

AN ORDINANCE FOR THE PURPOSE)
OF AMENDING CHAPTER 5.01 OF)
THE METRO CODE, CHANGING ITS)
NAME TO "SOLID WASTE FACILITY)
REGULATION," AUTHORIZING)
DEMONSTRATION FACILITIES AND)
CLARIFYING THE EXECUTIVE)
OFFICER'S AUTHORITY TO IMPOSE)
DATA REPORTING AND OTHER)
FACILITY REQUIREMENTS)

ORDINANCE NO. 95-623

Introduced by: Mike Burton
Executive Officer

WHEREAS, The title of the Metro Code Chapter 5.01, "Disposal Site Franchising" no longer accurately depicts the wide range of recycling and recovery activities carried on in the region; and

WHEREAS, "Solid Waste Facility Regulation" is a more accurate description of the purpose and activities of the "franchise code;" and

WHEREAS, It is desirable policy to allow for demonstration facilities of limited duration to be authorized by the Executive Officer to test innovative ideas and techniques; and

WHEREAS, There is recognition of the need for more electronic reporting of data from regulated facilities; and

WHEREAS, Metro's commitment to recycling and recovery goals requires that materials processors be required to obtain greater levels of recovery during processing; and

WHEREAS, Materials recovery processors must be able to rapidly respond to continuously changing commodities prices and should not be subject to regulated rates in a market driven environment; and

WHEREAS, Renewal of a franchise should be recognized as a discretionary act of the Council subject to consistency with code criteria; and

WHEREAS, Updating Chapter 5.01 requires removal of some language ambiguities and more current references to applicable law; and

WHEREAS, The ordinance was submitted to the Executive Officer for consideration and was forwarded to the Council for approval; now therefore,

THE METRO COUNCIL ORDAINS AS FOLLOWS:

Section 1 Metro Code Chapter 5.01, "Disposal Site Franchising," is renamed "Solid Waste Facility Regulation."

Section 2 The following Section 5.01.035 is added to Metro Code Chapter 5.01:

Section 5.01.035 Demonstration Facilities

- (a) The executive officer may enter into an agreement with the owner or operator of a proposed demonstration resource recovery facility allowing temporary operation of the facility and establishing the terms for such operation. The terms established in the agreement for operation of a demonstration facility shall not, generally, be less stringent than the terms for operation of a fully franchised or licensed facility, and shall address potential nuisance aspects of facility operation.
- (b) An applicant for a demonstration facility agreement shall apply to the executive officer on forms provided by the executive officer. The applicant shall submit an application fee in the same amount as franchise applicants. The executive officer shall establish criteria for approval of a demonstration facility.
- (c) The executive officer shall approve or deny the application within 90 days of receipt of a complete application. In the event the executive officer does not act to approve or deny the application within 90 days of receipt, the application shall be considered denied. Issuance of a demonstration facility agreement is discretionary on the part of the executive officer and not subject to appeal as a contested case under the Metro Code or any other appeal. An applicant's only remedy for refusal of the executive officer to enter into a demonstration facility agreement is to apply for a franchise or license (as appropriate) under the general requirements of this chapter and to exercise all procedural rights that the formal franchise or license application process provides.
- (d) At the end of 18 months from the date of approval of the demonstration facility agreement, or such shorter time period as may be determined by the executive officer, the owner or operator shall either cease operations or shall have submitted an application for a franchise or license (as appropriate) under the terms of this chapter. In the event of timely filing of a franchise or license application, the

executive officer may allow the facility to continue to operate while the franchise or license application is pending, provided that the applicant is operating in conformity with its agreement and any other applicable Metro regulations.

- (e) Demonstration facilities shall be exempt from payment of Metro user fees and excise tax on incoming tonnage but shall pay user fees and excise tax on residual that is disposed of to the same extent as franchised facilities that accomplish materials recovery and recycling as a primary function under Section 5.01.150(a).

Section 3 Metro Code Section 5.01.070 is amended to read:

Section 5.01.070 Issuance of Franchise:

(a) Applications filed in accordance with Section 5.01.060 shall be reviewed by the Executive Officer. The Executive Officer or his/her designated representative may make such investigation as the Executive Officer deems appropriate, and shall have the right of entry onto the applicant's proposed franchise site with or without notice before or after the franchise is granted to assure compliance with this chapter, the Code, DEQ permit and franchise agreement.

(b) Upon the basis of the application, evidence submitted and results of any investigation, the Executive Officer shall formulate recommendations regarding whether the applicant is qualified, whether the proposed franchise complies with the District's Solid Waste Management Plan, whether the proposed franchise is needed considering the location and number of existing and planned disposal sites, transfer stations, processing facilities and resource recovery facilities and their remaining capacities, and whether or not the applicant has complied or can comply with all other applicable regulatory requirements.

(c) The Executive Officer shall recommend to the Council whether the application should be granted, denied, or modified. If the Executive Officer recommends that the application be granted, the Executive Officer shall recommend to the Council specific conditions of the Franchise Agreement including, but not limited to, detailed electronic data reporting requirements and percentage of materials that must be recovered, and whether or not the franchise should be exclusive. Following the recommendation of the Executive Officer, the Council shall issue an order granting, denying or modifying the application. The Council may attach conditions to the order, limit the number of franchises granted, and grant exclusive franchises. If the Council issues an order to deny the franchise, such order shall be effective immediately. An exclusive franchise may be granted if the Council determines that an exclusive franchise is necessary to further the objectives of the Solid Waste Management Plan. In determining whether an exclusive franchise should be granted, the Council shall consider the following:

- (1) The proximity of existing and planned solid waste disposal facilities to the proposed site.

- (2) The type and quantity of waste that existing facilities receive and the type and quantity of waste that planned facilities will receive.
- (3) The capacity of existing and planned solid waste disposal facilities.
- (4) The type of vehicles that existing facilities receive and the type of vehicles that planned facilities will receive.
- (5) The hauling time to the proposed facility from waste generation zones established by the District.

(d) ~~If the Council does not act to grant or deny a franchise application within one hundred twenty (120) days after the filing of a complete application, a Temporary Franchise shall be deemed granted for the site requested in the application unless the Executive Officer notifies the applicant that more time is needed to review and process the application and advises the applicant how much time will be needed to complete the review. The one hundred twenty (120) days will not begin until~~ The Executive Officer shall forward a proposed franchise agreement or a recommendation that a franchise not be issued to the Council for review within 120 days of receipt of a complete application, unless the executive officer has notified the applicant that a specified amount of additional time is needed for the review, ~~has accepted the application as complete and ready for processing.~~

(e) Within ten (10) days after receipt of an order granting a franchise, the applicant shall:

- (1) Enter into a written franchise agreement with the District,
- (2) Obtain a corporate surety bond guaranteeing full and faithful performance during the term of the franchise of the duties and obligations of the franchisee under the franchise agreement, and
- (3) Provide proof that the applicant can obtain public liability insurance, including automotive coverage, in the amounts of not less than ~~\$300,000~~\$500,000 for any number of claims arising out of a single accident or occurrence, \$50,000 to any claimant for any number of claims for damage to or destruction of property and, \$100,000 to any claimant for all other claims arising out of a single accident or occurrence or such other amounts as may be required by ~~State law for public contracts~~ the Oregon Tort Claims Act.
- (4) Name the District as an additional insured in the insurance policy required by Section 5.01.060(b)(3).

(f) The granting of a franchise shall not vest any right or privilege in the franchisee to receive specific types or quantities of solid waste during the term of the franchise.

- (1) To ensure a sufficient flow of solid waste to the District's resource recovery facilities, the Council may, upon thirty (30) days prior written notice, without hearing at any time during the term of the franchise, direct solid waste away from the franchisee. Whenever possible the District shall divert an equitable amount of waste from each franchised facility to the resource recovery facility. In such case, the Council shall make every reasonable effort to provide notice of such direction to affected haulers of solid waste.
- (2) In emergency situations, to ensure a sufficient flow of solid waste to the District's resource recovery facilities, the Council or the Executive Officer may, without hearing, issue a sixty (60) day temporary order directing solid wastes away from the franchisee. In such situations, the Council or Executive Officer shall give the franchisee as much advance notice as is reasonably possible under the circumstances, and shall make a reasonable effort to provide notice of such direction to affected haulers of solid waste. A temporary order issued by the Executive Officer under this subsection shall be subject to codification or revocation by the Council.

(g) In addition to the authority contained in Section 5.01.070(f)(1), for the purposes of this chapter, the Council may, upon sixty (60) days prior written notice, direct solid waste away from the franchisee, direct additional solid waste to the franchisee, or limit the type of solid wastes which the franchisee may receive. Sixty (60) days prior notice shall not be required if the Council finds that there is an immediate and serious danger to the public or that a health hazard or public nuisance would be created by a delay. The direction of the solid waste away from a franchisee or limitation of the types of solid wastes a franchisee may receive under this subsection shall not be considered a modification of the franchise, but a franchisee shall have the right to request a contested case hearing pursuant to Code Chapter 2.05. However, a request for a contested case hearing shall not stay action under this subsection.

Section 4 Metro Code Section 5.01.080 is amended to read:

5.01.080 Term of Franchise:

(a) The term of a new or renewed franchise shall be the site longevity or five (5) years, whichever is less. In recommending site longevity, the Executive Officer shall consider the population to be served, the location of existing franchises, probable use and any other information relevant to the franchise term. The Executive Officer shall recommend the term of the franchise to the Council. The Council shall establish the term of the franchise.

(b) Franchises ~~shall may~~ be renewed ~~unless if~~ the Council determines that the proposed renewal ~~does not~~ meets the criteria of Section 5.01.070(b) and all other requirements of this Chapter, provided that the franchisee files an application for renewal not less than one ~~hundred~~ twenty (120) days prior to the expiration of the franchise term, together with a statement

of material changes in its initial application for the franchise and any other information required by the Executive Officer. The Council, upon recommendation from the Executive Officer, may attach conditions or limitations to the renewed franchise.

Section 5 Metro Code Section 5.01.110 is amended to read:

5.01.110 Variances:

(a) The Council, upon recommendation of the Executive Officer, may grant specific variances from particular requirements of this chapter to such specific persons or class of persons upon such conditions as the Council may deem necessary to protect public health, safety and welfare, if the Council finds that the purpose and intent of the particular requirement can be achieved without strict compliance and that strict compliance:

- (1) Is inappropriate because of conditions beyond the control of person(s) requesting the variance; or
- (2) Will be rendered extremely burdensome or highly impractical due to special physical conditions or causes; or
- (3) Would result in substantial curtailment or closing down of a business, plant, or operation which furthers the objectives of the District.

(b) A variance must be requested in writing and state in a concise manner facts to show cause why such variance should be granted. The Executive Officer may make such investigation as he/she deems necessary and shall make a recommendation to the Council together with the franchise recommendations or within sixty (60) days after receipt of the variance request if such request is not part of a franchise application.

(c) If the Council denies a variance request, the Executive Officer shall notify the person requesting the variance of the right to a contested case hearing pursuant to Code Chapter 2.05.

(d) If a request for a variance is denied, no new application for this same or substantially similar variance shall be filed for at least six (6) months from the date of denial.

Section 6 Metro Code Section 5.01.170 is amended to read:

5.01.170 Determination of Rates:

~~(a) No franchisee or operator of a site operating under a District Certificate or Agreement upon the effective date of this chapter shall charge a rate which is not established by the Council or, pending establishment of a rate by the Council, an interim rate established by the Executive Officer.~~

(ba) At the time the Council grants a franchise, or after the Council grants a franchise it shall establish the rate(s) to be charged by the franchisee. The Council may establish uniform rates for all franchisees or varying rates based on the factors specified in this section.

(eb) Effective January 1, 1982, before the Council establishes or adjusts any rate, the Rate Review Committee shall investigate the proposed rates and submit a recommendation to the Executive Officer. The Executive Officer shall forward the Committee's recommendation along with his/her recommendation to the Council, after which the Council shall hold a public hearing. The Council shall then set forth its findings and decision.

(ec) In determination of rates, the Rate Review Committee, Executive Officer and Council shall give due consideration to the following:

- (1) Operating and nonoperating revenues.
- (2) Direct and indirect operating and nonoperating expenses including franchise fees.
- (3) Non-franchise profits.
- (4) Reasonable return on investment exclusive of any capital investment in the franchise or any sum paid for the value of the franchise or any other intangible value.
- (5) Any other factors deemed relevant by the Council.

(ed) The rate(s) shall be reviewed and, if necessary, adjusted in the manner set forth in Section 5.01.180(c):

- (1) At any time by the Council after giving ten (10) days written notice to the franchisee of the intent to review; or
- (2) Upon written request by the franchisee on forms provided by the Executive Officer, which request may be made not more than once every six months; or
- (3) In the event the District exercises its right to control the flow of solid waste as provided in Section 5.01.070(f) or 5.01.070(g).

(e) Processing facilities that accomplish materials recovery and recycling as a primary function shall be exempt from rate setting under this chapter if:

- (1) Materials that are recovered from source-separated recyclables or mixed waste are intended to be, and are in fact, sold or traded in competitive markets; and,

(2) User fees and excise taxes are paid for all residual material disposed of at a landfill or other disposal facility.

Adopted by the Metro Council this _____ day of _____, 1995.

J. Ruth McFarland, Presiding Officer

ATTEST:

Approved as to Form:

Recording Secretary

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Daniel B.Cooper, General Counsel

STAFF REPORT

IN CONSIDERATION OF ORDINANCE NO. 95-623 FOR THE PURPOSE OF AMENDING CHAPTER 5.01 OF THE METRO CODE, CHANGING ITS NAME TO "SOLID WASTE FACILITY REGULATION", AUTHORIZING DEMONSTRATION FACILITIES AND CLARIFYING THE EXECUTIVE OFFICER'S AUTHORITY TO IMPOSE REPORTING AND OTHER FACILITY REQUIREMENTS

October 26, 1995

Presented by: Roosevelt Carter

Factual Background and Analysis

There are six primary elements addressed in the proposed Code amendments. They are:

1. The name of the Code chapter is changed from "Disposal Site Franchising" to Solid Waste Facility Regulation."
2. Authority is provided for the Executive Officer to approve "demonstration facilities" for limited time periods.
3. The Code will specifically state the Executive Officer's authority to require detailed electronic data from franchisees.
4. The Code will specifically state the Executive Officer's authority to require material recovery rates for facilities that may vary from facility to facility.
5. The Code will be amended to exempt material recovery facilities (MRFs) from Metro rate setting.
6. The Code language is amended to reflect some housekeeping and maintenance matters.

1. Chapter Name Change

The recommended new name for the Disposal Site Franchising chapter of the Metro Code is "Solid Waste Facility Regulation". The facilities regulated by Metro range from landfills and transfer stations to petroleum soils treatment facilities and material recovery facilities. This new name is intended to reflect the broad spectrum of facilities regulated by Metro rather than the more narrow implication of the term "disposal sites."

2. Demonstration Facilities

This new Code provision will authorize the Executive Officer to administratively approve "demonstration facilities."

The specifically proposed Code requirements for the Executive Officer to approve demonstration facilities are:

- Ninety day application approval period;
- Demonstration facility agreement may be issued for a period not to exceed 18 months;
- Authority to issue is "discretionary" by the Executive Officer; and,
- User fees and excise tax to be paid on residual materials sent for landfill disposal.

Non-Specific Approval Criteria

The proposed Code language does not provide specific facility approval criteria for the Executive Officer because of the need for flexibility in responding to diverse and unique proposals. This proposed new element of the Code and the authority granted to the Executive Officer represents a significant evolution for Metro in responding to solid waste system dynamics.

Examples of the kinds of criteria that may be used by the Executive Officer (*but not embodied in Code language*) in evaluating a demonstration facility application are:

1. Will it divert solid waste from landfill disposal;
2. Will it use a method or means of waste management that has not yet been shown to be commercially viable and is consistent with the Regional Solid Waste Management Plan (RSWMP);
3. Will the demonstration facility be able to provide quantifiable data on the end use or product resulting from its management of the waste;
4. Will the facility have potential for wider application in the event of satisfactory test results;
5. Can the facility satisfy all necessary land use standards, DEQ permit requirements and any other regulatory or permitting requirements prior to commencing operation of the demonstration facility;

6. The proposed facility will not require any Metro guarantee of waste delivery;
7. The proposed facility does not require any Metro financial assistance to establish, finance, build or operate; and,
8. The facility will have an operating life not to exceed 18 months from Executive Officer approval of the operation to end of demonstration.

Yard Debris Processors

A matter currently under consideration by Metro is the potential of regional licensing of yard debris processors. Yard debris processors and potential tie-ins with organics processing may well be absorbed into the Code. This potential element of the Code and the final version of the RSWMP may well drive additional changes in the Code.

The current amendments to the Code will facilitate the ease of incorporating future elements of the RSWMP relative to organics processing. It will also aid movement toward the policy of "facility regulation" vs. "disposal site franchising" .

3 & 4. Electronic Data Reporting and Material Recovery Requirements

The Code provides authority for the Executive Officer to impose a variety of reporting and other requirements of franchises and other regulated facilities. Modern electronic data reporting has become the norm since the establishment of the Code. Also, with the need to recover increasing amounts of materials from processable solid waste to meet Metro and State goals, it is advisable to note these matters as is provided in the amendment to Code Section 5.01.070(c).

5. Removal of Rate Setting Requirement for Material Processors

Section 5.01.170 is recommended to be changed to exempt materials processing facilities from Metro rate setting requirements. Without exception, the Metro Council has considered and approved rate setting variances for material recovery facilities due to the need for such facilities to rapidly respond to market forces. The proposed code amendment addresses this issue by providing elimination of a rate setting requirement for processors who accomplish materials recovery as a primary function of their franchise.

The new language for the rate setting exemption also provides for safeguards against using "materials recovery" as a deception for operating a transfer station. Materials recovery and recycling must be a "primary function" of the facility. Also materials must be recovered and must in fact be sold in a competitive market. This coupled with setting minimum franchise recovery rates for facilities will ensure that materials recovery facilities are doing what they are intended to do.

6. Code Language Housekeeping

Franchise Renewals and Council Discretion

The current language of Section 5.01.080(b) referring to "Franchises shall be renewed unless . . ." gives the impression that a franchise holder is entitled to renewal absent extraordinary circumstances, and does not sufficiently characterize the Council's authority to exercise appropriate discretion in considering franchise renewals within the Code criteria. The proposed amendment to this section does not make a substantive change, but it does more correctly state the Council's discretionary role in franchise renewals.

Ambiguities and Current Law references

Code Section 5.01.070(e) has been amended to provide the current insurance coverage amounts and reference to the Oregon Tort Claims Act.

Also, a modification is proposed for Section 5.01.110(b) relating to variances. The language of section (b) creates a dilemma if a variance request is in the context of a new or renewal franchise request as contrasted with a 'stand alone' variance request. If the variance request is outside of a franchise application or renewal request, the sixty day response time is appropriate. The new language accommodates the longer period of time when a variance request is within the context of the general franchise application or renewal.

Also, Section 5.01.070(d) should be amended to more clearly reflect the Council's discretion to schedule matters for hearing as appropriate to the Council's workload.

Finally, Section 5.01.170(a), with regard to rate setting, should be deleted. This will eliminate some overlap and ambiguity relative to Section 5.01.170(b). No change is made in the Council's authority to set rates as appropriate.

EXECUTIVE OFFICER'S RECOMMENDATION

The Executive Officer recommends adoption of Ordinance No. 95-623 Amending Chapter 5.01 of the Metro Code.