

BEFORE THE METRO COUNCIL

ADOPTING THE HEARINGS OFFICER'S PROPOSED) RESOLUTION NO. 05-3648A
ORDER AND AUTHORIZING THE CHIEF OPERATING)
OFFICER TO ISSUE A FINAL ORDER AFFIRMING) Introduced by Michael Jordan,
THE CONDITIONS SET FORTH IN PARAGRAPHS 3.8,) Chief Operating Officer, with the
3.9, AND 5.2 OF SOLID WASTE FACILITY LICENSE) concurrence of David Bragdon,
NO. L-109-05, ISSUED TO GREENWAY RECYCLING,) Council President
INC.)

WHEREAS, the Chief Operating Officer issued Solid Waste Facility License No. L-109-05 to GreenWay Recycling, Inc. (the "Licensee"), in March of 2005; and

WHEREAS, the Licensee requested a contested case hearing to contest the license conditions set forth in Paragraphs 3.8 and 3.9 of the license, which require solid waste and recyclable materials to be covered within 12 hours of receipt and removed from the site within 48 hours of receipt, and Paragraph 5.2 of the license, which requires a qualified operator to be on site during all hours of operation; and

WHEREAS, a hearing on the matter was held on July 6, 2005, before Metro Hearings Officer Robert J. Harris; and

WHEREAS, on October 17, 2005, the Hearings Officer issued a proposed order, attached hereto as Exhibit A to this resolution, that concluded that the contested conditions set forth in the license were validly issued and reasonable and not in violation of Oregon law, the Oregon or U.S. constitution or a violation of Metro code and procedures; and

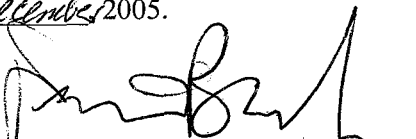
WHEREAS, the Licensee filed exceptions to the proposed order, attached hereto as Exhibit B to this resolution; and

WHEREAS, Metro Code 2.05.045(b) provides that the Council shall adopt the Hearings Officer's proposed order or revise or replace the findings or conclusions in the order, or remand the order to the Hearings Officer; and

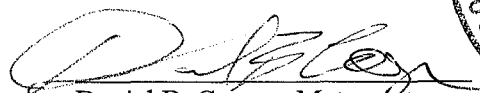
WHEREAS, the Council has considered the proposed order as required by the Metro Code; now therefore,

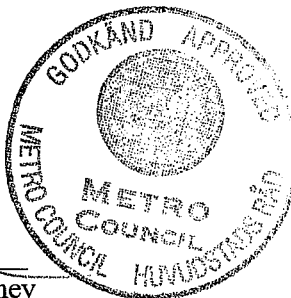
BE IT RESOLVED that the Council adopts the Proposed Order From Hearing issued by Hearings Officer Robert J. Harris in Metro Contest Case: In The Matter of Metro Solid Waste Facility License Number L-109-05 issued to GreenWay Recycling, Inc., and directs the Chief Operating Officer to issue a final order substantially similar to the Proposed Order, provided that such final order shall also include the language provided in Exhibit C to this resolution.

ADOPTED by the Metro Council this 8th day of December 2005.


David Bragdon, Council President

Approved as to Form:


Daniel B. Cooper, Metro Attorney



BEFORE THE METRO COUNCIL

ADOPTING THE HEARINGS OFFICER’S PROPOSED) RESOLUTION NO. 05-3648
ORDER AND AUTHORIZING THE CHIEF OPERATING)
OFFICER TO ISSUE A FINAL ORDER AFFIRMING) Introduced by Michael Jordan,
THE CONDITIONS SET FORTH IN PARAGRAPHS 3.8,) Chief Operating Officer, with the
3.9, AND 5.2 OF SOLID WASTE FACILITY LICENSE) concurrence of David Bragdon,
NO. L-109-05, ISSUED TO GREENWAY RECYCLING,) Council President
INC.

WHEREAS, the Chief Operating Officer issued Solid Waste Facility License No. L-109-05 to GreenWay Recycling, Inc. (the “Licensee”), in March of 2005; and,

WHEREAS, the Licensee requested a contested case hearing to contest the license conditions set forth in Paragraphs 3.8 and 3.9 of the license, which require solid waste and recyclable materials to be covered within 12 hours of receipt and removed from the site within 48 hours of receipt, and Paragraph 5.2 of the license, which requires a qualified operator to be on site during all hours of operation; and,

WHEREAS, a hearing on the matter was held on July 6, 2005, before Metro Hearings Officer Robert J. Harris; and,

WHEREAS, on October 17, 2005, the Hearings Officer issued a proposed order that the contested conditions set forth in the license were validly issued and reasonable and not in violation of Oregon law, the Oregon or U.S. constitution or a violation of Metro code and procedures; and,

WHEREAS, Metro Code 2.05.045(b) provides that the Council shall adopt the Hearings Officer’s proposed order or revise or replace the findings or conclusions in the order, or remand the order to the Hearings Officer; and,

WHEREAS, the Council has considered the proposed order as required by the Metro Code; now therefore,

BE IT RESOLVED that the Council adopts the Proposed Order From Hearing issued by Hearings Officer Robert J. Harris in Metro Contest Case: In The Matter of Metro Solid Waste Facility License Number L-109-05 issued to GreenWay Recycling, Inc., and directs the Chief Operating Officer to issue a final order substantially similar to the Proposed Order.

ADOPTED by the Metro Council this ____ day of _____, 2005.

David Bragdon, Council President

Approved as to Form:

Daniel B. Cooper, Metro Attorney

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METRO CONTESTED CASE: SOLID WASTE FACILITY LICENSE NUMBER L-109-05

BEFORE ROBERT J. HARRIS HEARINGS OFFICER

In The Matter of Metro Solid Waste Facility) PROPOSED ORDER
License Number L-109-05) FROM HEARING

Issued to:)
GREENWAY RECYCLING, LLC,)
Respondent.)

BACKGROUND AND PROCEDURAL POSTURE

On February 25, 2004, GreenWay Recycling LLC (hereinafter licensee) was issued Metro License Number YD-109-04 as a reload facility for yard debris and landscape waste. On March 11, 2005, the license was amended, at licensee's request, and reissued as L-109-05 authorizing licensee to accept additional types of solid waste at the facility. On March 11, 2005, Licensee was sent a copy of the staff report (Exhibit HO-1) a copy of the proposed amended license (Exhibit HO-2), a letter from Michael Hoglund, Metro Solid Waste & Recycling Department Director (Exhibit HO-3), and a Contested Case Notice (Exhibit HO-4).

On April 20, 2005, Licensee requested a contested Case Hearing regarding certain provisions of its license (Exhibit HO-5). Metro asked that the Hearings Officer notify licensee that its request for a hearing be set out in more specificity.

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1 Pursuant to previous Metro Code 5.05.090, and 7.01.100, on May 5, 2005, the Hearings
2 Officer sent to licensee a notice of hearing for June 1, 2005, and enclosing copies of Metro
3 Documents that were to be presented at the hearing. A notice of procedure and rights was also
4 enclosed.

5 Included with that standard notice letter of May 5, 2005, was a letter to licensee from
6 the Hearings Officer asking licensee to state with some specificity, the basis for the objection
7 to conditions of the amended license (Exhibit HO-6). That letter gave licensee until May 20,
8 2005, to send a more specific hearing request in. That date was chosen because the hearing had
9 been initially scheduled for June 1, 2005.

10 By letter dated May 16, 2005, licensee specified five separate objections to the Amended
11 License (Exhibit HO-7).

12 On May 26, 2005, the Hearings Officer was informed that Mr. Terrell Garrett, the Agent
13 of licensee was sick and in the hospital with pneumonia. The June 1, 2005, hearing was reset to
14 July 6, 2005 (Exhibit HO-8).

15 In late June licensee retained Mr. Lawrence Derr, attorney at law, to represent it in the
16 hearing.

17 On July 1, 2005, Mr. Derr emailed the hearings officer stating that licensee was
18 contesting certain specific conditions of the amended license (Exhibit HO-9).

19 On July 6, 2005, at the Metro Offices in Portland, Oregon the hearing was held. Present
20 were: For Metro: Paul Garrahan, Metro Assistant Counsel, Bill Metzler, Metro Planner, Roy
21 Brower, Metro Regulatory Affairs Division Manager. Present for Licensee were: Lawrence Derr,
22 Counsel, Terrell Garrett, President of licensee.

23 The Hearings Officer, Robert Harris, stated on the record that there had been no ex-parte
24 communications. The parties acknowledged on the record that they understood the rights and
25 procedures, and waived their reading.

1 Prior to taking testimony, all witnesses were put under oath.

2 **EVIDENTIARY RULINGS**

3 The Hearings Officer accepted documents and photos during the Hearing and gave left
 4 the record open after the hearing for the parties to supplement the record, including submitting
 5 briefings on the legal issues. Based on the evidence offered at the hearing and the records and
 6 evidence admitted prior to the close of record, The Hearings Officer made the following a part
 7 of the Record:

8 <u>Exhibit Number</u>	<u>Exhibit</u>
9 HO-1	Metro Staff Report
10 HO-2	Copy of Proposed Amended License number L-109-05
11 HO-3	Letter from Michael Hoglund , Metro Solid Waste & 12 Recycling Department Director
13 HO-4	Contested Case Notice
14 HO-5	Licensee Request for Contested Case Hearing
15 HO-6	Hearings Officer Letter, Notice of Hearing and Notice of 16 Rights and Procedures
17 HO-7	Licensee Letter specifying objections to Amended License
18 HO-8	Letter from Hearings Officer resetting Hearing
19 HO-9	Email from Mr. Derr withdrawing some specific 20 objections
21 HO-10	License 4D-109-04 issued to Greenway Recycling LLC

22 METRO offered the following Exhibits into evidence, which were accepted without
 23 objection and marked accordingly:

24 <u>Exhibit Number</u>	<u>Exhibit</u>
25 Metro -1(a) through 1(l)	12 color photos (8 x 10) of the subject site

- 1 Metro - 2 Metro Solid Waste Facility License L-003-03
- 2 Metro - 3 Metro Solid Waste Facility License L-009-04
- 3 Metro - 4 Copy of Metro File for Greenway Recycling LLC -
- 4 Complaints
- 5 Metro - 5 Copy of Metro File for Greenway Recycling LLC
- 6 Application file for YD-109-04
- 7 Metro - 6 Copy of Metro File for Greenway Recycling LLC -
- 8 YD-109-04; Enforcement Actions
- 9 Metro - 7 Copy of Metro File for Greenway Recycling LLC -
- 10 YD-109-04; Site Visits
- 11 Metro - 8 Copy of Metro File for Greenway Recycling LLC -
- 12 YD-109-04 Correspondence
- 13 Metro - 9 Site Map of subject property
- 14 Metro - 10 Cover letter dated July 27, 2005, from Paul Garrahan
- 15 along with one page (double sided) supplemental
- 16 statement of Roy Brower in response to Mr. Garrett's
- 17 July 20, 2005 supplemental statement.
- 18 Metro - 11 Copy of Metro file for Greenway Recycling LLC
- 19 YD-109-04 DEQ.
- 20 Metro - 12 Copy of Metro file for Greenway Recycling LLC
- 21 YD-109-04 operation plan.
- 22 Metro - 13 Greenway Recycling Public Notice file.

Licensee offered the following Exhibits into evidence, which were accepted without objection and marked accordingly:

<u>Exhibit Number</u>	<u>Exhibit</u>
Licensee - 1	Cover letter of Lawrence Derr dated July 20, 2005, along with copies of Change of Authorization form an attachment and supplemental statement of Mr. Terrell Garrett dated July 20, 2005 (5 pages including cover letter).

ISSUES

1. Does Metro have the authority to regulate licensee’s activities on licensee’s site?

2. If Metro has the authority to exercise authority over licenses activities on its site, was Metro required to pass rules and regulations pursuant to the Oregon Administrator Procedures Act prior to exercising its authority; or to otherwise engage in administrative rule making?

3. If Metro had regulatory authority over licensees site, and it was not required to promulgate rules under the Oregon Administrative Procedures Act, did Metro exercise its authority properly in setting certain conditions on the issuance of a license to licensee?

PRELIMINARY LEGAL QUESTION

Licensee contests as a preliminary issue whether Metro has the authority to impose operational conditions on the issuance of the type of license issued in this instance. Licensee makes two arguments. Whether Metro has the authority to even include operational conditions as part of a valid license and if so, whether Metro was required to make rules in advance setting forth the particularities of license requirements and parameters.

A. Grant of Authority to impose operational Conditions on Licensee

Metro is a home rule government authorized by the Oregon Constitution (article XI section 14) and Metro Charter. The Oregon Constitution provides that Metro shall exercise all powers and perform all duties as granted to, imposed upon or distributed among district officers by the constitution or laws of this state, by the District charter or by its authority. Metro Charter provides that “(m)atters of metropolitan concern include the powers granted to and duties imposed on Metro by current and future state laws and those matters the Council by ordinance determines to be of metropolitan concern. (Metro Charter Section 4). This provision gives Metro wide authority to act in matters of metropolitan concern (*City of Sandy v. Metro*, 2005 Or. App. (2005))

1 Licensee argues that ORS 268.318(2) is the effective grant of licensing authority to
2 Metro by the state and establishes the only items that Metro may consider when issuing
3 licenses. Licensee argues that none of the conditions at issue fall within the categories listed in
4 ORS 268.318(2).

5 Metro argues that the grant of authority to Metro to impose operational conditions on
6 licensees is not bounded by ORS 268.318. It points to ORS 268.317 which grants Metro broad
7 authority to issue licenses (sub. 5) and the authority to prescribe a procedure to do so (sub. 6)
8 In addition, Subsection 7 of that statute allows Metro to regulate the services provided by
9 license and order modifications, additions or extensions to the... facilities, plan or services as
10 shall be in the public interest. (ORS 268.317(7)) Metro also points to the broad grant of
11 authority in the Oregon Constitution and the Metro Charter.

12 I find as a matter of law that Metro does have the authority, under Applicable
13 Constitutional provisions, Metro Charter and Oregon law, to not only issue and regulate licenses
14 regarding solid waste handling and disposal, but to include operational conditions on the
15 issuance of such licenses.

16 **B. Is Metro required to issue Rules or Procedures regarding issuance of**
17 **Licenses for Solid Waste Facilities?**

18 Metro is not a State Agency. It is a home rule government directly elected by the people
19 of the Metro district. Therefore I find that the Oregon APA does not apply to Metro.

20 ORS 268.317(6) states that Metro *may* “Prescribe a procedure for the issuance,
21 administration, renewal or denial of contracts, licenses, or franchises granted under subsection
22 (5) of this section. Nowhere is Metro required to undertake rulemaking as contemplated by
23 licensee in its brief.

24 //

25 //

1 Licensee argues that without formal rulemaking Metro is left with a case by case standard
2 less, ad hoc review in cases involving conditions of licenses. And that such a legal construct is
3 contrary to law.

4 Metro points out that it has established a procedure for review. Licensee has the ability to
5 contest a license condition through the contested case process, which process is fully set forth in
6 Metro Code and Oregon Statutes regarding review of contested cases (ORS 34.010 *et seq*).

7 I find that Metro has the authority to review and issue licenses regarding solid waste
8 facilities without having first formally promulgated administrative rules under the Oregon APA.
9 The procedure as set forth in the Metro Code, providing for contested case hearings, and Judicial
10 review pursuant to the procedures and requirements under ORS 34.010 *et seq*, Writ of Review, is
11 legally sufficient to meet Statutory and constitutional requirements.

12 FINDINGS OF FACT

13 I. Background

14 GreenWay Recycling LLC (licensee), is an Oregon Limited Liability Company in the
15 business of waste handling and recycling. It operates at a facility located at 4135 NW St. Helens
16 Road, Portland, Oregon (facility) a location within the jurisdiction of Metro. Terrell Garrett is a
17 member of licensee.

18 In February 2004, licensee received license No. YD-109-04 for its facility. That license
19 authorized licensee to accept, process and reload source separated yard debris and landscape
20 waste and accept, process and reload clean treated painted wood waste at its facility.

21 In October 2004, licensee applied for a Change of Authorization for its license to add the
22 ability to accept and reload non-putrescible solid waste and source separated recyclable
23 materials. Licensee proposed to accept the dry solid waste from commercial sources only, and
24 proposed procedures whereby select haulers could deposit the materials at the facility after
25

1 regular business hours. Licensee's application stated that it would reload all categories of waste
2 to their respective destinations on a first in, first out basis within 72 hours.

3 In March 2005, Metro granted the Change of Authorization through issuance of license
4 No. L-109-05. That license added conditions applicable to both the existing operations and the
5 newly allowed activities.

6 Licensee objected to the following added conditions of license L-109-05.

7 1. That portion of Paragraph 3.8 (regarding non-putrescible solid waste for
8 reloading) stating:

9 *All mixed non-putrescible waste must be reloaded into containers*
10 *or vehicles and securely covered or tarped within 12 hours of*
11 *receipt, or by the end of each business day, whichever is soonest.*
12 *All mixed non-putrescible waste must be removed from the site*
13 *within 48 hours after it has been received.*

14 2. That portion of Paragraph 3.9 (regarding source-separated
15 recyclables) stating:

16 *All non-putrescible source separated recyclable materials must be*
17 *securely covered or tarped within 12 hours of receipt All non-*
18 *putrescible source separated materials must be removed from the*
19 *site within 48 hours after it has been received.*

20 3. That portion of paragraph 5.2 stating:

21 *The licensee shall during all hours of operation provide an operating staff*
22 *qualified to carry out the functions required by this license and to otherwise*
23 *ensure compliance with Metro Code Chapter 5.01*

24 **II. Conditions Contained in License L-109-05, paragraphs 3.8 and 3.9**

25 The proposed use by licensee is as a dry waste and source separated recyclables *reload*
facility. A reload facility is an adjunct facility that transfers waste between collection and
another solid waste facility (Metro Code Section 5.01.010(nn)). In that way it is more akin to a
transfer station than a material recovery facility. A standard Metro contract and franchise
provision for a Metro transfer station is that all wastes received at such a facility must, within

1 24 hours of receipt, be processed, appropriately stored or properly disposed of (Exhibit Metro-
2 10). Metro has imposed this 24 hour requirement on other reload facilities, such as Aloha
3 Garbage Company (Exhibit Metro-10).

4 Mr. Garrett testified that his facility as constructed was limited in how much material
5 he could accept. Based on Mr. Garrets own testimony it appears that the facility could accept
6 approximately two days worth of materials.

7 The facility site is relatively small, and has an environmental overlay which reduces the
8 usable area of the site. The activities proposed by licensee are relatively intense for the size of
9 the facility. While licensee did a good job of configuring the site for maximum use, if
10 substantial amounts of solid waste are brought to the site, it does create the possibility of a
11 nuisance. Metro stated that it imposed condition 3.8 at least partially in order to prevent
12 nuisances from occurring on the site. A neighbor has complained numerous times about the
13 odors and dust coming from the facility. The complaint regarding odors was not substantially
14 confirmed. The complaint regarding dust was confirmed as an intermittent, minimal problem.
15 The city of Portland also contacted licensee regarding placing solid waste in an environmental
16 conservation zone resource. That problem was remedied. Nevertheless, it appears from the
17 record that the facility, by operation or because of its size, poses certain challenges to the
18 operator and its neighbors.

19 The evidence from Metro's solid waste experts shows that recoverable solid waste may
20 be damaged, contaminated, or its recyclable value may be reduced when it is left uncovered
21 and exposed to the elements. Metro requirements that the materials be covered within 12 hours
22 or by the end of each work day is a reasonable response to this legitimate area of Metro
23 concern.

24 Given the type of use proposed (a reload facility), conditions imposed on other reload
25 facilities, the site characteristics and possible nuisance conditions caused therefrom, the

1 legitimate goal or maximization of recyclable materials and the history of operations of the
 2 licensee's facility, there is substantial evidence on the record to support the conditions
 3 contained in paragraphs 3.8 and 3.9 of the license.

4 **III. Conditions Contained in License L-109-05, paragraph 5.2**

5 Metro allows other facilities to offload solid waste after hours, but only if the haulers
 6 are "affiliated" with the owner of the facility. There is no evidence that any of the haulers to
 7 the licensee's facility are affiliated haulers. Affiliated haulers are defined by Metro as those
 8 who work for the same company as the waste disposal site, or who work for haulers who are
 9 owned or controlled by the same legal entity as the waste disposal site.

10 Metro's reasoning for only allowing affiliated haulers to offload after hours is because
 11 the waste disposal site operators have the ability to set standards, and enforce those standards
 12 on drivers who are hauling and offloading at the site. On the other hand, non-affiliated haulers
 13 may have more incentive to avoid the rules. Metro also reasons that if a violation is discovered
 14 to have been committed by a non-affiliated hauler, the waste disposal site owner may not have
 15 a great incentive to take action against the hauler since the hauler is a "customer" rather than an
 16 employee.

17 Metro's has a legitimate and compelling concern regarding contaminated loads being
 18 sent to the facility. Unaffiliated Haulers are not as likely as facility employees to ensure that
 19 only appropriate materials are deposited at the facility.

20 **IV. Equal Protection**

21 Licensee argues that it is not being treated similarly to other entities whom are licensed by
 22 Metro.

23 Licensee points to Wastech and East County Recycling (ECR licenses) in arguing that
 24 conditions 3.8 and 3.9 unfairly and unreasonably discriminate against it.

25 //

1 Licensee is not similarly situated to the Wastech and ECR Facilities. Wastech and ECR are
2 material recovery facilities, not reloading facilities. The significant differences are: Wastech
3 and ECR must actually recover at least 25% of the dry solid waste that they accept. Licensee
4 has no such requirement or incentive to protect the materials from damage or diminution. The
5 evidence presented by Metro shows that at both Wastech and ECR the bulk of the days
6 incoming waste is processed and either sorted into marketable components, stored under cover
7 when appropriate, or delivered to a landfill for disposal, or stored in trucks for delivery to a
8 landfill by the end of the day.

9 Licensee argues that it is being treated differently than Wastech as to condition 5.2 because
10 Wastech was not required to have a qualified operator on site at all times. Neither Wastech nor
11 Metro allows such after hours unregulated access any longer. Therefore there is no unequal
12 treatment regarding condition 5.2

13 CONCLUSIONS OF LAW

14 Based on the Findings of Fact, I make the following Conclusions of Law:

- 15 1. Metro has the legal authority to set conditions when issuing solid waste,
16 recycling reload facility licenses.
- 17 2. Metro's enforcement authority and rulemaking authority is not governed by the
18 Oregon Administrative Procedures Act.
- 19 3. There is substantial evidence on the record for Metro make the requirement set forth
20 in Paragraph 3.8 a condition of license No. L-109-05.
- 21 4. Licensee has failed to show that other similarly situated licensees are being treated
22 differently than it is being treated in regards to condition 3.8.
- 23 5. There is substantial evidence on the record for Metro to make the requirement set
24 forth in Paragraph 3.9 a condition of license No. L-109-05.
- 25 6. Licensee has failed to show that other similarly situated licensees are being treated

1 differently than it is being treated in regards to conditions 3.9.

2 7. There is substantial evidence on the record for Metro to make the requirement set
3 forth in Paragraph 5.2 a condition of license No. L-109-05.

4 8. Licensee has failed to show that other similarly situated licensees are being treated
5 differently than it is being treated in regards to conditions 5.2.

6 **ORDER**

7 Based upon the above findings of fact, ultimate findings of fact, reasoning and
8 conclusions of law, it is hereby ORDERED THAT:

9 The Conditions as set forth in License L-109-05 are hereby found to be validly issued
10 and reasonable and not in violation of Oregon law, the Oregon or US constitution or a violation
11 of Metro code and procedures.

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Robert J. Harris
Hearing Officer

15 Dated: October 17, 2005.

16 **PROPOSED ORDER AS FINAL ORDER:**

17 ANY MOTION TO RECONSIDER THIS ORDER MUST BE FILED WITHIN TEN (10)
18 DAYS OF THE ORIGINAL ORDER. IF YOU FAIL TO OBJECT OR FILE A MOTION FOR
19 RECONSIDERATION AFTER THE TENTH DAY, THEN THIS ORDER BECOMES THE
20 FINAL ORDER. THE HEARINGS OFFICER MAY RECONSIDER THE FINAL ORDER
21 WITH OR WITHOUT FURTHER BRIEFING OR HEARINGS. IF ALLOWED,
RECONSIDERATION SHALL RESULT IN REAFFIRMANCE, MODIFICATION OR
REVERSAL. FILING A MOTION FOR RECONSIDERATION DOES NOT TOLL THE
PERIOD FOR FILING AN APPEAL IN COURT.

22 **RIGHT OF APPEAL:**

23 A PERSON MAY APPEAL A FINAL ADVERSE RULING BY WRIT OF REVIEW AS
24 PROVIDED FOR IN ORS 34.010 THROUGH 34.100

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BEFORE THE METRO REGIONAL GOVERNMENT

IN THE MATTER OF THE METRO SOLID)	
WASTE AND RECYCLING DEPARTMENT)	
DIRECTOR'S APPROVAL WITH CONDITIONS)	GREENWAY RECYCLING, LLC'S
OF THE CHANGE OF AUTHORIZATION)	EXCEPTIONS TO PROPOSED
REQUEST OF METRO SOLID WASTE)	ORDER FROM THE HEARING
FACILITY LICENSEE GREENWAY)	
RECYCLING, LLC,)	
LICENSE NUMBER L-109-05)	

Metro Hearing Officer Robert Harris issued a proposed Order on October 17, 2005. On October 25, 2005 the Metro Chief Operating Officer issued a Notice of Opportunity to File Written Exceptions and New Evidence by November 15, 2005. Greenway Recycling, LLC takes exception to the sections of the Proposed Order beginning at page 5 titled Preliminary Legal Question, Findings Of Fact, and Conclusions of Law.

I. REASON FOR APPEAL

Metro issued the initial and modified licenses that Greenway sought to conduct its business. However, it did so only after extensive delays and subject to conditions that negatively impact Greenway's ability to conduct its business in compliance with all applicable codes and regulations, both those of Metro and other agencies with jurisdiction. Neither the delays nor the conditions are sanctioned by provisions of Metro Code or regulations.

Greenway brought this appeal not just to remove unnecessary and burdensome conditions. It brought the appeal to require Metro to comply with its own Code, Section 5.01.132, by issuing administrative procedures and performance standards in advance of licensing review and imposition of operating conditions. Only in that way can prospective licensees and franchisees know what standards they will be required to meet and assess whether their business plan can fit within a rational regulatory scheme of solid waste management.

But the requirement of administrative standards and procedures does not benefit just prospective and current licensees and franchisees. It forces Metro to reflect on the need for and efficacy of proposed standards and restrictions, open those proposals to comment from the industry, the public and other regulatory agencies, and learn from the dialogue. When that process is complete and procedures and performance standards are adopted, the agency staff is empowered by their existence to assist or require licensees to comply. In the absence of procedures and standards, staff is subjected to the current situation requiring ad hoc decision making. Ad hoc decision making practically assures unequal treatment of licensees and franchisees and interferes with the efficient operation of the market place.

The Regional Solid Waste Management Plan states:

"The overall goal of the RSWMP is:

"Continue to develop and implement a solid waste Management Plan that achieves a solid waste system that is regionally balanced, environmentally sound, cost-effective, technologically feasible and acceptable to the public."

This goal cannot be achieved by the current, ad hoc process of issuing, conditioning and overseeing licenses and licensees. The discussion below explains why the advance adoption of procedures and performance standards to inform staff and prospective licensees is not just good policy but a legal requirement.

II. THE SOURCE OF METRO'S REGULATORY AUTHORITY

The Hearing Officer found that Metro's authority to impose the conditions that are contested in this appeal derives at least in part from the State Constitution and Metro Charter as a matter of "metropolitan concern". While it may not affect the resolution of the issues in this case, that is not a correct statement of the law. State statutes clearly provide that recycling and solid waste disposal are matters of statewide, not metropolitan, concern.¹

Metro's authority is based on a delegation from the State Legislature through ORS 268.317 and 268.318 and certain other provisions not relevant here found in ORS Chapters 459 and 459A. The Hearing Officer described briefly the competing contentions of Greenway and Metro regarding the application of these statutes and case law as they control Metro's regulatory authority. Without explanation the Hearing Officer reached the general conclusion that Metro has authority to impose operational conditions in the course of issuing licenses.

Greenway does not dispute that Metro has authority to license and regulate certain aspects of its business activities. The dispute is over the methods by which Metro purports to regulate those activities.

III. LIMITATIONS ON METRO'S REGULATORY AUTHORITY

Greenway explained to the Hearing Officer that before Metro can impose operational restrictions on Greenway in the form of license conditions, it must first announce the standards and procedures to which a licensee must conform under the applicable circumstances. Metro argued, and the Hearing Officer apparently agreed, that the appellate cases so holding apply only to court review of state agencies operating under the State Administrative Procedures Act. In fact the principal applies in any situation where an administrative agency purports to apply a decision making criterion to an applicant for a permit.

¹ "ORS 459.015(1) The Legislative Assembly finds and declares that:

"(a) The planning, development and operation of recycling programs is a matter of statewide concern."

"ORS 459.065(1) The Legislative Assembly finds that solid waste disposal is a matter of statewide concern. * * *"

Metro counsel cited *Anderson v. Peden*, 284 Or 313 (1978) for the proposition that establishing policy on a case-by-case basis in a permit proceeding is permissible. That case was a State Supreme Court review of a county decision denying a conditional use permit for a mobile home. The disappointed applicant alleged that certain general statements of purpose in the county's zoning code were too vague and could not be clarified on a case-by case basis in the subject proceeding. The Court disagreed, noting that there is no constitutional requirement to clarify a vague standard by advance rulemaking, provided that the individual decisions applying the standard do not violate other constitutional protections against such things as unequal grant of privileges or immunities.

But the Court also observed that where a standard is announced as applicable for the first time in the permit proceeding, that does violate the law. The Court stated, "Respondents do not deny that under the ordinance an applicant should be able to learn in advance of making application by what criteria his proposal will be judged." *supra* at 323. The Court's comment did not determine the outcome of the case because the applicant had not properly raised this argument to the county or the lower court. This is the part of *Anderson* that is relevant to this case, because here there are no standards governing the operational conditions imposed on Greenway. There are only the conditions themselves, imposed as a part of the license.

In *Commonwealth v. Washington County*, 35 Or App 387 (1977) the Court of Appeals expressly applied the holdings of such state Administrative Procedures Act cases as *Sun Ray Dairy v. OLCC*, 16 Or App 63 (1973) to county land use permit decision making. The principal is not limited to state APA cases. *Commonwealth* involved an application for preliminary subdivision plat approval in which the county attempted to apply general policy statements from its comprehensive plan in a manner that did not give the applicant guidance as to what would be required to submit an acceptable plat. The Court said:

"An applicant, be he seeking a liquor license or a subdivision, should not be put in a position of having his success or failure determined by guessing under which shell lies the pea." *Commonwealth, supra* at 399.

The Court's admonition applies with particular force where there are no announced standards other than the conditions themselves imposed in the license.

IV. WRIT OF REVIEW REMEDY

Among the reasons courts require announced standards in the decision making process is to facilitate judicial review.² Metro counsel argued and the Hearing Officer apparently agreed that the statutory reasons that a court may allow writ of review relief provide the missing standards for review. That position misses the point. The standards the court decisions found lacking are the laws being applied by the agency in its decision making and its construction of those laws. One of the bases for writ of review relief is that the agency improperly construed the

² "Were we to decide this case in the absence of administratively adopted standards, we would necessarily either be imposing court-made standards on the agency or we would ourselves be guilty of subjective decision making. Either role would be deleterious to the ability of the agency to fulfill its proper administrative role." *Sun Ray Dairy, supra* at 399.

applicable law. Until the local entity announces the law (standards) it is applying, the court has nothing against which to evaluate whether it properly construed the law.

V. METRO CODE SECTION 5.01.132

The Metro Council has wisely adopted Code provisions that should have avoided the dilemma faced by Greenway and others. Chapter 5.01 "Governs the Regulation of Solid Waste Disposal Sites and Solid Waste Facilities Within Metro." MC 5.01.020. The Chapter includes Section 5.01.132 titled "Adoption & Amendment of Administrative Procedures and Performance Standards." The Section provides in full as follows:

"(a) The Chief Operating Officer shall issue administrative procedures and performance standards governing the obligations of Licensees and Franchisees under this chapter, including but not limited to procedures and performance standards for *nuisance control*, public notification of facility operations, *management of unacceptable wastes*, facility record keeping and reporting, yard debris composting operations, transportation of Putrescible Waste, and designation and review of Service Areas and demand pursuant to Section 5.01.131 of this chapter. *emphasis supplied*

(b) The Chief Operating Officer may issue administrative procedures and performance standards to implement all provisions of this chapter.

(c) The Chief Operating Officer shall substantially amend the administrative procedures and performance standards issued under subsections (a) and (b) of this section only after providing public notice and the opportunity to comment and a public hearing on the proposed amendment."

The conditions at issue on this appeal according to Metro staff relate to nuisance control and management of unacceptable waste. Whatever administrative procedures and standards the Chief Operating Officer may have issued pursuant MC 5.01.132(a), none known to Greenway relate to nuisance control or management of unacceptable waste applicable to Greenway's facility. The obligations under subsection (a) are mandatory, as contrasted with the discretionary authority under subsection (b).

Greenway raised this issue before the Hearing Officer, stating "Finally and perhaps most important, the Metro code requires that the standards lacking in this case be in place." Greenway Recycling LLC's Hearing Memorandum, page 9. The Hearing Officer did not address the Code Section at all. Metro Counsel argued that conditions in each license constitute the performance standards required by 5.01.132(a).

This circular argument does nothing to either satisfy the Court described mandates to announce the rules of the game or the underlying policy advantages explained at the beginning of this document. The argument fails on a logical basis as well. If, as Metro staff and counsel argue, the conditions and therefore the standards required by 5.01.132(a) are created and amended with each license issuance, then the process violates 5.01.132(c). That subsection provides that amendments to the administrative procedures and performance standards may

occur only after public notice, public hearing and opportunity to comment. In other words, precisely the process that Greenway asserts should have been but was not followed.

VI. THE HEARING OFFICER'S FINDINGS OF FACT

Under the heading "Findings of Fact" the Hearing Officer assumes and attempts to respond to arguments Greenway did not make. The Hearing Officer assumes that Greenway objected to the three contested conditions because they are not supported by substantial evidence and violate constitutional equal protection guarantees against unequal treatment. Greenway did describe examples of faulty facts and reasoning asserted by Metro staff related to the conditions and circumstances where other licensees were treated differently. That information was provided as background to place Greenway's appeal in context. Greenway did not argue that these circumstances were independent reasons to strike the conditions. They may well be such, but as Greenway explained at the beginning of its Hearing Memorandum the focus of this appeal is on the regulatory framework and its lack of support for the conditions imposed. Greenway disagrees with the conclusions of the Hearing Officer recited as Findings of Fact. But those findings do not answer the objections raised by Greenway.

VII. CONCLUSION

The law announced by the courts and the Code adopted by the Metro Council require that an applicant for a license know in advance of preparing an application what administrative procedures and performance standards will govern the activity proposed under a license. If there are aspects of the proposed activity that will be controlled or restricted by conditions the standards controlling those conditions must be known.

The process of establishing the administrative procedures and performance standards is the appropriate opportunity for staff, the industry and other members of the public to fully debate and air the merits and demerits of the proposed provisions. There is nothing so complicated or unique about reload or recovery facilities that the general rules applicable to them can only be decided on a permit by permit basis. If unique circumstances do apply to a particular facility, the existence of general standards will serve to guide individual decision making for that facility. Applicable law and good public policy dictate this approach to licensing.

Dated November 15, 2005



Lawrence R. Derr

Attorney for Greenway Recycling, LLC

Language substantially similar to the the following language shall be included in the final order issued by the Chief Operating Officer:

Greenway asserts that Metro Code section 5.01.132(a) requires Metro to have issued administrative rules governing the obligations of solid waste facility licensees and that Metro may not impose conditions on such licenses unless it has issued such rules and the conditions are supported by such rules. Greenway Memorandum at 9-10; Greenway Exceptions to Proposed Order at 4. Metro Code section 5.01.132(a) provides that “[t]he Chief Operating Officer shall issue administrative procedures and performance standards governing the obligations of Licensees . . . under this chapter . . .” That provision does not describe any specific procedure or form that Metro’s administrative procedures and performance standards must take, nor do any other provisions of the Metro Code impose any specific requirements applicable to such administrative procedures and performance standards. The Chief Operating Officer has implemented Metro Code section 5.01.132(a) by imposing performance standards applicable to each licensee in the form of license conditions. We find that the conditions enumerated in each Metro solid waste facility license provide performance standards governing licensees’ obligations under Metro Code chapter 5.01 in compliance with Metro Code section 5.01.132(a).

///

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing METRO COUNCIL AGENDA PACKET, for the Metro Council meeting to be held on December 8, 2005, on the following:

Lawrence R. Derr, Esq.
Attorney for Greenway Recycling, LLC
Josselson, Potter & Roberts
425 NW 10th Ave., Suite 306
Portland, OR 97209

and

Robert J. Harris, Esq.
Metro Hearings Officer
Harris Law Firm PC
165 SE 26th Ave.
Hillsboro, OR 97123-7024

On December 2, 2005, by mailing to said individual a complete and correct copy thereof via certified mail, return receipt requested, contained in a sealed envelope, with postage prepaid; and deposited in the U.S. post office at Portland, Oregon.

Christina Billington
Metro Council Operations Manager

From: Paul Garrahan
To: Christina Billington
Date: 11/22/2005 3:11:50 p.m.
Subject: Service of 12/8 Council packet on Greenway parties

Chris: As you know, at the Dec. 8 meeting the Council will be considering a proposed order in a solid waste licensing contested case and exceptions to that proposed order submitted by Greenway Recycling LLC, the party that initiated the contested case. The Metro Code requires that parties to the case be served with documents related to it--including the Council agenda packet. When the packet is completed, could you please send a copy of it to Greenway's attorney (Lawrence Derr) and to the hearings officer (Robert Harris), along with the attached certificate of service signed by you? The certificate of service contains the addresses for Mr. Derr and Mr. Harris. Please let me know if you have any questions regarding this matter. Thank you.

Paul Garrahan
Assistant Metro Attorney
503-797-1661
garrahanp@metro.dst.or.us
www.metro-region.org

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CC: Dan Cooper; Marv Fjordbeck; Mike Hoglund; Roy Brower

M E M O R A N D U M

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TEL 503 797 1700 | FAX 503 797 1797



METRO

DATE: November 16, 2005
TO: David Bragdon, Council President
FROM: Michael Hoglund, *MH* Solid Waste & Recycling Director
RE: GreenWay Recycling Contested Case (Resolution No. 05-3648)

On March 11, 2005, GreenWay Recycling, LLC ("GreenWay"), was granted a Metro solid waste facility license authorizing the reloading of non-putrescible waste. GreenWay contested three of the provisions of its license. A hearing was held before the regional Hearings Officer who then issued a decision in the form of a Proposed Order. The deadline for filing written exceptions to the Proposed Order was 5:00 p.m. on November 15, 2005. GreenWay filed a written exception that was received by Metro at 4:05 p.m. on November 15, 2005.

Code Section 2.05.035 requires that the Proposed Order, and any exceptions received shall be forwarded to the Council for consideration at its next scheduled meeting at least two weeks after the deadline for filing exceptions (at its scheduled December 8, 2005 meeting). As required by the Code, I am forwarding to you, with this memo, the Proposed Order, the draft resolution for approval of a Final Order, a copy of GreenWay's written exceptions and a full and complete copy of the record. My suggestion is to forward this record to Chris Billington so it can be used as a Council reference document.

Ex parte restrictions do not allow SWR staff to discuss this matter with Council. If you have questions, please contact Dan Cooper or Marv Fjordbeck. It is my understanding that OMA will update you on Council procedures prior to the December 8th Council meeting. The Hearings Officer will present this order on December 8th, as well.

MH:SK:mb

Enclosures

cc: Roy Brower, Regulatory Affairs Manager
Marv Fjordbeck, Senior Attorney
Steve Kraten, Principal Solid Waste Planner

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