harmful effect upon a property owner alone is insufficient to justify an action for damages. *Johnston v. Boise City*, 87 Idaho 44, 52, 390 P.2d 291, 295 (1964). In *Johnston* the Court focused on there being "a reasonable relationship to the public health, safety, moral or general welfare" in order to validate the exercise of the police power. *Id.* The Court stated:

> If the exercise of the authority under such an enactment is reasonable and not arbitrary, any injury occasioned thereby must be considered a servitude inherent under our system of government, and damages from such injury must be considered as *damnum absque injuria*. [Citations omitted.] In the instances where the exercise of the authority transgresses the bounds of reasonableness, or is arbitrary in result, to the point where there is an actual taking of private property for public use, (Idaho Const., Art. 1, § 14) or to the point where there is a deprivation of property without due process of law (Idaho Const., Art. 1, § 13), an action would lie for damages by way of inverse condemnation or of injunctive relief.

Id.

The Court then adopted the following formulation of the Kansas Supreme Court in *Smith v. State Highway Commission*, 185 Kan. 445, 346 P.2d 259, 268 (1959):

> Determination of whether damages are compensable under eminent domain or noncompensable under the police power depends on the relative importance of the interests affected. The court must weigh the relative interests of the public and that of the individual, so as to arrive at a just balance in order that government will not be unduly restricted in the proper exercise of its functions for the public good, while at the same time giving due effect to the policy of the eminent domain clause of insuring the individual against an *unreasonable loss* occasioned by the exercise of governmental power. (Emphasis in original.)

Here we conclude that Garbage Service suffered an unreasonable loss occasioned by the exercise of governmental power by the City in excluding Garbage Service from continuing its business in the annexed areas.

In a similar case this Court has held that once a supplier of service lawfully enters into an area to provide that service, annexation of the area by a city does not "in the absence of condemnation" authorize an ouster of the supplier from that area. *Unity Light & Power Co. v. City of Burley*, 92 Idaho 499, 502, 445 P.2d 720, 723 (1968). Implicit in the decision in *Unity* was an acknowledgment that the supplier of the service in the annexed area had a property interest in servicing its customers there. In *Unity* the trial court awarded the supplier $500 damages for taking by Burley of property rights, and enjoined Burley from interfering with the supplier's existing customers. *Id.* at 504, 445 P.2d at 725. This Court affirmed. The Court stated that "[a]mong the considerations which led to the conclusion that [the supplier] could not be ousted from the territory annexed by Burley insofar as service to its members at the time of annexation is concerned, is that the legislature as early as 1903 recognized that delivery of electricity throughout the state was essential." *Id.* at 502–03, 445 P.2d at 723–24. We note a similar recognition of the importance of solid waste disposal declared by the legislature in I.C. § 31–4401.

In *Unity*, this Court held that the City of Burley had the power to condemn the supplier's property within the annexed area. *Id.* at 503, 445 P.2d at 724. Here, the City had the right of eminent domain under I.C. § 50–1030(c) for the purpose of preserving the public health as provided for in I.C. § 50–304. Although the City did not exercise its right of condemnation in this case, it did take Garbage Service's property by excluding Garbage Service from servicing its existing customers in the annexed areas.

The decision of this Court in *Renninger v. State*, 70 Idaho 170, 213 P.2d 911 (1950), disposes of the City's contention that it is immune from liability to Garbage Service by virtue of I.C. § 6–904(4). The City characterizes this suit as one for tortious conduct of the City. In *Renninger* this Court held that art. 1, § 14 of the Idaho Constitution waives the immunity of the state in an inverse condemnation case. *Id.* at 178, 213 P.2d at 916. This case is correctly characterized as one for inverse condemnation and not as one for tortious interference with contract. The City cannot avoid liability by attempting to recast what it has done.

III.

THERE IS EVIDENCE TO SUPPORT THE JUST COMPENSATION DETERMINATION OF THE TRIAL COURT

[3] The City has challenged the trial court's determination of the amount of just compensation awarded to Garbage Service on the grounds that the trial court took into account evidence not based on the fair market value of the property taken and evidence premised on some elements of

noncompensable damages. The essence of the City's position is that the trial court did not correctly determine the fair market value of the garbage collection routes of Garbage Service that were taken because the trial court used the earnings of Garbage Service in the annexed areas to determine the amount to be awarded. In its Findings and Conclusions, the trial court premised its award of just compensation on the "present market value" of the portion Garbage Service's business that was taken by the City.

Two members of this Court sitting with a district judge, acting as the Court of Appeals, have recently stated that the standard by which an appellate court should review an award of just compensation by a trial court is whether there is evidence to support the value determination of the trial court. The amount awarded may be set aside only if it is not supported by any evidence. *Eagle Sewer Dist. v. Hormaechea*, 109 Idaho 418, 420, 707 P.2d 1057, 1059 (Idaho Ct.App.1985).

In reaching its decision on just compensation in this case the trial court pointed out that the expert witnesses, who testified concerning the value of the garbage routes owned by Garbage Service at the time of the taking, placed the value within a range from $39,552 to $800,000. The trial court concluded that Garbage Service should be awarded $262,574 as just compensation for the property taken by the City. In arriving at this value the trial court chose to use the "discounted future earnings method." This method was described in Pratt, *Valuing Small Businesses and Professional Practices* (1985), a treatise accepted as authoritative and reliable by one of the expert witnesses for the City. The City contends that the discounted future earnings method of valuation should not have been used, but that if it were used, the court should not have used a ten-year projection of future earnings with a ten percent discount rate. The City contends that this resulted in an excessive calculation of damages.

Even though one of the expert witnesses for the City testified that a different number of years and a different discount rate should have been used, there is evidence in the record to support the use of both the ten-year period of projecting revenue and the ten-percent discount rate employed by the trial court. Although there was much conflicting evidence about the value of what was taken from Garbage Service, under the standard set forth in *Eagle Sewer Dist.*, we uphold the valuation of the trial court.

IV.

ALLOWANCE OF INTEREST FROM THE DATE OF TAKING

[4, 5] The trial court granted Garbage Service interest on the damages awarded from the dates of the takings. This was proper, since art. 1, § 14 of the Idaho Constitution provides that private property shall not be taken "until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor." This Court has adopted a rule that in a condemnation case interest should be awarded from the time the condemning party takes possession or becomes entitled to possession of the property. *Independent School Dist. of Boise City v. C.B. Lauch Const. Co.*, 78 Idaho 485, 493, 305 P.2d 1077, 1082 (1957). In an inverse condemnation case a party whose property has been taken should be entitled to interest on the value of the property from the date of the taking. Otherwise, the party from whom the property was taken would have been deprived of both the property taken and the use of the just compensation during the period from the taking until the amount of the just compensation for the property taken is determined. This would violate the intent of art. 1, § 14 of our constitution.

V.

CONCLUSION

The partial summary judgment and judgment of the trial court are affirmed.

Costs to respondent.

No attorney fees on appeal.

BAKES, BISTLINE and HUNTLEY, JJ., concur.

SHEPARD, Chief Justice, concurring and dissenting.

I concur in much which is stated in the majority opinion, and write only to express my reluctance to join the majority in its decision that the action of the city in the instant case was a "taking" of respondent's "property." I agree with the majority that the question need only be considered from the standpoint of our state Constitution without recourse to the provisions of the Constitution of the United States. In my view the majority gives insufficient consideration to the question, while at the same time painting with such a broad brush that the police powers of municipalities within the state may be severely inhibited in the future.

I deem it clear that a municipality is authorized within the limits of its police power to regulate or prohibit certain activities when such exercise of authority bears a reasonable relationship to the public health, safety, morals or general welfare of its citizens. In some instances, while the exercise of that authority may have harmful effects on some of its citizens, if the exercise of that authority is reasonable and not arbitrary any injury occasioned thereby must be considered a servitude inherent under our system of government, and damages from such injury must be considered as *damnum absque injuria*. *Johnston v. Boise City*, 87 Idaho 44, 390 P.2d 291 (1964). In the instant case there appears no question raised by the parties but that the collection, hauling and disposal of solid waste is within the legitimate regulatory authority of the municipality. Likewise, I see no question raised that the city was acting arbitrarily, capriciously, or unreasonably in its action. In any event, it should be noted that the instant action comes before us as a result of summary judgment being issued against the city, and if any questions were presented relating to the above matters, they were improperly resolved at summary judgment.

It is appropriate to note that in this state, and in other jurisdictions, a substantial distinction has been drawn between cases involving the "taking" of *real* property and interests therein, as contrasted with the taking of intangible property such as the contract rights of the respondent in the instant case. As to the "taking" of intangible rights through the exercise of the police powers of municipalities, there is a scarcity of authority in this and other jurisdictions.

I would note that most cases dealing with the question of inverse condemnation, have done so in the context of the taking of *real* property. *Robison v. H. & R.E. Local # 782*, 35 Idaho 418, 207 P. 132 (1922), obviously dealt with different times. There the Court stated:

> A right to conduct a business is property. Incident to this property right is the goodwill of the business, and the right to appeal to the public for patronage. One may conduct his business in his own way, and may employ whom he will upon such terms as may be agreed upon, and may discharge any employee at will unless restrained by a valid contract so long as he violates no law. These rights are entitled to protection of the law.

That statement, however, was made in the context of reviewing an injunction issued by the trial court prohibiting picketing by a Labor union of certain business premises. The Court upheld in modified form the injunction issued to prohibit the picketing.

O'Connor v. City of Moscow, 69 Idaho 37, 202 P.2d 401 (1949), involved the validity of a municipal zoning ordinance which prohibited certain businesses in a certain area of the municipality. The plaintiff had owned certain property, and conducted a business thereon which would in effect be zoned out of existence. The Court struck down the ordinance stating:

> An ordinance which prohibits the continuation of existing lawful businesses within a zoned area is unconstitutional as a taking property without due process of law and being an unreasonable exercise of the police power ... The effect of the provision of the ordinance here complained of is to deprive respondents of their property by preventing the sale of their business and restricting their leas-

ing of the real property [illegible] connection therewith.

A zoning ordinance deals basically with the use, not ownership, of property. The provision in question declaring a change in ownership to be a new business is an arbitrary and unreasonable exercise of the police power and violates the constitutional protection given by the due process clauses.

The decree of the trial court declaring said ordinance void and of no effect, and enjoining the city from applying it, was affirmed.

The case of *Winther v. Village of Weippe*, 91 Idaho 798, 430 P.2d 689 (1967) was, as noted by the Court, similar to *O'Connor v. City of Moscow, supra*, in that the trial court had adjudged a municipal ordinance to be unconstitutional and void when it attempted to restrict the number of beer licenses in the village. The Court said: "The facts in the instant case are indicative of a plan or scheme designed to eliminate respondents' business under color of municipal authority attempted to be exercised not only retroactively, but in an unreasonable, arbitrary and discriminatory manner."

The cases of *Hughes v. State*, 80 Idaho 286, 328 P.2d 397 (1958) and *Johnston v. Boise City*, 87 Idaho 44, 390 P.2d 291 (1964) both involve real property and access thereto from public streets. As the Court stated in *Johnston:* "This Court has consistently held that access to a public way is one of the incidents of ownership of land bounding thereon. Such right is appertenant to the land and is vested right." Hence, I view neither of said cases as bearing on the question presented in the instant case.

The only case in this jurisdiction which in my view bears even peripherally on the instant case is *Unity Light & Power Co. v. City of Burley*, 92 Idaho 499, 445 P.2d 720 (1968). There, Unity provided electrical energy in an area which became annexed to the city of Burley. Unity continued to serve its members in the annexed areas and continued to maintain its poles and transmission lines in the newly annexed area, although the city had never granted [illegible] Burley also operated a municipal power system furnishing electrical energy to inhabitants of the city. Burley instituted proceedings seeking to condemn certain lines and other facilities of Unity. In my view the opinion of the Court is somewhat confusing since the $500.00 damages to Unity represented a taking of "property rights, including power lines, ..." and for contract interference. However, as noted by the Court in its opinion, the trial court's order (affirmed on appeal) restraining Burley from interfering with the operation of Unity, was at least partially based on a statutory "anti-pirating law."

As I view the majority opinion, the only case close to the circumstances of the instant matter is *Parker v. Provo City Corp.*, 543 P.2d 769 (Utah 1975). There the court held a municipal ordinance to be void as applied to the plaintiff. The ordinance made unlawful the collection, removal or disposal of garbage or waste matter, but the court held, "nowhere in the record do we find that this waste is garbage, kitchen refuse, or a by-product which may be deemed deleterious to the public health. The definition section of the subject ordinance makes a definite distinction between garbage and waste." In my view, the brief and terse opinion of the Utah court sheds no light on the matter in question here.

On the other hand, the cases from two other jurisdictions are remarkably similar to the instant case. In *City of Estacada v. American Sanitary Service*, 41 Or.App. 537, 599 P.2d 1185 (1979), Sanitary had a franchise from the county to perform solid waste collection services in unincorporated areas, and Walker had a franchise from the city to perform like collection service within the city's boundaries. "After the city annexed part of Sanitary's area, Walker claimed the right to serve that area. The city initiated this action, asking for a declaration that Sanitary 'has no vested property right or legally protected interest in the continuance of its service to areas encompassed in its county franchise which have been annexed....' Sanitary counterclaimed for damages based on a taking by Sanitary had "a vested property interest" in the annexed area and that a taking had occurred for which Sanitary was entitled to damages. The court of appeals reversed the holding of the trial court. In its opinion the court stated:

The Idaho Supreme Court in *Unity Light & Power Co. v. City of Burley*, 92 Idaho 499, 445 P.2d 720 (1968), arrived at a compromise by holding that the city could not 'pirate' the state created franchisee's customers in the annexed area for its own utility operation, but the city could refuse to allow the franchisee to expand its service to new customers in the area. While that solution has a certain facial attractiveness, it is difficult to discern the operating principal being applied, for the result was to amend judicially the terms of the very franchise being protected. The opinion rests on the concept that the franchise was both a valuable property and was subject to the same degree of regulation by the state after annexation as it was before.

We do not have before us a franchise created by a higher authority than the city. Nor do we have a situation where the city is directly or indirectly taking tangible assets of the franchisee for a public use....

In those circumstances we do not believe the city may be prevented from exercising its own power without first paving off the value of the county-created franchise. The trial court erred in holding that a failure by the city to honor the county franchise would be a taking within the meaning of article 1, section 18 of the Oregon Constitution.

City of Estacada v. American Sanitary Service, supra, was essentially followed in *Stillings v. Winston-Salem*, 311 N.C. 689, 319 S.E.2d 233 (1984). There the court stated:

The primary question presented for review is a matter of first impression for this Court: Does an exclusive solid waste collection franchise granted by a county remain effective in areas subsequently annexed by a city and thereby entitle the franchisees to compensation for a taking [illegible] mandate, begins providing its own garbage collection service? For the reasons stated here, we answer the question in the negative and conclude that the Court of Appeals erred in finding a "taking" requiring compensation by the city of Winston-Salem.

In essence, plaintiffs contend that the City's extension of solid waste collection services into their franchise areas represented a governmental taking of their property for which plaintiffs are entitled to just compensation under the fifth and fourteenth amendments to the United States Constitution and under article 1 section 19 of the Constitution of North Carolina....

The franchisees in this case have no absolute rights with respect to their franchises. All rights are limited by neighboring rights, and when the rights of these franchisees are considered in the light of the rights of the public through the city of Winston-Salem, the franchisees' rights are subject to the rights of these others. The City, by exercising its duty, has not impinged upon or violated any of the rights of the franchisees. Furthermore, not every damage to private property by the government is subject to compensation. We conclude, then, that plaintiffs have no compensable injury.

The court further resolved the United States constitutional question noting *Loretto v. Teleprompter Manhatten CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *Larsen v. South Dakota*, 278 U.S. 429, 49 S.Ct. 196, 73 L.Ed. 441 (1929); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Peters) 420, 9 L.Ed. 773 (1837).

Hence, based on all of the above, I would hold that at the point of summary judgment the city's ordinance prohibiting the collection, hauling or disposal of solid waste is presumed valid, as against the claim of Coeur d'Alene Garbage, and Coeur d'Alene Garbage is effectively precluded

from operating within the newly annexed areas of the municipality. Further, I find nothing in the law of this jurisdiction which requires the payment of compensation for such loss of business, nor do I find any persuasive authority therefor in any other jurisdiction. If the opinion of my brethren might somehow be restricted solely to the instant case, abstract concepts of fairness might impel me to concur. However, as stated earlier, I believe the majority paints with a broad brush and future applications of the principles laid down here will, I believe, seriously impede upon the police powers of the municipalities in this state in the future.

BISTLINE, Justice, specially concurring:

Having concurred in the opinion authored by Justice Johnson, I write only to emphasize the strength of the statement that an existing business *is* property, and also to comment on the citation to *Hughes v. State of Idaho*, both appearing at (p. 591, 759 P.2d at p. 882).

I.

Justice Johnson has written that "the right to conduct a business is property,"—which is absolutely correct. The underlying issue in the *Robison* case was the business owner's complaint that *access* to his place of business was being impaired by picketing union workers. No governmental action was involved and hence there was no claim of an inverse taking.[1] Injunctive relief was sought and obtained.

Similarly, in *O'Connor v. City of Moscow*, 69 Idaho 37, 202 P.2d 401 (1949), cited by Justice Johnson, also at p. 592, 759 P.2d at p. 883, the only relief sought was a declaration of the invalidity of an ordinance which in an arbitrary and unreasonable exercise of city police power deprived the O'Connors of their property.

The *Winther v. City of Weippe* case, cited along with *O'Connor*, was in all respects similar to the latter mentioned, both citing to and relying upon it. The three cases spanned 45 years, and involved 15 different persons sitting where we five now sit. In one case only was there a single dissent. In the *O'Connor* case district judge Sutphen sitting in the stead and place of Justice Budge, did not vote with the majority because of his view that:

> The business of operating billiard and pool tables for gain and a beer parlor where draft beer is sold is not recognized as a useful business, although it is a lawful one, and I do not think it can seriously be contended that the City of Moscow does not have the authority to confine such business places to reasonable territorial limits within its borders.

69 Idaho at 45, 202 P.2d at 406.

In the *O'Connor* case Justice Hyatt, although he thereafter also cited to the *Robison* case, chose to borrow a more encompassing definition of property:

> Property has been well defined in *Spann v. Dallas*, 111 Tex. 350, 235 S.W. 513, 514, 19 A.L.R. 1387, as follows:
>
> > Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right.

69 Idaho at 42, 202 P.2d at 404.

It was a unanimous Court which in *Winther* quoted the foregoing passage (and more) from *O'Connor* as the predicate for its judgment and opinion. It can safely be stated that an established business *is property*.

II.

Hughes v. State, 80 Idaho 286, 328 P.2d 397 (1958), also cited in the Court's opinion (p. 592, 759 P.2d at p. 883), received some, but certainly not due, consideration in the recent case of *Merritt v. State of Idaho*, 113 Idaho 142, 742 P.2d 397 (1986). Justice Johnson ably [illegible] for the proposition that "[p]rivate property of all classifications may be taken for public use." That statement in *Hughes* was made subsequent to a prior paragraph in *Hughes* which read:

> We now approach the proposition, whether appellants' allegedly destroyed easement, *constituting the right of vehicular access* of the public generally to their property for business purposes, is property capable of being "taken" and capable of severance from the property to which it appertains and of which it is a part. . .

80 Idaho at 293, 323 P.2d at 400 (emphasis added). And, immediately following the single sentence which Justice Johnson utilizes, this Court in *Hughes* went on to state the holding that:

> Real property includes "that which is appurtenant to the Land." I.C. sec. 55–101. It includes all easements attached to the land. I.C. sec. 55–603. It includes hereditaments, whether corporeal or incorporeal, such as easements, and every interest in lands. 73 C.J.S. Property § 7, p. 159.
>
> Easements are included in the classification of estates and rights in lands which may be taken for public use. I.C. sec. 7–702.

80 Idaho at 293, 328 P.2d at 400.

Thereafter, in order, the opinion presented authority substantiating that holding (including a case decided 80 years ago which held that "Any destruction, interruption or deprivation of the common, usual and ordinary use of property is by the weight of authority a taking of one's property in violation of the constitutional guarantee." *Knowles v. New Sweden Irr. Dist.*, 16 Idaho 217, 231, 101 P. 81, 86 (1908)), and then gave a somewhat expanded version of the one-liner quoted by Justice Johnson, saying more fully:

> Our review of Idaho's Constitution, statutes and decisions, clearly shows that the power of eminent domain extends to every kind of property taken for public use, including the right of access to public streets, such being an estate or interest in and appurtenant to real property, and since such right of access constitutes an interest in, by virtue of being an easement appurtenant to, a larger parcel, the court, jury or referee *must ascertain and assess* the damages which will accrue to the portion not sought to be condemned by reason of the severance of the portion—the right of access—sought to be condemned, and the construction of the improvement. I.C. sec. 7–711.
>
> We therefore hold that appellants' allegedly destroyed right of business access to their business property, if such be proven, constituted a taking of their property, whether or not accompanied by a taking of physical property, and constituted an element of damage, as dues also any element of alleged taking of their physical property, ...

80 Idaho at 295, 328 P.2d at 402.

Unfortunately, as considerations of law are concerned, and unjustly as considerations of justice be concerned, the majority opinion in *Merritt* did not comprehend what had been held and stated in *Hughes*, and by selective reading came up with the untenable understanding that all vehicular access had to be *"destroyed,"* 113 Idaho at 144, 742 P.2d at 399, notwithstanding that the *Hughes* court's opinion stated that essential questions presented were "(a) whether the destruction *or impairment* of access constitutes a taking of property, and (b) whether destroyed *or impaired* access must be accompanied by a taking of physical property to constitute an element of damages." 80 Idaho at 292, 328 P.2d at 403 (emphasis supplied).

Expecting that it might be asked what is the point in discussing the *Merritt* case, the answer is readily made. In this case now before us inverse condemnation is the issue. It was also the issue in *Hughes*, and again in *Merritt*. *Hughes* was not even understood by the majority in *Merritt*, where Justices Bakes and Donaldson formed a majority by joining with Justice Huntley.

This they did notwithstanding the caution extended by Justice Shepard, where he quoted directly from a then recent perti-

1. The doctrine of inverse condemnation had yet to be declared.

nent opinion authored by Justice Donaldson, with whom Justice Bakes had concurred. Justice Donaldson, joined by Justice Bakes a short time before *Merritt* had this view of the *Hughes* [and *Mabe*] holdings:

> The right of access of a property owner to an abutting public street has long been the subject of judicial discourse in Idaho. A thorough review of authority reveals it is a right which Idaho courts have been particularly careful to protect.... Nor is *interference with access* merely an element of severance damages to be considered in an action for condemnation, but *is in itself a property right* the taking of which may be compensated in an action for inverse condemnation, that is 'whether or not accompanied by a taking of physical property.' (Citing *Hughes* and *Mabe v. State*, 83 Idaho 222, 86 Idaho 254, 360 P.2d 799, 385 P.2d 401).

Chief Justice Shepard in *Merritt v. State*, 113 Idaho 142, 146–147, 742 P.2d 397, 401–02 (1986), quoting the dissent of Justice Donaldson, joined by Justice Bakes in *State v. Bastian*, 97 Idaho 444, 546 P.2d 399 (1976). Following which, Justice Shepard went on to add in *Merritt*:

> Although our previous cases are not totally clear, I believe the law of Idaho is, or should be, that a landowner whose property abuts a public street or road and enjoys access thereto cannot be summarily deprived of that property right without compensation. This I believe regardless of what the law may be in other jurisdictions. Although the public necessity and convenience may demand the taking of property, such may not be done without an award of just compensation. No argument regarding the safety or convenience of the general public justifies the taking of such a property right absent just compensation.

Merritt, supra, 113 Idaho 147, 742 P.2d at 402.

In my *Merritt* dissent, I spoke similarly by quoting from a brief authored by counsel for the State in the case of *Lobdell v. State of Idaho*, 89 Idaho 559, 407 P.2d 135 (1965):

> While no clear cut rule existed in 1957 at the time respondents constructed the highway adjacent to appellants' premises, nevertheless on several occasions since then *this Court has determined and declared that access rights are a property interest.* See *Hughes v. State*, (1958), 80 Idaho 286; 328 P.2d 397. Clearly then when the state acquires existing access between privately owned real property and the public highway it comes into possession of a real property interest. *This rule has been applied to some forms of impairment.* See *State ex rel Rich v. Fonburg*, (1958), 80 Idaho 269; 328 P.2d 60, and *Farris v. City of Twin Falls*, (1958 [1959]), 81 Idaho 583; 347 P.2d 996.

Merritt v. State, 113 Idaho at 148, 742 P.2d at 403 (emphasis added).

Following which was added my own thought that:

> That brief also could have cited the then even more recent case of *Mabe v. State*, 83 Idaho 222, 360 P.2d 799 (1961), which reaffirmed *Hughes*, and also discussed *Farris* and *Fonburg*, of which the Highway Department had to be well aware when it stipulated to a taking in the *Lobdell* case.

Id. 148, 742 P.2d at 403. All of which should establish to any reasoning mind that *Merritt* was wrongly decided, and is a travesty. Whenever *Hughes* is correctly cited and relied upon, as is so today, it seems in order to point to the mischief which was occasioned when it was negligently misread by the author, who was joined by two justices who had expressed just the opposite view earlier. At West Publishing Company the person in charge of writing the headnotes depicting the holdings in the opinion was aware that the Court in *Hughes* was considering destruction *or* impairment of access as being a compensable taking. *See* headnote 6, 80 Idaho at 288, 328 P.2d at 399.

Regretfully I register my disappointment that today it is Chief Justice Shepard who seemingly does not entertain the same view which he displayed so convincingly in *Merritt*. He sees *Robison* as having dealt with different times, and correctly notes that the relief sought was injunctive. He correctly points to the same in *O'Connor*. As mentioned earlier, however, no governmental authority was involved in *Robison*, and, as to *O'Connor*, inverse condemnation did not become a remedy in Idaho until *Renninger v. State*, 70 Idaho 170, 213 P.2d 911 (1950). The best conclusion which I am able to draw is that the Chief Justice adheres to the view that real property, or interests therein are subject to condemnation and inverse condemnation, but that an established business is not. That I do not understand.

114 Idaho 600

In the MATTER OF Application For PERMIT NO. 47-7680 In the Name of Royal Crest, Inc., Collins Bros. Corp., Assignee.

COLLINS BROS. CORP., an Idaho corporation, Appellant-Respondent on appeal,

v.

A. Kenneth DUNN, Director, Idaho Department of Water Resources, Respondent-Appellant on appeal.

No. 16844.

Supreme Court of Idaho.

July 21, 1988.

Department of Water Resources granted company's application for permit to appropriate water from geothermal source, subject to nine conditions, and company appealed. The District Court, Fifth Judicial District, Twin Falls County, Daniel C. Hurlbutt, J., reversed the Department and granted the company's application for a permit without conditions attached. Department appealed. The Supreme Court, Bakes, J., held that: (1) the company had not been denied procedural due process in the permit process; (2) the Department did not err in conducting a postconference examination of the premises in question; (3) the proposed decision and order was not rendered invalid by mention of post-hearing creation of groundwater unit; and (4) Department's determination that it was not in the public interest to use water from the geothermal aquifer to irrigate crops was not clearly erroneous.

Reversed.

1. Administrative Law and Procedure ⇐506

Constitutional Law ⇐318(2)

Waters and Water Courses ⇐146

Company which sought permit to appropriate water from geothermal groundwater source was not denied procedural due process in permit process on ground that Department of Water Resources considered matters outside record in drafting proposed order, as company was provided with adequate notice of its statutory opportunity to make exceptions and have hearing before proposed order became final, and company was in fact given hearing on merits after order became final pursuant to its motion to modify order. I.C. § 42-1701A; U.S.C.A. Const.Amends. 5, 14.

2. Waters and Water Courses ⇐133

After conference on company's application for permit to appropriate water from geothermal groundwater source, Department of Water Resources did not err by conducting field examination of premises in question, as Department was entitled by statute to conduct field examinations on water permits, and agreement between company and those protesting its application, which provided that director could decide case based in part "upon the records of department," contained no limitation on director's statutory authority to examine premises. I.C. § 42-1805(3).

3. Waters and Water Courses ⇐146

Fact that proposed decision and order of Department of Water Resources, concerning company's application for permit to appropriate underground water, mentioned

260.247. Annexation or expansion of solid waste services by city, notice to certain private entities, when—city to contract with private entity, duration, terms

1. Any city which annexes an area or enters into or expands solid waste collection services into an area where the collection of solid waste is presently being provided by one or more private entities shall notify the private entity or entities of its intent to provide solid waste collection services in the area by certified mail.

2. A city shall not commence solid waste collection in such area for at least two years from the effective date of the annexation or at least two years from the effective date of the notice that the city intends to enter into the business of solid waste collection or to expand existing solid waste collection services into the area, unless the city contracts with the private entity or entities to continue such services for that period.

3. If the services to be provided under a contract with the city pursuant to subsection 2 of this section are substantially the same as the services rendered in the area prior to the decision of the city to annex the area or to enter into or expand its solid waste collection services into the area, the amount paid by the city shall be at least equal to the amount the private entity or entities would have received for providing such services during that period.

4. Any private entity or entities which provide collection service in the area which the city has decided to annex or enter into or expand its solid waste collection services into shall make available upon written request by the city not later than thirty days following such request, all information in its possession or control which pertains to its activity in the area necessary for the city to determine the nature and scope of the potential contract.

5. The provisions of this section shall apply to private entities that service fifty or more residential accounts or fifteen or more commercial accounts in the area in question.

(L.1988, H.B. No. 1207, § A (§ 1).)

HAZARDOUS WASTE MANAGEMENT

260.350. Short title

Sections 260.350 to 260.430 shall be known and may be cited as the "Missouri Hazardous Waste Management Law".

(L. 1977, p. 415, § 1.)

Title of Act:

An Act relating to hazardous waste management, with penalty provisions and a termination date for certain provisions. L.1977, p. 415.

Law Review Commentaries

Hazardous waste site cleanup: generator liability in Missouri. James T. Price, 40 J. of Mo. Bar 289 (1984).

Hazardous waste superfunds: Legislation and economics. 52 UMKC L.Rev. 388 (1984).

Library References

Health and Environment ⇐25.5(1).

C.J.S. Health and Environment §§ 61 et seq., 91 et seq., 106 et seq., 115 et seq., 125 et seq., 133 et seq.

260.355. Exempted wastes

Exempted from the provisions of sections 260.350 to 260.480 are:

(1) Radioactive wastes regulated under section 2011, et seq., of title 42 of United States Code;

(2) Emissions to the air subject to regulation of and which are regulated by the Missouri air conservation commission pursuant to chapter 643, RSMo;

(3) Discharges to the waters of this state pursuant to a permit issued by the Missouri clean water commission pursuant to chapter 204, RSMo;

(4) Fluids injected or returned into subsurface formations in connection with oil or gas operations regulated by the Missouri oil and gas council pursuant to chapter 259, RSMo;

For the purposes of this section, each quarterly period shall comm on the first day of the months of January, April, July, and Oct Whenever a revised certificate is forwarded by the office thirty day less prior to the commencement of the next quarterly period, the popul of the annexed territory shall not be considered until the commencem the following quarterly period.

Amended by Laws 1967, Ex.Sess., ch. 42, § 2, eff. July 1, 1967; Laws 1969, Ex ch. 50, § 1; Laws 1975, 1st Ex.Sess., ch. 31, § 1; Laws 1979, ch. 151, § 25 March 29, 1979.

Effective date—Laws 1967, Ex.Sess., ch. 42: See Historical Note following § 3.30.010.

Savings—Laws 1967, Ex.Sess., ch. 42: See Historical Note following § 3.30.010.

Cross References

Allocations to cities and towns from motor vehicle fund, see §§ 46.68.100, 46.68.110.

Armed forces shipboard population, on-base naval group quarter population, and dependents, determination for state revenue allocation, adjustments to be made as for changes due to annex see § 43.62.030.

Census to be conducted in dec periods, see Const. Art. 2, § 3.

Office of financial management, po lation of annexed territory to be to annexing city or town upon appro of the agency as provided in this se see § 43.62.030.

Population determinations, office o nancial management, see ch. 43.62

State planning and community af agency, see ch. 43.63A.

35.13.280. Cancellation, acquisition, of franchise or permit for op tion of public service business in territory annexed

The annexation by any city of any territory pursuant to those provis of chapter 35.10 RCW which relate to the annexation of a third class cit town to a first class city, or pursuant to the provisions of chapter 3 RCW shall cancel, as of the effective date of such annexation, any fr chise or permit theretofore granted to any person, firm or corporation the state of Washington, or by the governing body of such anne territory, authorizing or otherwise permitting the operation of any pub transportation, garbage collection and/or disposal or other similar pub service business or facility within the limits of the annexed territory, b the holder of any such franchise or permit canceled pursuant to this sec shall be forthwith granted by the annexing city a franchise to con such business within the annexed territory for a term of not less than f years from the date of issuance thereof, and the annexing city, by fr chise, permit or public operation, shall not extend similar or compet services to the annexed territory except upon a proper showing of inability or refusal of such person, firm or corporation to adequ service said annexed territory at a reasonable price: *Provided*, That provisions of this section shall not preclude the purchase by the anne city of said franchise, business, or facilities at an agreed or nego price, or from acquiring the same by condemnation upon payment damages, including a reasonable amount for the loss of the franchis permit. In the event that any person, firm or corporation whose fran or permit has been canceled by the terms of this section shall suffer measurable damages as a result of any annexation pursuant to the pr sions of the laws above-mentioned, such person, firm or corporation have a right of action against any city causing such damages.

Amended by Laws 1983, ch. 3, § 54.

Library References

Municipal Corporations ⇐36(1).

C.J.S. Municipal Corporations seq.

(4) In this annexation plan, it must be clearly stated that the entire municipality tends to share the tax burden for these services, and if so, the area may be annexed without a bond issue under the provisions of this part.

History: En. 11-518 by Sec. 5, Ch. 364, L. 1974; R.C.M. 1947, 11-518(part).

7-2-4733. Vote required on proposed capital improvements. Included within the plan must be methodology whereby the area to be annexed may vote upon any proposed capital improvements. Should a negative vote be cast by over 50% of the residents in the section or sections to be annexed in such election, the area may not be annexed.

History: En. 11-518 by Sec. 5, Ch. 364, L. 1974; R.C.M. 1947, 11-518(part); amd. Sec. 20, Ch. 250, L. 1979.

7-2-4734. Standards to be met before annexation can occur. A municipal governing body may extend the municipal corporate limits to include any area which meets the following standards:

(1) It must be contiguous to the municipality's boundaries at the time the annexation proceeding is begun.

(2) No part of the area may be included within the boundary of another incorporated municipality.

(3) It must be included within and the proposed annexation must conform to a comprehensive plan as prescribed in Title 76, chapter 1.

(4) No part of the area may be included within the boundary, as existing at the inception of such attempted annexation, of any fire district organized under any of the provisions of part 21, chapter 33, if the fire district was originally organized at least 10 years prior to the inception of such attempted annexation. However, a single-ownership piece of land may be transferred from a fire district to a municipality by annexation as provided in 7-33-2127.

History: En. 11-519 by Sec. 6, Ch. 364, L. 1974; amd. Sec. 1, Ch. 81, L. 1977; R.C.M. 1947, 11-519(1), (2).

7-2-4735. Guidelines for new boundaries of municipality. In fixing new municipal boundaries, a municipal governing body shall:

(1) wherever practical, use natural topographic features such as ridgelines, streams, and creeks as boundaries; and

(2) if a street is used as a boundary, include within the municipality land on both sides of the street, with such outside boundary not extending more than 200 feet beyond the right-of-way of the street.

History: En. 11-519 by Sec. 6, Ch. 364, L. 1974; amd. Sec. 1, Ch. 81, L. 1977; R.C.M. 1947, 11-519(3).

7-2-4736. Preservation of existing garbage or solid waste service in the event of annexation. (1) A municipality that annexes or incorporates additional area receiving garbage and solid waste disposal service by a motor carrier authorized by the public service commission to conduct such service may not provide competitive or similar garbage and solid waste disposal service to any person or business located in the area for 5 years following annexation except:

(a) upon a proper showing to the public service commission that the existing carrier is unable or refuses to provide adequate service to the annexed or incorporated area; or

(b) after the expiration of 5 years, if a majority of the residents of the annexed or incorporated area sign a petition requesting the municipality to provide the service.

(2) If a proper showing is made that the existing carrier is unable or refuses to provide adequate service to the annexed or incorporated area or, after the expiration of 5 years, if a majority of the residents sign a petition requesting service from the municipality, the municipality may provide garbage and solid waste disposal service to the entire annexed or incorporated area.

(3) For the purposes of determining whether an existing motor carrier provides adequate service, those services provided by the carrier prior to annexation are considered adequate services.

History: En. 11-526 by Sec. 1, Ch. 131, L. 1977; R.C.M. 1947, 11-526; amd. Sec. 1, Ch. 434, L. 1979; amd. Sec. 1, Ch. 381, L. 1987.

Cross-References

Public Service Commission — certification of garbage or solid waste services, Title 69, ch. 12, part 3.

7-2-4737 through 7-2-4740 reserved.

7-2-4741. Right to court review when area annexed. (1) Within 30 days following the passage of an annexation ordinance under authority of this part, either a majority of the resident freeholders in the territory or the owners of more than 75% in assessed valuation of the real estate in the territory who believe that they will suffer material injury by reason of the failure of the municipal governing body to comply with the procedure set forth in this part or to meet the requirements set forth in 7-2-4734 and 7-2-4735, as they apply to their property, may file a petition in the district court of the district in which the municipality is located seeking review of the action of the governing board and serve a copy of the petition on the municipality in the manner of service of civil process.

(2) If two or more petitions for review are submitted to the court, the court may consolidate all such petitions for review at a single hearing.

History: En. 11-522 by Sec. 9, Ch. 364, L. 1974; R.C.M. 1947, 11-522(1), (2).

Cross-References

Service of civil process, Title 25, ch. 3, part 2.

7-2-4742. Court review and decision when area annexed. (1) The review authorized under 7-2-4741 shall be conducted by the court without a jury. The court may hear oral arguments and receive written briefs and may take evidence intended to show that either:

(a) the statutory procedure was not followed; or

(b) the provisions of 7-2-4731 through 7-2-4735 were not met.

(2) The court may affirm the action of the governing body without change, or it may:

(a) remand the ordinance to the municipal governing body for further proceedings if procedural irregularities are found to have materially prejudiced the substantive rights of any of the petitioners;

(b) remand the ordinance to the municipal governing body for amendment of the boundaries to conform to the provisions of 7-2-4734 and 7-2-4735, but

affected by this act except as provided in Section 25."

The act was ratified June 29, 1983.

Effect of Amendments. — The 1987 amendment by c. 827, s. 1 substitu reference to Chapter 150B for refere to Chapter 150A in this section.

§ 160A-37.2. Assumption of debt.

(a) If the city has annexed any area which is served by a ru fire department and which is in an insurance district defined unc G.S. 153A-233, a rural fire protection district under Article 3A Chapter 69 of the General Statutes or a fire service district unc Article 16 of Chapter 153A of the General Statutes, then upon t effective date of annexation if the city has not contracted with t rural fire department for fire protection, or when the rural f department ceases to provide fire protection under contract, th the city shall pay annually a proportionate share of any payme due on any debt (including principal and interest) relating to fac ties or equipment of the rural fire department, if the debt v existing at the time of adoption of the resolution of intent, with payments in the same proportion that the assessed valuation of area of the district annexed bears to the assessed valuation of entire district on the date the annexation ordinance becomes ef tive.

(b) The city and rural fire department shall jointly presen payment schedule to the Local Government Commisson for proval and no payment may be made until such schedule is proved. (1983, c. 636, s. 22.)

Editor's Note. — Session Laws 1983, c. 636, s. 37.1, as amended by Session Laws 1983, c. 768, s. 25, provides: "The General Assembly intends by this act to repeal all acts and provisions of acts that modify the application to particular cities and towns of Parts 2 and 3 of Article 4A of Chapter 160A of the General Statutes or that exempt particular cities or towns from the applicaiton of either or both of those two Parts. Therefore, all such acts and provisions of acts, even if not specifically listed and repealed in Sections 26 through 35.4 of this act, are repealed. Neither this section nor Sections 26 through 35.4 of this act shall affect any annexation in progress on the dates of ratification of this act under any of the repealed or amended sections."

Session Laws 1983, c. 636, s. 38, vides: "This act shall be effective respect to all annexations where re tions of intent are adopted on or the date of ratification of this act, e that Sections 36 and 37 shall becom fective with respect to all annexa where resolutions of intent are ad on or after July 1, 1984, Sections through 35.5 and Section 37.1 are tive upon ratification and Sectio shall become effective as provide that section. No annexation where olution of intent was adopted prior t date of ratification of this act sha affected by this act except as provid Section 25."

The act was ratified June 29, 1

§ 160A-37.3. Contract with private solid waste lection firm(s).

(a) If the area to be annexed described in a resolution of in passed under G.S. 160A-37(a) includes an area where a pri solid waste collection firm or firms:

(1) On the ninetieth day preceding the date of adoption o resolution of intent in accordance with G.S. 160A-37(

(2) On the ninetieth day preceding the date of adoption of the resolution of consideration in accordance with G.S. 160A-37(i)

was providing solid waste collection services in the area to be annexed, and is still providing such services on the date of adoption of the resolution of intent, and:

(3) By reason of such annexation any franchise with a county or arrangements with third parties for solid waste collection will be terminated, and

(4) During the 90-day period preceding the date of adoption of the resolution of intent or resolution of consideration provided by subdivisions (1) or (2) of this subsection, the firm had in such area an average of 50 or more residential customers or a monthly average revenue from nonresidential customers in such area of five hundred dollars ($500.00) or more; provided that customers shall be included in such calculation only if policies of the city will provide solid waste collection to those customers such that arrangements between the solid waste firm and the customers will be terminated, and

(5) If such firm makes a written request that it wishes to contract, signed by an officer or owner of the firm, and delivered to the city clerk at least 10 days before the public hearing,

unless other arrangements satisfactory to the private solid waste collection firm or firms have been made, the city shall either:

(6) Contract with such solid waste collection firm(s) for a period of two years after the effective date of the annexation ordinance to allow the solid waste collection firm(s) to provide collection services to the city in the area to be annexed for sums determined under subsection (d) of this section, or

(7) Pay to the solid waste collection firm(s) in lieu of a contract a sum equal to the economic loss determined under subsection (f) of this section.

(b) The city shall make a good faith effort to provide at least 20 days before the public hearing a copy of the resolution of intent to each private firm providing solid waste collection services in the area to be annexed.

(c) The city may require that the contract contain:

(1) A requirement that the private firm post a performance bond and maintain public liability insurance coverage;

(2) A requirement that the private firm agree to service customers in the annexed area that were not served by that firm on the effective date of annexation;

(3) A provision that divides the annexed area into service areas if there were more than one firm being contracted within the area, such that the entire area is served by the private firms, or by the city as to customers not served by the private firms;

(4) A provision that the city may serve customers not served by the firm on the effective date of annexation;

(5) A provision that the contract can be cancelled for substantial violations of the contract, but no contract may be cancelled on these grounds unless the Local Government Commission finds that substantial violations have occurred,

except that the city may suspend the contract for up to 30 days if it finds substantial violation of health laws;

(6) Performance standards, not exceeding city standards, with provision that the contract may be cancelled for substantial violations of those standards, but no contract may be cancelled on those grounds unless the Local Government Commission finds that substantial violations have occurred;

(7) A provision for monetary damages if there are violations of the contract or of performance standards.

(d) If the services to be provided to the city by reason of the annexation are substantially the same as rendered under the franchise with the county or arrangements with the parties, the amount paid by the city shall be at least ninety percent (90%) of the amount paid or required under the existing franchise or arrangements. If such services are required to be adjusted to conform to city standards or as a result of changes in the number of customers, and as a result there are changes in disposal costs (including mileage and landfill charges), requirements for storage capacity (dumpsters and/or residential carts), and/or frequency of collection, the amount paid by the city for the service shall be increased or decreased to reflect the value of such adjusted services as if computed under the existing franchise or arrangements. In the event agreement cannot be reached between the city and the private firm under this subsection, such matters shall be determined by the Local Government Commission.

(e) The city may, at any time after one year's operation thereunder, terminate a contract made with the solid waste collection firm under subsection (a) of this section upon payment to said firm of an amount equal to the economic loss determined in subsection (f) of this section, but discounted by the percentage of the contract which has elapsed prior to the effective date of the termination.

(f) As used in this section, "economic loss" is 12 times the average monthly revenue for the three months prior to the passage of the resolution of intent or resolution of consideration, as applicable under subsection (a) of this section, collected or due the private firm for residential, commercial, and industrial collection service in the area annexed or to be annexed.

(g) If the city fails to offer a contract to the private firm within 30 days following the passage of an annexation ordinance, the private firm may appeal to the Local Government Commission. The private firm may appeal to the Local Government Commission for an order staying the operation of the annexation ordinance pending the outcome of the review. The Commission may grant or deny the stay upon such terms as it deems proper. If the Local Government Commission finds that the city has not made an offer which complies with this section, it shall remand the ordinance to the municipal governing board for further proceedings, and the ordinance shall not become effective until the Local Government Commission finds that such an offer has been made. Either the private firm or the city may obtain judicial review in accordance with Chapter 150B of the General Statutes.

(h) A firm which has given notice under subsection (a) of this section that it desires to contract, and any firm that the city believes is eligible to give such notice, shall make available to the city not later than five days following a written request of the city all

information in its possession or control, including but not limited to operational, financial and budgetary information, necessary for the city to determine if the firm qualifies for the benefits of this section and to determine the nature and scope of the potential contract and/or economic loss. (1985, c. 610, s. 3; 1987, c. 827, s. 1.)

Cross References. — As to effective date of annexation ordinances adopted under Article 4A of Chapter 160A, see § 160A-58.9A.

Editor's Note. — Session Laws 1985, c. 610, s. 8 provides that this section applies to all annexations where a resolution of intent under Parts 2 or 3 of Article 4A of Chapter 160A is adopted on or after September 1, 1985.

Effect of Amendments. — The 1987 amendment by c. 827, s. 1 substituted reference to Chapter 150B for reference to Chapter 150A in this section.

§ 160A-38. Appeal.

(a) Within 30 days following the passage of an annexation ordinance under authority of this Part, any person owning property in the annexed territory who shall believe that he will suffer material injury by reason of the failure of the municipal governing board to comply with the procedure set forth in this Part or to meet the requirements set forth in G.S. 160A-36 as they apply to his property may file a petition in the superior court of the county in which the municipality is located seeking review of the action of the governing board.

(b) Such petition shall explicitly state what exceptions are taken to the action of the governing board and what relief the petitioner seeks. Within five days after the petition is filed with the court, the person seeking review shall serve copies of the petition by registered mail, return receipt requested, upon the municipality.

(c) Within 15 days after receipt of the copy of the petition for review, or within such additional time as the court may allow, the municipality shall transmit to the reviewing court

(1) A transcript of the portions of the municipal journal or minute book in which the procedure for annexation has been set forth and

(2) A copy of the report setting forth the plans for extending services to the annexed area as required in G.S. 160A-35.

(d) If two or more petitions for review are submitted to the court, the court may consolidate all such petitions for review at a single hearing, and the municipality shall be required to submit only one set of minutes and one report as required in subsection (c).

(e) At any time before or during the review proceeding, any petitioner or petitioners may apply to the reviewing court for an order staying the operation of the annexation ordinance pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms as it deems proper, and it may permit annexation of any part of the area described in the ordinance concerning which no question for review has been raised.

(f) The court shall fix the date for review of annexation proceedings under this Chapter, which review date shall preferably be within 30 days following the last day for receiving petitions to the end that review shall be expeditious and without unnecessary delays. The review shall be conducted by the court without a jury. The court may hear oral arguments and receive written briefs, and may take evidence intended to show either

Chapter 2.7

SOLID WASTE ENTERPRISES

Sec.
4270. Definitions.
4271. Legislative findings and declaration.
4272. Continuation of service by solid waste enterprise; limitations.
4273. Contract for termination of service.

Chapter 2.7 was added by Stats.1976, c. 430, p. 1101, § 2.

§ 4270. Definitions

Unless the context otherwise requires, the following definitions shall govern the construction of this chapter:

(a) "Exclusive solid waste handling services" means any action by a local agency, whether by franchise, contract, license, permit, or otherwise, whereby the agency itself or one or more other designated local agencies or designated solid waste enterprises shall have the exclusive right to provide solid waste handling services of any class or type within all or any part of the territory of the local agency.

(b) "Local agency" means any county, city and county, city, or special district having power to provide solid waste handling services either by the agency itself or by authorizing or permitting other local agencies or solid waste enterprises to provide solid waste handling services.

(c) "Solid waste" means all putrescible and nonputrescible solid and semisolid wastes, including garbage, trash, refuse, paper, rubbish, ashes, industrial wastes, demolition and construction wastes, abandoned vehicles and parts thereof, discarded home and industrial appliances, manure, vegetable or animal solid or semisolid wastes, and other discarded solid and semisolid wastes.

(d) "Solid waste enterprise" means any individual, partnership, joint venture, unincorporated private organization, or private corporation regularly engaged in the business of providing solid waste handling services.

(e) "Solid waste handling services" means the collection, transportation, storage, transfer, or processing of solid wastes for residential, commercial, institutional, or industrial users or customers.

(Added by Stats.1976, c. 430, p. 1101, § 2.)

Library References

Municipal Corporations ⇐=907. C.J.S. Municipal Corporations § 265.

§ 4271. Legislative findings and declaration

The Legislature finds and declares as follows:

Although local agencies are empowered to furnish solid waste handling services, in extensive parts of the state solid waste enterprises are furnishing all or substantial portions of necessary solid waste handling services.

It is in the public interest to foster and encourage solid waste enterprises so that, at all times, there will continue to be competent enterprises willing and financially able to furnish needed solid waste handling services.

(Added by Stats.1976, c. 430, p. 1101, § 2.)

§ 4272. Continuation of service by solid waste enterprise; limitations

Where a local agency has authorized, by franchise, contract, or permit, a solid waste enterprise to provide solid waste handling services and such services have been provided for more than three previous years, the solid waste enterprise may continue to provide such services up to five years after mailed notification to such enterprise by the local agency having jurisdiction that exclusive solid waste handling services are to be provided or authorized, except that if the solid waste enterprise has an exclusive franchise or contract then the solid waste enterprise shall continue to provide such services and shall be limited to the unexpired term of the contract or franchise or five years, whichever is less. A solid waste enterprise providing solid waste handling services shall be subject to the provisions of this section only if:

(a) The services of the enterprise are in substantial compliance with the terms and conditions of any such franchise, contract, or permit, and meet the quality and frequency of services required by the local agency in other areas not served by the enterprise.

(b) The rates charged by the enterprise may be periodically reviewed and set by the local agency.

Nothing in this chapter shall be construed to affect the right of a city following annexation to terminate for cause a franchise, contract, or permit held by a solid waste enterprise authorized by the county.

(Added by Stats.1976, c. 430, p. 1101, § 2.)

Notes of Decisions

I. In general

County-licensed refuse collector operating in area for less than a year preceding such area's annexation to the City of Modesto would acquire no right to continue service in annexed area since this section requires three years of previous service in said area. 58 Ops.Atty.Gen. 467, 6-5-75.

A city-licensed refuse collector "automatically" acquired right to serve annexed area, subject to city's power to "permit" county-licensed collector to operate in annexed area for up to three years. Id.

§ 4273. Contract for termination of service

Any local agency or solid waste handling enterprise may contract, upon mutually satisfactory terms, for the termination of all or any part of the business of the enterprise prior to the expiration of the period specified in Section 4272.

(Added by Stats.1976, c. 430, p. 1101, § 2.)

Chapter 3

FUMES ESCAPING FROM BURNING GARBAGE

Article Section
1. Cremation of Refuse, Generally 4300
2. Cremation of Animal Refuse 4303

Article 1

CREMATION OF REFUSE, GENERALLY

Sec.
4300. Operation of crematory.
4301. Contamination of atmosphere.
4302. Violation; misdemeanor.

§ 4300. Operation of crematory

No person shall operate in any city, city and county, or town any crematory for the destruction by fire heat of garbage, ashes, offal, or other refuse matter, except as provided in this chapter.

(Stats.1939, c. 60, p. 561, § 4300.)

Historical Note

Derivation: Stats.1909, c. 046, p. 978, § 1.

APPENDIX H

Summary of Roundtable Discussion

NOTES FROM COLLECTOR
COMPENSATION DISCUSSION
October 16, 1989

I. Why should the Legislature require compensation for haulers displaced by organized collection?

A. Investment

Haulers have big investment, in time and money, tied up in business in a specific location. . The hauler may have worked years to build a business in a city and it may be the haulers only business. If the city bid out the service, the hauler may be out of business, especially with residential contracts. Haulers have expectations of continuing with residential accounts, but not so much with commercial accounts.

B. Fairness

It's not fair to change collection systems, so that haulers risk loss of business. Organize collection may result in hardship for haulers, depending on the method of organized collection.

The industry views the change from an open system to an organized system that results in displaced haulers (especially the bid system) as the most intrusive way to achieve city goals. Other forms of regulation, like specifying hours and days of pick-up, would result in less hardship on haulers than changing the collection system. If the city (or county) chooses a method that results in loss of business, the city should compensate the haulers for that loss.

It is not right to go in and change the way a business has operated for many years. Haulers are not so much interested in compensation, but want the ability to continue in their business.

C. Mobility/Ability to Compete

Haulers have limited ability to compete in another city. Both municipality and hauler representatives believe that residential customers have strong loyalties to existing haulers. It's hard to compete in a new location and to replace residential business.

D. Equalize Footing With Cities

Haulers don't mind competing with other haulers, based on price or service. Haulers can negotiate with customers. The city can come in and change the rules of the marketplace. Haulers can't compete against a city. Compensation puts the hauler back on the same footing as the city.

E. Transferability of Assets

Collection services require large capital investment, unlike professional services (e.g. attorney, engineering). Termination of collection services contracts results in loss of major asset of hauling business, because the capital investment depreciates so

quickly that it is not transferrable. Haulers can't turn around and sell expensive trucks.

F. Impact of Change to Bid System

If city goes to a bid system, other haulers in the community may not be able to wait to bid the next time. Small haulers may be wiped out during the term of the bid contract. Thus, bid systems may result in monopolies or at least favor large companies that can afford to wait or are more mobile.

Unlike in other municipal bid processes, failure to win the bid could result in the loss of many, many contracts (e.g. 10,000 residential accounts).

A small hauler that services only a small part of the city may be unable to bid on a city-wide contract because he or she does not have the resources to perform the required service. The loss of business may result not only from losing the bid, but from an inability to bid. A bid system favors larger haulers.

II. Are there reasons that the Legislature should not adopt a collector compensation law?

A. Improper Infringement on Local Decision Making

The cities have the right to look at the best way to organize collection to best serve the community. If just compensation were required for displaced haulers, the only options for cities not involving compensation are open collection and negotiated contracts with consortiums of existing haulers. Each city should have the right to address the appropriate means to reach its own goals for organized collection. Each community is unique.

B. Precedent/Floodgates

If compensation is required for haulers displaced by legitimate government action, industry similarly affected will seek compensation. Hauling services are not unique (similar services include snow plowing, sewer, water and gas services, diseased free removal, cable TV, city attorney, and engineering services). Those businesses make investments and are significantly affected by a change in service.

Rules requiring compensation for government action have developed in the courts over time. The Legislature has never created a statutory right compensation absent a constitutional right.

C. Chilling Effect

Requiring compensation would act as a disincentive to organizing collection. Many cities are examining organized collection in order to meet state, Metropolitan Council or county mandates or goals. Many Cities don't like organized collection anyway. Requiring compensation might dampen further a city's enthusiasm for pursuing organized collection. The requirement would slow down the process, and in many cases, stop it altogether. At a minimum,

compensation would narrow choices for a negotiated contract or open system.

County representatives also said that it might inhibit their willingness to proceed with an already complicated task, although the source of the revenue is an important consideration.

D. Practical Difficulties/Definition Problems

Under the current statutes, the definition of organized collection is too broad. It could be construed to include licensing haulers, regulating pick-up, requiring recycling, etc. If so, this may give the hauler too much control over whether he or she is displaced and would thus be entitled to compensation. For example, if a city increased its insurance requirements for licensing or required recycling pick-up, a hauler could say that the new requirement was financially impossible for him or her to meet. Non-compliance would mean an inability to operate in the city and, in effect, displacement. A hauler's decision not to proceed may result in the requirement of paying compensation.

[Long discussion regarding the city's ability to regulate. Hauling industry says that haulers are better able to decide how to meet goals. Examples include: 1) decisions on number of trucks servicing an area versus ability of garbage haulers to manage yard waste and recyclables; 2) decisions on bagging wastes to achieve ban on burning (no bags in compost piles) versus ability of trucks to handle debagged wastes (separate bag collection).

City of Eagan used licensing requirements for volume-based fees, recycling pick-up and districting. The requirements were jointly developed with haulers. Procedures for organizing collection are supposed to protect haulers, but maybe more procedural protection is needed. This is different from requiring compensation.]

One reason that you don't have just compensation statutes is that each fact situation is unique. Judicial system can weigh and balance the differences. It is the only method that can match the situation to the remedy. A formula is likely to over-compensate or under compensate all the time.

III. Assuming that compensation should be required, when should government be required to pay?

Point - Organized collection statue is very broad. If compensation is provided by statute, it must proceed with definition of what will trigger compensation. The statute currently defining organizing collection is not sufficiently clear.

A. Bid Process

Compensation should be required if a city organizes collection by bid process and the result is the loss of business, including bid zones, with smallest zones matching smallest hauler capability. Bid zones have the same effect as bids. Haulers will bid against each other and cut prices and someone will lose. No matter how it is bid, it would still be offensive to haulers.

B. Win/Lose Organized Collection Schemes

Compensation should required for organized collection that has the effect of allocating customers to the extent that it changes current allocations so that there are winners and losers.

If the hauler currently picking up 18% of the community for $10.00, and if the community says you can continue to collect 18% but at $6.25, the haulers believe this action is compensable, unless the price was negotiated.

C. Not Required if Rational Regulations or Good Faith Negotiations

Licensing requirements, day zoning, recycling collection are not included within definition of compensable organized collection.

Dakota County - Open enterprise system where cities, and county worked out informal, the pick-up of yard waste and recycled materials.

City interest - Minimize traffic on streets, in light of mandatory collection requirements for yard waste and recycled materials.

Bottom Line - Bid process would require compensation; good faith negotiation would not require compensation; licensing would not.

Why aren't haulers organizing similarly to submit bids? Why is this different from negotiations? Answers:

(1) Some haulers have the ability to bring in trucks from elsewhere and bid low (Large Haulers).
(2) Anti-trust problems
(3) If form consortiums to bid, maintain the element of competition in bidding process. There is no competition in a negotiation setting.
(4) Not limited to haulers in the area.

Concern with large haulers bidding at below cost to win contracts, lose money for the initial term and then renegotiate better price.

IV. What Criteria Should be Used to Establish Eligibility for Compensation?

A. Areas of Service

If haulers service 50 residential accounts or more or 15 or more commercial accounts (MO and NC).

B. Length of Service

1. California - 3 years.

2. Hauler proposal - 3 months. Hauling industry response: 3 months is not long enough. First 3 months are very volatile, in any business.

3. In business at the time the notice of organized collection is issued. (Licensing haulers is mandatory.)

C. Percent of Business in an Area - Not discussed.

D. Haulers should not be eligible if they voluntarily choose not to join a consortium.

Haulers bottom line: We'll take what we can get.

V. How should the Amount of Compensation be Determined?

A. Is a 2 to 5 year notice period, in lieu of compensation, sufficient?

Hauling industry response: No, because they like what they do. Haulers want notice, but that's not enough.

City response: Section 115A.94 - the process of organized collection was the necessary amortization period.

B. Formula

Problems - How do you value the loss? A formula is likely to always result in over-compensation or under compensation.

Haulers proposed formula - 18 months of average monthly income.

Problem: Haulers can use compensation to undercut business in another city and get foot in door.

C. Case-by-Case (Judicial or Arbitration)

Haulers want recognition that have a compensable interest.

Court proceeding has full fact finding mechanism.

Statutes provide that the city pay FMV of business. Then, the courts decide.

Advantage - Can look at each situation in each community because the hauling is very different. e.g. Minneapolis haulers don't collect tipping fees. Communities have different lot sizes, different volume of trash.

Haulers response: Open to method so long as the right to compensation exists.

D. Middle Ground

Statute can list criteria for giving guidance to determining compensation. e.g. permanent loss of business; transitional loss (lesser damages); mitigation of damages (tort law theory).

VI. Who Should Pay?

A. Winning Hauler

The hauler should calculate into his or her bid an amount necessary to compensate losing haulers.

Compensation could come from the difference between price presently paid and savings resulting from increased efficiency (temporary?) (If buy out hauler, haulers pay costs with proceeds from business.)

B. City should have some responsibility for its decision, split 50/50

C. City-imposed surcharge

VII. Alternatives to Compensation

A. Strengthen Existing Process

Require that the city thoroughly consider all organized collection options and that all haulers are included in the process. Note that government representatives felt that the haulers are very persuasive to customers. Thus, if the haulers are guaranteed an opportunity to make their case, they are likely to succeed. Residents want to maintain own haulers, even relative to a negotiated contract.

Disadvantage - If the city fails to consider contract negotiations, the hauler has the opportunity to sue for an injunction. A lawsuit may jeopardize the ability to negotiate because of ill feelings.

B. Require Good Faith Contract Negotiations

Change the process to require a specified time period in which to conduct good faith negotiations (like designation). If hauler refuses the negotiated plan, the hauler is on his own.

Disadvantage - Restricting a municipality's ability to bid out garbage collection services and providing for compensation when the constitution does not require compensation, set a precedents that government will oppose. It may open the floodgates.

Note that 90 day negotiation period may be insufficient if the city offers a "take it or leave it" plan.

C. Require compensation where process not just and fair.

Note: Compensation statute risks the ire of all communities, where only "5%" of the communities are not likely to work with the haulers.

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APPENDIX I

Survey Results

SURVEY ON JUST COMPENSATION OF WASTE HAULERS

For

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November 6, 1989

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SURVEY ON JUST COMPENSATION

INTRODUCTION

This report summarizes the responses to the survey conducted by DPRA for the Legislative Commission on Waste Management. The survey, intended to elicit opinions on the subject of just compensation for waste haulers displaced by systems of organized collection, was mailed to 17 waste haulers and 58 government officials. A separate version was sent to each of the two groups, one for haulers and one for government officials. Copies of the surveys are attached in the Appendix. As of October 24, DPRA had obtained responses from 35 government officials and 12 waste haulers.

METHODOLOGY

The 17 waste haulers that were selected comprise the 12-member Minnesota steering committee of the National Solid Waste Management Association, four of whom are also board members of the Minnesota Waste Association (MWA). The other five are board members of the MWA. It was expected that haulers on boards of professional organizations would be the most knowledgeable about the subject of the survey; therefore, these were the haulers selected. The 58 government officials surveyed comprise 17 people recommended by the Executive Director of the Association of Metropolitan Municipalities, a random sample of 13 county solid waste officers (out of 87), and a random sample of 28 members of the League of Minnesota Cities (out of 65).

DPRA mailed surveys to all 75 people, and also phoned the nine haulers who are on the board of the MWA and 22 randomly selected government officials.

RESULTS

Based on the different types of questions contained in the surveys, the discussion of responses is divided into categories, as follows:

- o Experience with organized collection
- o Effects of organized collection
- o Interest in the issue of just compensation
- o Circumstances for granting just compensation
- o Advantages and disadvantages of just compensation
- o Funding for just compensation
- o Suggestions

EXPERIENCE WITH ORGANIZED COLLECTION

Haulers

Six haulers (50%) have collected in communities that have an organized collection system; currently four haulers collect in such communities. Three of the six haulers lost business as a result of organized collection by their communities and no longer collect there, although one of these haulers is now servicing a different community with organized collection. The fourth hauler lost some business but still collects in the community, having bought out the other haulers during six to seven years following organized collection. The fifth hauler did not lose business when his community organized, and the sixth hauler collects in a community that was already organized before he began collecting there. None of the twelve haulers responding to the survey has ever bid for collection as part of a group. Six haulers (50%) have bid alone on projects; four of these have won, although only two of these four are still collecting in an organized community. Four haulers have participated as members of groups or consortia of firms in negotiations to implement organized collection. Although only one of these haulers obtained a contract via negotiation, none of them see the negotiation process as a problem.

Regarding the particular aspect of organized collection that is a problem for the collection industry, six haulers (50%) responded that organized collection itself is a

problem, although five of the six believe that different procedures would address their concerns. On the issue of the bidding process being a problem versus the negotiating process being a problem: seven haulers believe bidding is a problem but that negotiations are not, two haulers believe negotiations are a problem but bidding is not, one hauler believes both are a problem, and one hauler does not know, although he believes that organized collection of commercial customers would violate the ethic of free enterprise. Several haulers had comments on the bid method. One hauler indicated that haulers have a harder time protecting their businesses and investments when the bid method is used, because they lose everything at once if they lose on a bid. Others suggested that bids favor the syndicated collection corporations that can afford to bid low and lose money for a few years to eliminate competition without buying it out. In this latter scenario, the assertion is that there will be no small haulers left to enter into negotiations should the community decide to offer negotiations at a later time.

Local Government Representatives

Of the 35 local government representatives who responded to the survey, 19 have organized collection systems, 14 do not, and 1 does not know. These representatives were asked for their ideas on trade-offs between bidded contracts and negotiated contracts for refuse collection. Their comments are summarized below.

Negotiation

Pros

- considers factors not possible to consider in bids (reputations, credibility, long-term viability, good faith)
- easier to consider best interests of city
- quicker and easier
- preserves long-term opportunity for competitive services
- flexible for both city and haulers
- less threat of litigation
- less chance of receiving frivolous or inaccurate bids
- fairer
- prevents monopolies
- protects small haulers by preventing displacement

Cons

- process may appear closed
- could perpetuate some inefficiencies of collection
- more political

Bidded

Pros

- cleaner and safer
- prevents charges of favoritism
- city obtains competitive price
- perceived to be fair
- emphasizes performance

Cons

- considers only cost, but not overall value
- time-consuming
- may eliminate firms or innovations, or both
- decision likely to be contested
- puts small haulers out of business
- risks getting a contractor that will go out of business
- not flexible

EFFECTS OF ORGANIZED COLLECTION

Haulers

With regard to the effects of organized collection, ten of the twelve responding haulers answered "yes" to the question, "If a hauler loses business because of organized collection, is it more difficult to find replacement business than if the loss is due to direct competition?" The other two haulers, both of whom have experience in organized communities, answered that it "Depends on the situation." One hauler has made up the loss of residential customers by switching to commercial collections. Several haulers noted that it is the size of the loss resulting from organized collection that is the critical factor. A loss due to organized collection means the loss of a geographic zone, usually with hundreds of pick-ups, where as losses from direct competition result in the loss of a

single pick-up at a time. The hauler who replaced lost business 6-7 years after his community organized noted that when commercial collections are separate from the residential system it is possible to replace business by obtaining commercial customers on an individual basis.

Local Government Representatives

Eight of the nineteen communities with organized collection used the bidded process for contracts; haulers were displaced in one of these and the official there would use the negotiation process if this would preclude compensation. No haulers have ever requested compensation from any of the communities covered by the survey. Regarding the question of bidding versus negotiating: of the 8 representatives in organized communities who use the bid process, 3 would negotiate if this would obviate the need to compensate displaced haulers. Of those who already use a process other than bid (10 representatives), 5 would negotiate, 1 would not, and 4 felt the question was not applicable. Seven representatives from non-organized communities (out of the 9 who responded to this question) would negotiate, 1 would not, and 1 did not know.

INTEREST IN THE ISSUE OF JUST COMPENSATION

Haulers

All (100%) of the twelve haulers who responded have been thinking and talking about the issue of just compensation for displaced haulers, and ten of the twelve rate their level of interest in the subject as "very high."

Local Government Representatives

For the local government representatives, the survey questions on this category appeared to be slightly confusing: the representatives were not sure if they were being asked if they had thought about actually instituting a compensation program or if they had merely

thought about the issue. Also, they were not sure if they were being asked their level of interest in actually instituting a compensation program or their level of interest in the issue for its potential ramifications. Many representatives included comments to clarify their position. Eleven officials rated their interest and awareness as "very high," eight said they had "some" interest, five said they had "heard of it," eight said their level of knowledge and interest is "none," and two did not respond. The representatives in the seven-county "metro" area have a stronger level of awareness about the subject than those located "out-state."

CIRCUMSTANCES FOR GRANTING JUST COMPENSATION

Haulers

Haulers were asked their opinion of six possible reasons for a community to grant compensation to haulers displaced by organized collection. The table below illustrates their agreement and disagreement with these reasons.

REASONS FOR COMPENSATION

		Agree	Disagree	Does Not Apply or Blank
1.	It is only fair to pay for someone whose business is eliminated	11	1	-
2.	Garbage collection is unique and shouldn't be compared with other businesses licensed or regulated by the community	6	6	-
3.	Hauler should be compensated only if they have no obvious opportunity for other business	3	7	1

Table continued.....

REASONS FOR COMPENSATION
(continued)

		Agree	Disagree	Does Not Apply or Blank
4.	Haulers have outstanding debts on their equipment that should be covered by compensation	11		1
5.	Haulers have very little chance of finding other job opportunities that pay the same	4	2	6
6.	A license to collect garbage should be considered more like a long-term contract to operate in a community.	5	3	4

Local Government Representatives

Upon being asked for reasons that could justify special treatment for garbage haulers versus other enterprises regulated by the community in considering the issue of just compensation, only two officials responded:

1) They are a private industry that has taken care of a public problem for too long; they unknowingly place their health at risk.

2) The state's mandate on recycling puts them in a unique position.

Haulers and Local Government Officials

Both haulers and representatives were asked about the applicability of various criteria to determine if compensation is warranted. Twenty-one local government representatives indicated that no criteria should be considered (60%), to express their opposition to the

concept of compensation for displaced haulers. Only one hauler left the item blank. Another believes the criteria are not applicable because they sidestep the issue of livelihood; he believes the loss of business cannot be broken down, and that his 17-year-old business is not more important than a 17-month-old business. Responses of both haulers and representatives are combined in the table below, for ease of contrast and comparison.

Circumstances or Criteria for Granting Compensation

		Haulers		Local Government Representatives	
		No.	%	No.	%
1.	None, or blank	2	16.6%	21	60.0%
2.	Fraction of hauler's total business in community undergoing organization	7	58.3%	9	25.6%
3.	No customer potential available in adjacent areas	1	8.3%	7	20.0%
4.	Family-owned and operated business with employees other than family members	2	16.6%	3	8.6%
5.	Owner/operator is a local resident	2	16.6%	4	11.4%
6.	Years of operation in community	4	33.3%	9	25.6%
7.	If the number of haulers allowed to provide future collection is less than current number of active haulers	2	16.6%	8	22.8%
8.	Other: government intervention in or ignoring of haulers' role	2	16.6%	1	2.8%

As can be seen from the table, the criterion selected by the greatest number of haulers is the fraction of a hauler's business that is displaced if a community organizes its collection. Seven (70%) of the ten haulers who responded to the question selected this criterion. "Years of operation in the community" was the criterion selected by the second largest number of responding haulers (40%). Twenty-three representatives responded to the question, and the highest number (40%) selected the same two criteria as the haulers. Other criteria popular among representatives are "no customer potential available in adjacent areas," selected by 30%, and the "number of haulers allowed to provide future collection," selected by 35%.

ADVANTAGES AND DISADVANTAGES OF JUST COMPENSATION

Haulers

Haulers were asked to name good effects and bad effects that would be produced on decisions they make, if communities were to provide just compensation. They described the effects as follows:

Good Effects

1. A hauler would have the security to invest in and expand his business without the threat of being pushed out of work by organized collection and without having to deal with huge debts and no income.

2. Haulers would be able to maintain quality service due to better equipment.

3. Haulers would have the confidence to pursue other solid waste issues such as recycling, yard waste and appliances. They would have better long-term planning ability.

Bad Effects

1. If haulers are assured compensation, they would give up their businesses too easily.

2. Compensation could eliminate small haulers who act as a check on the system and could allow monopolies in industry.

3. Even with compensation, haulers will still be out of work.

Local Government Representatives

Representatives were asked to indicate whether they agree or disagree with various advantages and disadvantages of providing compensation for displaced haulers. Their responses are summarized below.

Advantages of Compensation

		Agree	Disagree	Does Not Apply, or Blank
1.	Avoid a lawsuit	10	12	12
2.	Avoid legal and other delays	11	10	13
3.	Considerations of fairness	15	7	12
4.	Protect local business concern and employer	12	7	15

Disadvantages of Compensation

		Agree	Disagree	Does Not Apply, or Blank
1.	Sets a precedent that is unacceptable for future similar actions	26	4	4
2.	Creates a dis-incentive to organize collection	21	9	4
3.	Adds to cost of providing collection services	26	3	5

Table continued...

Disadvantages of Compensation
(continued)

		Agree	Disagree	Does Not Apply, or Blank
4.	Potentially time-consuming process	20	6	8
5.	Difficulty in agreeing on proper compensation price	27	3	4
6.	Other:			
	- Impossible to control	1		
	- Destroys capitalist free market system	1		

With regard to advantages of compensation, many officials chose to express their opposition to the concept itself by leaving the question blank or indicating that none of the items are applicable. According to their comments, many local representatives who did respond to the question are opposed to compensation.

Representatives were also asked for descriptions of the effects of a compensation requirement on communities, including their own. These effects are listed below.

Good Effects

None

Bad Effects

1. Additional tax burden
2. Raise cost of collection
3. City would cap its licenses

4. Haulers going out of business for other reasons would request compensation

5. Unbearable expense--$5.4 million for 1 city, based on $20/customer for 18 months

6. Political problems

7. Prohibit communities from organizing

8. Affect freedom of choice if community kept same haulers

9. Unfortunate precedent

10. Lead to monopoly

FUNDING FOR COMPENSATION

Government at some level will be responsible if compensation is required. Therefore, local government representatives were asked their opinions as to what level of government should pay for compensation, and what should be the source of funds. Their responses are summarized below.

Level of Government to Pay Compensation

Municipal/City:	5
County:	1
State:	9
Other:	1 - All, including federal level
	9 - None
	4 - Level that mandates organization

Source of Funds

Taxes:	9
Fees collected by city:	7
Fees collected by haulers:	6
Other:	9 - None
	1 - "I oppose compensation"
	1 - Must be decided by condemning party

SUGGESTIONS

Considering their background and experience, representatives were asked if they had any methods of compensation to suggest, especially based on knowledge they had of any cases of compensation of displaced haulers elsewhere in the country. No representatives knew of any particular instances where just compensation worked; one representative compared it to welfare which, in his estimation, does not work. The methods for compensation of haulers suggested by officials are:

1. Buy them out and offer them jobs.
2. Pay them a percent of their income for 2-4 years.
3. Implement the Champlin Consortium arrangement.
4. Haulers should compensate each other.
5. Protect the small hauler.
6. Impossible situation!

In addition to requesting suggestions for compensation methods, DPRA also invited the haulers and local government representatives to comment on any aspect of the overall issue addressed by the survey: compensation for displaced haulers. Their comments and opinions are given below.

FROM LOCAL GOVERNMENT REPRESENTATIVES IN COMMUNITIES WITH ORGANIZED COLLECTION

> "Garbage haulers take advantage of free enterprise system, currently available. Need to merge their assets, joint venture, or whatever works. Taxpayers cannot guarantee a livelihood--there are many more standing in line!"
>
> "Garbage collection should be publicly run and operated. Big haulers that are private should not have to compensate smaller haulers that get frozen out. This is America. But if state, county, or city decide to do their own collection, compensation should be a consideration if any private haulers are displaced. Can't compete with tax subsidies. Why not do

certification and education programs for private haulers like the state does for wastewater plants and landfills? Why consider total displacement rather than more effective education and coordination?"

"Just compensation issue is raised either by haulers (to prevent organized collection) or by cities with bad experience with organized collection."

"The major problem with establishing a just compensation system for refuse haulers is the precedent established by such a law. Frequently, once such a law is established it can be used to apply to other industries (i.e., septic tank cleaning firms, construction firms, tree services, concrete and asphalt services, etc.). This type of law can also be used to set precedent in other fields, such as cable TV."

"Compensation is a constitutional right. The issue belongs in the courts. Legislation only applicable to fine points, e.g., amount of compensation, the formula. Depends on whether the route (and customers) constitutes tangible property. There is a policy statement from the League of Minnesota Cities on this issue. The more regulation and organization, the more the area becomes a quasi-utility."

"Would like to know--Whatever happened in Utah? Private haulers want free enterprise, but just compensation could interfere. Cities would be afraid to organize for fear of lawsuit. Compensation would put cities in default--they don't have that kind of money."

"Private sector is best option."

"Negotiation is the answer. Shouldn't put haulers out of business."

"Comes down to location--outstate Minnesota doesn't have problem. Metro area may have problem; if so, cities should pay."

"Most people realize that organization is necessary, especially with recycling. There are environmental concerns. There will be costs related to organization; these must be shared to make system work."

FROM LOCAL GOVERNMENT REPRESENTATIVES IN COMMUNITIES WITHOUT ORGANIZED COLLECTION

"Only reason [my community] would go to organized collection is if the private sector cannot provide the services. Perhaps with some support from government for recycling and composting. Philosophy is to place the challenge on the private sector."

"Government must be able to provide proper mix of services for citizens. Just compensation would set a precedent that will affect other industries regulated by the City. Want to maintain range of choices and ability to be economical."

"Just compensation law would be detrimental to what we're trying to do. Trying to keep expenses down and keep government out of it."

FROM HAULERS

"It's hard for compensation programs to work, because city and county coffers have to pay, and the loss is not as obvious as when a building is torn down. "

"With a compensation program it is possible to expand a business and pay off debts without fear of government taking away the business we established 42 years ago, which now employs 40 people. Without a compensation program there would be no incentive to stay in business."

"Any hauler that loses work due to government intervention should be compensated."

This survey is being conducted on behalf of the Legislative Commission on Waste Management (LCWM) to "prepare a report which examines whether and under what circumstances a local unit of government shall ensure just and reasonable compensation to solid waste collectors who are displaced when a local unit of government organizes collection under Minnesota Statutes, sec. 115A.94." This survey is being conducted to solicit information and opinions from industry and municipal representatives on this issue. You are one of the limited number of representatives to be contacted. So your reply is very important. We must have your answers to this survey by Wednesday, October 18. If you prefer, call us (Kathy Corcoran or Joe Carruth) at 612/227-6500. The information from this survey will be summarized and reported to the LCWM. Thank you for your prompt reply.

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LCWM Survey of City and County Governments
on Just Compensation

Name of Respondent:_____City/County_____

1. Do you have organized garbage collection?
___ Yes ___ No ___ Don't Know

2. If so, how did your community implement organized collection?

___ a. bid process
___ b. negotiation process
___ c. municipal collection
___ d. other, describe _____

3. If you used a bid process, why did you do so?

___ a. Not applicable
___ b. Required by law
___ c. Standard or historical practice
___ d. Preference
___ e. Other, specify _____

4. Did the process and decision on organized collection put out of business, either partially or totally, any haulers who had been collecting garbage in your community? ___ Yes ___ No

If "yes," did the displaced hauler(s) request compensation? ___ Yes ___ No

Did you provide it? ___ Yes ___ No

If "no," why not? Please check all that apply:

___ didn't think about it
___ sets a precedent that is unacceptable for future similar actions
___ creates a disincentive to organize collection
___ adds to cost of providing collection services
___ potentially time-consuming process
___ difficulty in agreeing on proper compensation price
___ other, please describe _____

If "yes," why? Please check all that apply:

___ avoid a lawsuit
___ avoid legal or other delays
___ considerations of fairness
___ protect local business concern and employer
___ other, specify _____

5. Would your community use the negotiated process instead of a bidding process to implement organized collection if, under the negotiated agreement, just compensation for haulers was not required? ____ Yes ____ No

6. Did you consider just compensation of haulers when you were organizing collection? ____ Yes ____ No ____ Not applicable

7. Have you or your associates given any thought to compensation of haulers displaced by organized collection? ____ Yes ____ No

8. Has the issue come up in conversation with colleagues? ____ Yes ____ No

9. What is the level of your (personal or administration) knowledge and interest in just compensation of displaced haulers?

___ a. Very high
___ b. Some
___ c. Heard of it
___ d. None

10. Please indicate your ideas on trade-offs between bid versus negotiated contracts for organized collection.

11. Please give your opinion on the advantages of compensating haulers displaced by organized collection by checking the appropriate column for each item.

Agree	Disagree	Doesn't Apply	
___	___	___	avoid a law suit
___	___	___	avoid legal or other delays
___	___	___	considerations of fairness
___	___	___	protect local business concern and employer
___	___	___	other, please describe _____

12. Please give your opinion on the disadvantages of compensating haulers by checking the appropriate column for each item.

Agree	Disagree	Doesn't Apply	
___	___	___	sets a precedent that is unacceptable for future similar actions
___	___	___	creates a disincentive to organize collection
___	___	___	adds to cost of providing collection services
___	___	___	potentially time consuming process
___	___	___	difficulty in agreeing on proper compensation price
___	___	___	other, please describe _____

13. What circumstances or criteria, if any, should be considered in granting compensation? (Please check all that apply.)

___ a. None
___ b. Fraction of hauler's total business in community undergoing organization is

- ___ (i) less than 25%
- ___ (ii) 25 - 50%
- ___ (iii) 50 - 75%
- ___ (iv) 75 - 90%
- ___ (v) 90 - 100%

___ c. No customer potential available in adjacent areas
___ d. Family owned and operated business, employees other than family number

- ___ (i) 25% or more
- ___ (ii) 15 - 25%
- ___ (iii) 10 - 15%
- ___ (iv) 5 - 10%

___ e. Owner/Operator is local resident
___ f. Years of operation in community

- ___ (i) 1 year or less
- ___ (ii) 1 - 3 years
- ___ (iii) 3 - 10 years
- ___ (iv) more than 10 years

___ g. The number of haulers allowed to provide future collection is less than current number of active haulers
___ h. Other, specify _____

14. Do you have specific examples of compensation programs:

That worked (please specify)?

That didn't work (please specify)?

15. Do you have any methods of compensation to suggest? _____

16. What effect would a compensation program have on your municipality and/or others?

Yours _____

Others _____

17. What reasons are there to justify special consideration or treatment of garbage haulers in compensation decisions versus other industries or enterprises licensed or regulated by the community?

Identify _____

None _____

18. What level of government should pay the cost of compensation?

____ a. Municipal/City
____ b. County
____ c. State
____ d. Other, specify _____

19. What source/sources of funds should be used?

____ a. Taxes - local or state
____ b. Fees collected by city from customers
____ c. Fees collected by haulers that continue in business
____ d. Other _____

Other comments:

LCWM Survey for Haulers on Just Compensation

Name of Respondent:_____

1. Have you or your associates given any thought to compensation of haulers displaced by organized collection? ____ Yes ____ No

2. Has the issue come up in conversation with colleagues? ____ Yes ____ No

3. What is the level of your knowledge and interest in just compensation of haulers displaced by organized collection?

____ a. Very high
____ b. Some
____ c. Heard of it
____ d. None

4. Do any of your collections occur in an organized collection system?

____ Yes ____ No

5(a). Have you collected garbage in a community that changed from an open system to organized collection?

____ Yes ____ No

(b). Are you still collecting garbage in that community? ____ Yes ____ No

(c). Did you lose any business as a result of organized collection in that community?

____ Yes ____ No

6. Have you lost business in any community because of organized collection?

____ Yes ____ No

7. Did you find enough new business in other locations to replace what you lost in an organized collection community?

____ Yes ____ No ____ Doesn't apply

If "yes," how long did it take to replace the business? _____

8. Did you ever bid for business in a community going to organized collection?

   (a) By yourself? ___ Yes ___ No

   Did you win? ___ Yes ___ No

   (b) As part of a group? ___ Yes ___ No

   Did you win? ___ Yes ___ No

9. Did you ever participate as a member of a group or consortium of firms in a negotiation to implement organized collection in a community?

   (a) ___ Yes ___ No

   (b) Did you win? ___ Yes ___ No

10. If a hauler loses business because of organized collection, is it more difficult to find replacement business than if the loss is due to direct competition?

    ___ Yes ___ No ___ Depends on the situation

11. Is organized collection a problem for the industry or is the process of organizing collection the problem, or are both problems?

    (a) Organized collection is a problem. ___ Yes ___ No ___ Don't know

    If "yes," would different procedures address your concerns regarding organized collection?

    ___ Yes ___ No ___ Don't know

    (b) Process is the problem:

    If Bid ___ Yes ___ No ___ Don't know

    If negotiated ___ Yes ___ No ___ Don't know

12. Please give your opinion of the following reasons for compensation of haulers displaced by organized collection. Check the appropriate column for each item.

Agree	Disagree	Doesn't Apply	
___	___	___	It is only fair to pay someone whose business is eliminated.
___	___	___	Garbage collection is unique and shouldn't be compared with other businesses licensed or regulated by the community.
___	___	___	Haulers should be compensated only if they have no obvious opportunity for other business.
___	___	___	Haulers have outstanding debts on their equipment that should be covered by compensation.
___	___	___	Haulers have very little chance of finding other job opportunities that pay the same.
___	___	___	A license to collect garbage should be considered more like a long-term contract to operate in a given community.

13. What effects, if any, would a compensation program have on decisions made by haulers?

Good effects: _____

_____

_____

Bad effects: _____

_____

_____

14. What circumstances or criteria, if any, should be considered in granting compensation? (Check all that apply.)

____ a. None
____ b. Fraction of hauler's total business in community undergoing organization is

____ (i) less than 25%
____ (ii) 25 - 50%
____ (iii) 50 - 75%
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____ e. Owner/Operator is local resident
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____ (i) 1 year or less
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____ (iii) 3 - 10 years
____ (iv) more than 10 years

____ g. Number of haulers allowed to provide future collection is less than current number of active haulers
____ h. Other, specify _____

15. Do you know of any compensation programs?

(a) That worked? (Please identify) _____

Why? _____

(b) That didn't work? (Please identify) _____

Why? _____