

ORDINANCES

The Zero Waste Movement

by Sophia M. Stadnyk, Senior Associate Counsel

"Zero Waste" is a recent approach that goes beyond recycling and seeks to "redesign the way that resources and materials flow through society." According to one source, the approach began in the Australian municipality of Canberra in 1995, when the City endorsed a goal of "No Waste by 2010."[1] One of the underlying concepts of zero waste is to reverse unsustainable practices and policies by imposing producer responsibility or accountability for waste.

On May 19, 2011, the San Francisco, California Board of Supervisors enacted an ordinance, Ordinance 78-11 ("Environment Code–Yellow Pages Distribution Pilot Program"), as part of the City's zero waste campaign.[2] It established a three-year pilot program to reduce waste in the distribution of "yellow pages" telephone directories to residences and businesses, and to reduce neighborhood blight, by restricting distribution to circumstances where: (1) there was personal delivery of the directory "to a human being," (2) there had been a request for delivery of the directory to that residence or business, or (3) where directories were maintained for pick-up at a distribution center or a business open to the public. The ordinance mandated a public outreach program to educate residents about the environmental harms caused by the "excessive distribution" of commercial phone directories.[3]

The City's campaign was intended to reduce the "gross overproduction and significant wastage" associated with the publication of commercial telephone directories by prohibiting their delivery to residents and businesses that did not first opt-in to receiving these publications. The Internet made the publication of paper directories unnecessary for most people, particularly for the tech-savvy residents of San Francisco. David Chiu, the President of San Francisco Board of Supervisors, interviewed in May 2011, said that the City had at "least 1.6 million phonebook directories [or] yellow pages, dumped in apartment lobbies and neighborhoods, creating neighborhood blight. If you stack up all of these phonebooks, just in San Francisco, that's equivalent to almost 300 Transamerica Pyramids laid end to end."[4] This also added up to some seven million pounds of wastepaper that needed to be recycled annually;[5] and the ordinance noted that recycling of commercial phone directories posed "special difficulties because of their bulk, weight, and composition."[6] The better approach was to avoid having to recycle these materials altogether. In addition, as mentioned by Mr. Chiu, these unwanted deliveries, in many cases, sat outside for extended periods to be degraded by the elements, and contributed to neighborhood blight.

Spokespeople for Local Search Association (LSA), a trade association comprised of publishers and businesses involved in the local search industry and which published the Yellow Pages, defended the use of these directories, pointing out that many people (like seniors) still don't have computers or Internet access, and that any restrictions on distribution disproportionately affected small businesses.[7] The LSA challenged the ordinance pursuant to 42 U.S.C. § 1983 on behalf of its publisher members, alleging violations of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Supremacy Clause, and similar violations of free speech and equal protection under California's Constitution provisions. It applied for a preliminary injunction, claiming that the ordinance had caused, and would likely cause, irreparable financial harm by depriving its members of their free speech rights.[8] That case is pending.

However, a similar ordinance has been addressed by the courts: *Dex Media West, Inc. v. City of Seattle*, 790 F. Supp. 2d 1276 (W.D. Wash. 2011). In 2010, the City of Seattle passed Ordinance 123427, which required a "yellow pages phone book" publisher to meet the following conditions in order to be able to distribute directories: (1) obtain an annual distributor license; (2) to pay 14 cents for each directory distributed; and (3) to clearly display, on the front cover of each directory (and on its website), a message about opting-out of receiving directories. Dex Media West, Inc. and other publishers moved for a for preliminary injunction. The central issue was the claim that the ordinance violated the publishers' First Amendment rights. The plaintiffs, in this regard, argued that the directories were not just commercial, but contained community, public safety, and political information.

The court in *Dex Media* denied the injunction. The court declined to conclude that the plaintiffs were likely to succeed on the merits of their assertion that yellow pages directories were "fully protected" noncommercial speech. The yellow pages directories contained advertisements, referenced specific products, and the plaintiffs had an economic motive for publishing the directories and delivering the yellow pages to residents' doorsteps. The presence of noncommercial speech did not alter the "commonsense conclusion" that yellow pages directories were commercial speech. The City's three primary interests in enacting the ordinance (summarized as waste reduction, resident privacy, and cost recovery) met the lesser standard applicable to regulation of commercial speech in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980). "The Ordinance's opt-out registry, recovery fee, and license requirement all 'provide more

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20. U.S. Envt'l. Prot. Agency, *Presumptive Remedies: Site Characterization and Technology Selection for CERCLA Sites With Volatile Organic Compounds In Soils, 3* (1993).
21. *Presumptive Remedies: Policies and Procedures, supra* note 15.
22. Glass Geltman, *supra note 6*, at 338.
23. *Environmental Covenants Act Summary,* Uniform Law Commission, http://tinyurl.com/bmfk4xx (last visited Mar. 13, 2012).
24. Kurt A. Strasser & William Breetz, *The Benefits of a Uniform State Law for Institutional Controls, in* Implementing Institutional Controls at Brownfields and Other Contaminated Sites, 31-37 (Amy L. Edwards, ed., 2003).
25. *Environmental Covenants Act Summary, supra* note 23.
26. *Id.*
27. Strasser & Breetz, *supra* note 24, at 33.
28. U.S. Gov't Accountability Office, GAO-06-900T, *Superfund: Better Financial Assurances and More Effective Implementation of Institutional Controls Are Needed to Protect the Public* (2005).
29. *Superfund: Published Institutional Controls, U.S.* Environmental Protection Agency, http://tinyurl.com/78xqmzv (last updated Feb. 13, 2012).
30. *Id.*
31. Glass Geltman, *supra* note 6, at 348-49. **M**

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than ineffective or remote support' for the City's stated interests."

The *Dex Media* case is currently on appeal before the U.S. Court of Appeals for the Ninth Circuit, with oral arguments being heard on February 09, 2012. San Francisco has voluntarily postponed enforcement of its ordinance until 30 days after the Ninth Circuit renders its ruling in *Dex Media*,[9] and in the meantime, the City defendants in the San Francisco case have applied for, and obtained, a temporary stay of proceedings pending the Ninth Circuit's resolution of the *Dex Media* case.[10]

Notes

1. *See* Grass Roots Recycling Network page at http://archive.grrn.org/zerowaste/articles/campaign_zw.html.
2. The Ordinance is available online at http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances11/o0078-11.pdf.
3. *Id.*
4. Richard Gonzales, *San Francisco Moves To Ban Yellow Pages*, NPR, May 16, 2011, at http://www.npr.org/2011/05/16/136368752/san-francisco-moves-to-ban-yellow-pages.
5. *Id.*
6. Ordinance, *supra,* note 2.
7. Gonzales, *supra*, note 4.
8. *Local Search Ass'n v. City & County of San Francisco*, No: C 11-02776 SBA, 2012 U.S. Dist. LEXIS 61613 (N.D. Cal. May 02, 2012).
9. *Id.* at *3.
10. *Id.* at *12. **M**

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lease the lot at the intersection from the owner. Only one member of the Planning and Zoning Board voiced concern (because the lot was zoned "C-2" for larger businesses, and the intersection concerned was the busiest in the city). The Board granted Bowlby the requested permits and told her to proceed with her business plan, and Bowlby opened her business later that month.

In September 2009, the Board again discussed Bowlby's business and decided to revoke the permits. Bowlby was not informed about this meeting or told her permits were being reconsidered. The next day, the city building inspector gave Bowlby a letter informing her of the Board's new ruling and told Bowlby she was to immediately close her business because the Board had determined that it did not conform to the City's laws and regulations. The reasons in the letter were: (1) that Bowlby had misled the Board as to the location of her business; (2) that the location posed a safety concern because the busy intersection was not safe for children; (3) that the land was zoned C-2 and intended for larger businesses; (4) that the portable toilet next to Bowlby's business was an eyesore and a health hazard; and (5) that the overall look of the business was offensive and inappropriate for the eastern entrance to the city.

The Aberdeen Zoning Ordinance required that all appeals of Board decisions were to be made to the mayor and Board of Aldermen, and thereafter to the courts. Bowlby, instead, brought suit against the City and the Board in a Section 1983 suit in federal court, claiming, among other things, that her business was taken without just compensation, in violation of the Fifth Amendment Takings Clause, and that her business was closed without notice or a hearing, in violation of the Fourteenth Amendment Due Process Clause. The City defendants filed a motion to dismiss. The district court granted the motion based on Rule 12(b)(6), relying on the U. S. Supreme Court's decision in *Williamson County Reg. Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), in that Bowlby's takings claim was not ripe because she did not first seek just compensation in a state court for the taking of her business. As Bowlby's equal protection claim would not exist but for the taking, that, too, was unripe. The Board had not violated Bowlby's due process rights because there had not been a final deprivation by the state, since Bowlby had not appealed the decision to revoke her permission to operate her business. Bowlby appealed, arguing that she had a property interest in being allowed to operate her business, and that the Board's revocation of her business permits without prior notice or a hearing violated her Fourteenth Amendment right to procedural due process.

The U. S. Court of Appeals for the Fifth Circuit agreed and reversed the dismissal of Bowlby's due process claim, finding that business permits, along with other "privileges, licenses, certificates, and franchises . . . qualify as property interests for purposes of procedural due process." Once the Board had issued permits for Bowlby to operate her business at a designated intersection, she had a property interest in those permits, and by extension, in operating at the location identified in those permits. Once issued, a license or permit could not be taken away by the State without due process. Bowlby was due predeprivation process.

Exhaustion of state remedies was not required before a plaintiff could bring suit under § 1983 for denial of

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