



September 10, 2007

Nancy Wieben Stock
Presiding Judge of the Superior Court
Orange County Grand Jury
700 Civic Center Drive West
Santa Ana, CA 92701

Re: City of Dana Point Response to 2006-2007 Orange County Grand Jury Report

Dear Judge Weiben Stock:

The City of Dana Point conducted a detailed review of the Orange County Grand Jury report entitled "Assembly Bill 939 Waste Diversion: Are We Finally Making Progress?" Within the report, the Orange County Grand Jury requested that all thirty-four Orange County jurisdictions respond to the findings and recommendations outlined in the report by September 14, 2007.

In accordance with California Penal Code Section 933 and 933.05, government entities are required to submit a response to any finding or recommendation addressed to the jurisdiction within the report. The City of Dana Point is required to respond to Finding F-6 and Recommendation R-6 along with each of the thirty-four Orange County cities. Finding F-6 is recorded in the Grand Jury report as follows: *"The presence of non-franchise haulers and so-called "Ghost Haulers" bins, in cities which bypass the recycling system, needs to be corrected in order to establish the waste hauler's confidence that their municipalities are looking out for their best interests."* The California Penal Code specifies the required permissible responses to the findings and recommendations contained in the Grand Jury report. In accordance with Section 933.05(a), the respondent (City of Dana Point) agrees with Finding F-6.

Recommendation R-6 is recorded in the Grand Jury report as follows: *"Municipalities need to solve their unauthorized waste bin problems by enacting city ordinances forbidding these practices, imposing fines, including stepped-up fines for additional violations, and impounding unauthorized bins."* In accordance with Section 933.05(b), the respondent (City of Dana Point) reports that Recommendation R-6 has been implemented through a variety of actions including: adoption of an exclusive hauling franchise; adoption of an ordinance making it a criminal misdemeanor for a commercial solid waste enterprise to collect solid waste in violation of its exclusive franchise; and adoption of an ordinance governing the collection, recycling and disposal of Construction and Demolition Waste. The only caveat to the City's implementation of Recommendation R-6 is that it has not adopted an ordinance calling for the "impoundment" of "unauthorized bins." As more fully discussed below, this aspect of

the recommendation will not be implemented in that it is not reasonable in that it is contrary to well established law.

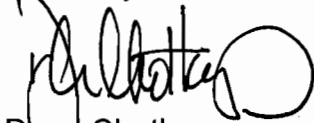
The City of Dana Point has issued an exclusive franchise for solid waste handling services to CR&R. This franchise has been in place for over ten years and was recently readopted for an additional lengthy period. Pursuant to the terms of this franchise, any person or entity that hires a solid waste enterprise in the City, whether for hauling residential, commercial, industrial, temporary, or construction waste, may only hire the franchised hauler. The City's Municipal Code prohibits any person, other than a so called self hauler, to collect, haul or dispose of solid waste; and further, any violation of the Municipal Code is a misdemeanor. The City's code enforcement employees as well as its building inspectors and other field professionals are aware of the City's intolerance for unauthorized bins within the City's boundaries. Employees are trained to notify the City's solid waste and recycling franchise contract administrator of unauthorized bins placed in the City, and appropriate code enforcement actions may be instituted if violations occur.

As an additional measure, the City of Dana Point established a Construction and Demolition Waste Recycling Program in 2004 (Ordinance No. 03-17 and Resolution No. 03-12-10-04 and 05-01-26-05). The purpose of the ordinance is to encourage contractors and other builders to recycle 75% of their construction and demolition waste by collecting a security deposit valued at 1% of the value of the construction project. Security deposits can only be refunded to those contractors and other builders who can prove they recycled 75% of their construction and demolition waste at one of the City's five certified recycling facilities (the City's exclusive franchised hauler is the only hauler on the list). Besides using the City's hauler to recycle the construction and demolition material, the only other option to remove the waste is to self-haul the material to a certified recycling facility that has already been approved by the City.

For example, a contractor who pulls a permit to build a new single family house valued at \$300,000 must pay a \$3,000.00 security deposit. The City can only refund the deposit if the contractor can prove that he/she recycled 75% of the waste generated by the project. The City requires its franchised hauler, CR&R to take all Construction and Demolition material to a transfer station to be sorted and recycled. Knowing that such waste will be diverted from local landfills by CR&R, the City encourages contractors to use the City's franchised hauler to dispose of construction waste by agreeing to automatically refund the deposit once the project is finalized and it has been verified that CR&R was used for the entire project. The alternative is for the contractor to self haul construction waste itself, without hiring a solid waste enterprise, to a facility that diverts 75% of the materials from local landfills. If this alternative is chosen, various requirements apply by which the self hauling contractor must demonstrate where waste was delivered and how it was diverted before a deposit will be returned.

There has been much discussion over the years about the possibility of adopting an ordinance that would result in the impounding of "unauthorized bins." While the Grand Jury report does not provide any detail of what this means, the City assumes it is a reference to a draft ordinance prepared by CR&R's legal counsel. The City of Dana Point as well as most if not all of the other South Orange County Cities have been asked by CR&R to adopt this ordinance. This ordinance authorizes CR&R to simply pick up and impound any bin it observes in the City that does not belong to it. The City of Dana Point has concluded the ordinance violates various well established legal principles. Understand that no bin may be placed in the public right of way in Dana Point, and rather all must be located on private property. Hence, the ordinance would authorize CR&R to trespass upon private property, presumably as the City's agent, to impound a bin. Even if it were to impound a bin itself, the City would not be in a position to do so without first obtaining the permission of the property owner. In addition, existing case law has established that a bin placed to collect recyclable materials as opposed to solid waste (meaning any material for which the hauler pays consideration or that is collected at no charge) is beyond the City's franchise authority. Accordingly, a company in competition with the City's franchised hauler may lawfully place bins on private property within the City to collect recyclable materials. If such bins are impounded, whether by the City or CR&R acting as its agent, the City will be exposed to legal ramifications. Indeed, considering bins may lawfully be placed in the City for the collection of recyclable materials it would likely constitute a violation of the Constitution's guarantee against unreasonable searches and seizures if City were to seize bins without providing notice and a hearing. The City believes its current practice (whereby it investigates whether a bin is lawfully in the City and takes code enforcement action if it is not) is an equally effective means to deal with the issue noted in Recommendation R-6, and more importantly ensures the City does not violate the law.

Sincerely,

A handwritten signature in black ink, appearing to read "Doug Chotkevys", with a large circular flourish at the end.

Doug Chotkevys
City Manager