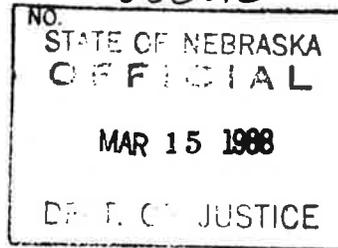


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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88023



ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: March 14, 1988

SUBJECT: LB 981; Authority of Cities of the Metropolitan Class Including Omaha to Impose Mandatory Fees for the Collection and Disposal of Refuse and Garbage

REQUESTED: Senator Paul Hartnett and the Members of the Urban Affairs Committee

WRITTEN BY: Robert M. Spire, Attorney General
Dale A. Comer, Assistant Attorney General

LB 981 is apparently intended to provide specific statutory authority for cities of the metropolitan class, including Omaha, to charge a fee for the collection and disposal of garbage and refuse. Legal research provided to the Urban Affairs Committee indicated that metropolitan cities may already have such authority under current law, and that LB 981 is unnecessary. You therefore requested our opinion as to whether the City of Omaha has authority to impose a mandatory fee for the collection and disposal of refuse and garbage under current law. You also requested our opinion as to whether there is a legal distinction between garbage and refuse in connection with any such authority of the City of Omaha. For the reasons set out below, we have concluded that the city has no clear authority for such a garbage or refuse collection charge. This is true whether the material to be collected is garbage or other forms of refuse.

Neb.Rev.Stat. §14-102(28) (Cum.Supp. 1986) provides that cities of the metropolitan class may establish "plants for the removal and disposal of garbage", and may "make contracts for the removal or disposal of garbage, or for both, except as hereinafter provided." The statute also states:

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Before the city council shall make specifications therefore, bids shall be advertised for as now provided by law, and the contract shall be let to the lowest and best bidder, who shall furnish bond to the city conditioned upon his or her carrying out the terms of the contract, the bond to be approved by the city council.

In addition to this specific authority dealing with garbage disposal, subsection (25) of §14-102 provides for police regulation in general, and states, in part, that cities of the metropolitan class have authority to:

Make and enforce all police regulations for the good government, general welfare, health, safety, and security of the city and the citizens thereof, in addition to the police powers expressly granted herein; and in the exercise of the police power, they may pass all needful and proper ordinances, ...

Other than these particular statutes dealing with garbage disposal and the general police power, there are no statutes pertinent to cities of the metropolitan class which detail further authority concerning the disposal of garbage or refuse.

The statutory sections set out above obviously contain no specific authority which would allow cities of the metropolitan class including Omaha to charge property owners fees for the collection and disposal of garbage or refuse. Therefore, if Omaha has such authority under current law, it must be based upon case law which would indicate that such authority to charge fees is inherent in the city's police power.

You have referred us to a series of older Nebraska cases which concern the police power of Nebraska municipalities and its application to garbage collection and removal. See, Urbach v. City of Omaha, 101 Neb. 314, 163 N.W. 307 (1917); Kelley v. Broadwell, 3 Neb. Unof. 617, 92 N.W. 643 (1902); Iler v. Ross, 64 Neb. 710, 90 N.W. 869 (1902); Coombs v. MacDonald, 43 Neb. 632, 62 N.W. 41 (1895); Smiley v. MacDonald, 42 Neb. 5, 60 N.W. 355 (1894). These various cases stand for the propositions that cities can, under their general police power, provide for the removal and disposal of garbage, can grant exclusive contracts for the removal and disposal of garbage, and apparently, can set prices for the contractors who engage in such removal and disposal operations. These cases also appear to indicate that

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rules pertaining to the general police power of cities regarding garbage disposal apply to garbage defined as putrescible material as opposed to general refuse, and there is some distinction as to the latter material which we assume is the basis for the second question which you posed to us. Nowhere do these various older cases squarely face the issue of whether a city has authority under its general police power to assess charges and fees for the removal and disposal of garbage.

Our research indicates that cases from other jurisdictions and other authorities indicate that cities have such authority to charge fees under their general police power. For example, in McQuillan, Municipal Corporations, it is stated at §24.250, "A special charge, tax, or assessment may be made by a municipal corporation, reasonably commensurate to the cost of removal of garbage and refuse." See also, Mayor and Aldermen of City of Milledgeville, 221 Ga. 498, 145 S.E.2d 507 (1965); Taylor v. City of Wahpeton, 62 N.W.2d 31 (N.Dak. 1953); 56 Am.Jur.2d, Municipal Corporations, §461.

Whatever the rule in other jurisdictions, our Supreme Court has not dealt directly with this issue. Moreover, the clear rule in Nebraska appears to be that:

.... a municipal corporation may exercise only such powers as are expressly granted, those necessarily or fairly implied in or incidental to powers expressly granted, and those essential to the declared objects and purposes of a municipality. Statutes granting powers to municipalities are to be strictly construed, and where doubt exists, such doubt must be resolved against the grant.

Briar West Inc. v. City of Lincoln, 206 Neb. 172, 175, 176, 291 N.W.2d 730, 732 (1980). See, Nebraska League of Savings and Loan Associations v. Johnson, 215 Neb. 19, 337 N.W.2d 114 (1983); Chase v. County of Douglas, 195 Neb. 838, 241 N.W.2d 334 (1976). In one case, our Supreme Court indicated that:

.... legislative charters wherein cities are empowered to perform certain acts or functions are construed with a greater degree of strictness than ordinary civil statutes, and the rule in Nebraska is that they shall be strictly construed. Their authority to perform municipal acts will not be extended beyond the plain import of the language of the charter.

Metropolitan Utilities District v. City of Omaha, 171 Neb. 609, 614, 107 N.W.2d 397, 402 (1961).

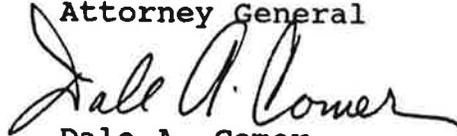
Given the Nebraska case law cited above calling for strict construction of municipal authority, and in light of the absence

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of Nebraska cases or statutes directly authorizing municipalities to impose a charge or fee for the collection of garbage, we cannot say that current case law or statutes give cities of the metropolitan class including Omaha the authority to charge a fee for the collection and disposal of garbage or refuse. This is true whether the material to be collected is "garbage" as opposed to any other form of refuse. LB 981 would obviously correct that problem, and clearly authorize such action by the City of Omaha.

Sincerely Yours,

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Attorney General



Dale A. Comer
Assistant Attorney General

cc: Patrick J. O'Donnell
Clerk of the Legislature

APPROVED BY:


Attorney General

5-3-10