



**CITY OF LODI
COUNCIL COMMUNICATION**

AGENDA TITLE: Ordinance No. 1739 entitled, "An Ordinance of the City Council of the City of Lodi Amending Title 8 – Health and Safety – Chapter 8.24, Comprehensive Municipal Environmental Response and Liability, By Repealing and Reenacting Section 8.24.090 – 'Miscellaneous Provisions,' Subsections 'D' and 'E,' and Adding Subsection 'F' to the Lodi Municipal Code Relating to Availability of Contribution"

MEETING DATE: January 7, 2004

PREPARED BY: City Clerk

RECOMMENDED ACTION: Following reading by title, it would be appropriate for the City Council to adopt the attached Ordinance No. 1739.

BACKGROUND INFORMATION: Ordinance No. 1739 entitled, "An Ordinance of the City Council of the City of Lodi Amending Title 8 – Health and Safety – Chapter 8.24, Comprehensive Municipal Environmental Response and Liability, By Repealing and Reenacting Section 8.24.090 – 'Miscellaneous Provisions,' Subsections 'D' and 'E,' and Adding Subsection 'F' to the Lodi Municipal Code Relating to Availability of Contribution" was introduced at the regular City Council meeting of December 17, 2003.

Pursuant to state statute, an ordinance may be adopted five days after its introduction following reading by title.

This ordinance has been approved as to form by the City Attorney.

FUNDING: None required.

A handwritten signature in black ink, appearing to read "Susan J. Blackston".

Susan J. Blackston
City Clerk

SJB/JMP

Attachment

APPROVED:

A handwritten signature in black ink, appearing to read "H. Dixon Flynn".

H. Dixon Flynn, City Manager

ORDINANCE NO. 1739

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF LODI
AMENDING TITLE 8 – HEALTH AND SAFETY – CHAPTER 8.24,
COMPREHENSIVE MUNICIPAL ENVIRONMENTAL RESPONSE
AND LIABILITY, BY REPEALING AND REENACTING SECTION
8.24.090 – “MISCELLANEOUS PROVISIONS,” SUBSECTIONS “D”
AND “E,” AND ADDING SUBSECTION “F” TO THE LODI MUNICIPAL
CODE RELATING TO AVAILABILITY OF CONTRIBUTION

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LODI AS FOLLOWS:

SECTION 1. Section 8.24.090 – “Miscellaneous Provisions” Subsections “D” and “E” of the Lodi Municipal Code is hereby repealed and reenacted to read as follows:

D. Settlement Procedures and Consequences.

1. Settlement of Joint and Several Liability. Any person alleged by the city to be jointly and severally liable pursuant to this chapter, or any person who has been found to be jointly and severally liable pursuant to this chapter by a final and binding administrative order or final order of a court of competent jurisdiction, who has entered into an Effective Settlement, Administrative Settlement, or Judicially Approved Settlement shall not be liable for claims for contribution, equitable indemnity, or partial or comparative equitable indemnity regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the other jointly and severally liable parties that have not settled by the amount of the settlement. Unless the settlement qualifies as an Administrative Settlement (the final action validating and approving which has neither been stayed nor reversed by a court of competent jurisdiction) or as a Judicially Approved Settlement (the final order validating and approving which has neither been stayed nor reversed on appeal by a court of competent jurisdiction) pursuant to this subsection, the status of any settlement of all or any part of any joint and several liability imposed by this chapter as an Effective Settlement may be challenged in a civil action by any person not party to the settlement agreement whose rights or interests are or may be adversely affected by the settlement and whose claims against the settling party are not otherwise barred by operation of law.

2. Administrative Settlement. The validity of any settlement of all or any part of any joint and several liability or obligation imposed by or pursuant to this chapter (or any other liability that the city attorney is authorized to assert on behalf of the city or the people of the state of California related to protection of public health, welfare and the environment and which is not required by the general laws of the state of California to be judicially validated or reviewed for good faith purposes by another prescribed process that is exclusive of the processes available pursuant to this chapter) as an Effective Settlement may be determined by a final action of the city council validating and approving the settlement pursuant to the following methods that is applicable:

a. If at the time of the effective settlement there is not pending an administrative adjudicatory proceeding brought pursuant to this chapter to which the settling party is a respondent, by a resolution of the city council adopted at or following a properly noticed public meeting of the city council, provided that advance public notice of the council’s consideration of the settlement for purposes of validating it as an Effective Settlement has been published in the Lodi News-Sentinel for at least two consecutive two-day periods commencing at least two weeks in advance of the scheduled meeting of

the city council at which the settlement will be considered. The notice required by this subsection 2.a shall provide the public with notice of the availability of the settlement for public review, the general nature of the pending settlement and its general effects if approval of the settlement as an Effective Settlement is granted, the date and time scheduled for city council meeting, and provide for an public comment period in advance of the council meeting of at least ten (10) days duration during which any person may submit written comments on the settlement to the city attorney for timely presentation to the city council, and of the opportunity of interested parties to attend the city council meeting and request time to present orally their views to the city council; or

b. If there is an administrative proceeding brought pursuant to this chapter to which the settling party is a respondent pending at the time of the effective settlement, by joint motion for approval of the settlement brought before the hearing officer by the city attorney and by the settling party or parties, provided that advance public notice of the motion has been published in the Lodi Sentinel for at least two consecutive two-day periods commencing at least two weeks in advance of the scheduled hearing before the hearing officer at which the motion for validation and approval of the settlement will be considered. The notice required by this subsection 2.b shall provide the public with notice of the availability of the settlement for public review, the general nature of the pending settlement and its general effects if approval of the settlement as an Effective Settlement is granted, the date, time and place scheduled for hearing, and provide for a public comment period in advance of the hearing of at least ten (10) days duration during which any interested members of the public may submit written comments on the settlement to the city attorney for timely presentation to the hearing officer together with the written responses of the settling parties, if any, and of the right of any person whose interests are or may be adversely affected by the settlement to petition the hearing officer for permissive leave to intervene in the proceedings for the sole purpose of protecting their interests that are or may be adversely affected by the settlement, which leave, if granted by the hearing officer, may be conditioned as the hearing deems proper in the interests of justice and as appropriate given the nature of matter pending before the hearing office and its actual or threatened adverse impact on the public health, welfare or the environment, and the right of interested members of the public to seek leave from the hearing officer, which leave is committed to the sole discretion of the hearing officer, to address the hearing officer on the record regarding the merits of the motion at the scheduled hearing. If timely and properly objected to by any party to the administrative proceeding (specifically including any person granted leave to intervene in the proceeding), the hearing officer's report and recommendation regarding the motion for approval and validation of the settlement, which shall be rendered and filed by the hearing officer on an expedited basis, shall, together with any timely objections to that report and recommendation, be brought before the city council for final action at its next public meeting held pursuant to the regularly applicable notice requirements.

3. Judicially Approved Settlement. The validity of any settlement of all or any part of any joint and several liability or obligation imposed by or pursuant to this chapter (or any other liability that the city attorney is authorized to assert on behalf of the city or the people of the state of California related to protection of public health, welfare and the environment and which is not required by the general laws of the state of California to be judicially validated or reviewed for good faith purposes by another prescribed process that is exclusive of the processes available pursuant to this chapter) as an effective settlement under this chapter may be judicially determined and finally resolved, as follows:

a. In an action brought by the city attorney in the name of the city pursuant to Part II, Title 10, Chapter 9 of California Code of Civil Procedure, Sections 860--870; or

b. If, at or within sixty days following the date of settlement, there is a judicial action pending between the settling party and the city in which the city has asserted one or more claims arising under this chapter, by joint motion brought in such pending action for judicial approval of the settlement, with such advance public notice, if any, deemed appropriate by the court of the availability of the settlement for public review, the general nature of the pending motion and its general effects if granted, the date and time scheduled for hearing of the motion, the available intervention procedures, and the opportunity for interested or affected members to submit comments on the settlement to the city attorney for timely presentation to the court, together with the city's response thereto.

4. Persons Not a Party to Settlement. If the city has obtained less than complete relief with respect to an Environmental Nuisance from a person who has resolved its liability to the city imposed pursuant to this chapter in an administrative or judicially approved settlement, the city may bring or continue an action against any person who has not resolved its liability imposed pursuant to this chapter with respect to such Environmental Nuisance.

E Contribution.

1. To the full extent authorized by, and subject to the terms and conditions set forth in, the general laws of the state of California, any person who is or may be liable to the City pursuant to this Chapter 8.24 for payment for, or performance of, some or all of an Abatement Action or other obligation imposed pursuant to this chapter, or for recovery of some or all of Abatement Action Costs incurred or to be incurred by the city, may seek contribution pursuant to the general laws of the state of California from any other person, specifically including the city, liable under this chapter for some or all of the same relief who has not obtained valid contribution protection that precludes by operation of law such contribution recovery from such person. Any contribution action brought under this subsection E.1 of this section 8.24.090, or concerning any liability arising pursuant to this chapter, shall be governed by the general laws of the state of California.

2. Notwithstanding the provisions of subsection E.1 of this section 8.24.090, if any court of competent jurisdiction determines that the general laws of the state of California do not provide for any legal process by which a person who is or may be jointly and severally liable to the city pursuant to this Chapter 8.24 for payment for or performance of some or all of an Abatement Action or other obligation imposed pursuant to this chapter, or for recovery of some or all of Abatement Action Costs incurred or to be incurred by the city, may seek contribution from any other jointly and severally liable parties, specifically including the city, then, and in that event only, such a contribution action may be commenced and maintained pursuant to this subsection E.2 of this section 8.24 .090 by: (i) any person who is or may be jointly and severally liable to the City pursuant to this Chapter 8.24 against any other jointly and severally liable or potentially liable party, specifically including the City, during or following any civil action commenced by the City Attorney pursuant to this Chapter 8.24; or (ii) a respondent to an administrative order issued pursuant to this chapter that has become final and binding and not subject to further direct judicial review who is in complete compliance with the requirements of that order against any other party who is also jointly and severally liable or potentially liable for some or all of the relief imposed by the order.

a. In any contribution action commenced or maintained pursuant to this subsection E.2 of this section 8.24.090, the court, in resolving contribution claims, may allocate Abatement Action Costs, the costs or performing Abatement Actions or other joint and several relief imposed pursuant to this chapter among liable parties using such equitable factors as the court determines are appropriate.

b. In resolving any contribution claims brought pursuant to subsection E.2(ii) of this section 8.24.090, the court shall give the highest priority to securing the expeditious and complete compliance with the terms and conditions of the final and binding administrative order and shall manage the proceedings in the contribution action so as to secure the uninterrupted, timely and complete compliance with the requirements of the final and binding administrative order.

c. Nothing in this subsection E.2 of this section 8.24.090 shall diminish the right, if any, of:

i. any person to bring an action for contribution under federal law or under the general laws of the state of California in the absence of a civil action commenced by the city attorney under this chapter; or

ii. a respondent to an administrative order issued pursuant to this chapter to bring an action for contribution under federal law or under the general laws of the state of California although such respondent is not in complete compliance with the requirements of that administrative order.

3. In any contribution action to apportion any liability arising under this chapter, the rights, if any, of a person who has resolved its liability to the city to recover contribution from other jointly and severally liable parties shall be subordinate to the direct rights of the city to seek and recover the relief authorized by this Chapter 8.24 from those same liable parties.

SECTION 2. Section 8.24.090 "F" – "Computation of Time" of the Lodi Municipal Code is hereby added to read as follows:

F. Computation of Time. In computing any period of time prescribed or allowed by this chapter, the day of the act, event, or default from which the designated period of time begins to run shall be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

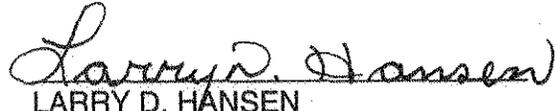
SECTION 3. All ordinances and parts of ordinances in conflict herewith are repealed insofar as such conflict may exist.

SECTION 4. No Mandatory Duty of Care. This ordinance is not intended to and shall not be construed or given effect in a manner which imposes upon the City, or any officer or employee thereof, a mandatory duty of care towards persons or property within the City or outside of the City so as to provide a basis of civil liability for damages, except as otherwise imposed by law.

SECTION 5. Severability. If any provision of this ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application. To this end, the provisions of this ordinance are severable. The City Council hereby declares that it would have adopted this ordinance irrespective of the invalidity of any particular portion thereof.

SECTION 6. This ordinance shall be published one time in the "Lodi News Sentinel", a daily newspaper of general circulation printed and published in the City of Lodi and shall take effect thirty days from and after its passage and approval.

Approved this 7th day of January, 2004


LARRY D. HANSEN
Mayor

Attest:


SUSAN J. BLACKSTON
City Clerk

State of California
County of San Joaquin, ss.

I, Susan J. Blackston, City Clerk of the City of Lodi, do hereby certify that Ordinance No. 1739 was introduced at a regular meeting of the City Council of the City of Lodi held December 17, 2003, and was thereafter passed, adopted and ordered to print at a regular meeting of said Council held January 7, 2004, by the following vote:

AYES: COUNCIL MEMBERS – Beckman, Howard, and Land

NOES: COUNCIL MEMBERS – Hitchcock and Mayor Hansen

ABSENT: COUNCIL MEMBERS – None

ABSTAIN: COUNCIL MEMBERS – None

I further certify that Ordinance No. 1739 was approved and signed by the Mayor on the date of its passage and the same has been published pursuant to law.


SUSAN J. BLACKSTON
City Clerk

Approved as to Form:


RANDALL A. HAYS
City Attorney

Jennifer Perrin

From: Ron Bernasconi [Ron@BernasconiCommercial.com]
Sent: Wednesday, January 07, 2004 4:45 PM
To: Susan Blackston; Susan Hitchcock; Emily Howard; Keith Land; John Beckman; Larry Hansen
Subject: We need independent legal advise before we make any changes to MERLO or our Contract with Envision

Honorable City Council Members,

I am very concerned by the actions recently taken in closed session and would have appeared before the Council tonight. However, I have to run a practice tonight and therefore request that the City Clerk file the following as my public testimony at tonight's regular meeting of the Lodi City Council.

In 1999 City Attorneys Michael Donovan and Randy Hays expressed no doubt that **the city would more than recover all expenses incurred when we relied upon their advise to borrow \$16 million dollars from Lehman Brothers at 20 to 30%.**

In fact City Attorney Hays told the Sacramento Bee, "**The way the laws are designed, we can't lose,**"

Then on December 24, 2003 the Sacramento Bee reported that a, "Court ruling may put Lodi on the spot for millions" after Judge Damrell ruled that portions of the city's cleanup ordinance known as MERLO conflicted with federal law and was unconstitutional.

As a result, Lodi cannot recover the \$22.5 million it spent in legal fees or the \$7.5 million in interest financing Envision's ill-conceived legal strategy.

In his 40 page ruling Damrell removed the portions of MERLO that were unconstitutional **and approved the remainder of the ordinance.**

Now our City Attorneys are asking the Council to consider new additions to MERLO, which would be ill-advised without an independent legal review.

Frankly, 11th hour additions to MERLO on the eve of trial may further anger the Judge if they are viewed as attempts to circumvent his recent ruling.

Another potential threat to our City emanates from the plan to renegotiate our contract with Envision.

Now, we would all love to have Envision slash its fees, but can we trust them not to slip in clauses that elevates their interests above those of the City?

We should be able to rely on our City Attorney. However, Randy Hays has proven to be nothing more than a rubber stamp to anything Donovan presents and it would be foolish to believe that any member of the City Council can negotiate contract language with an attorney(s) without independent counsel to protect the City's interests. As the saying goes, "**Those who act as their own attorney have a fool for a client.**"

Moreover, renegotiating our contract with Envision after the Court's recent rebuke of our legal strategy not only makes the City look weak and stupid; **it may undermine the City's ability to proceed against Envision for malpractice**, which may be our only way out of this debacle.

Apparently, 4 Council members believe it would be too expensive to hire another outside attorney because even though Envision's fees are accruing at an alarming rate, Envision is collecting only what they can squeeze out of our insurer, USF&G.

Ironically, this is how it should have been from the start. Having to be accountable to USF&G would have stemmed the over billing that occurred while Hays was asleep at the switch as Envision burned through the \$16 million dollar Lehman Loan before they even got to trial.

Now after spending close to \$30 million dollars on a lawsuit that is basically being thrown out of court on the eve of trial, it should be painfully apparent to everyone that there is nothing more expensive than bad legal advise and that failing to secure independent legal counsel would be a false economy.

Why doesn't the City use the firm it has already retained to review Envision's Legal Bills especially since that expenditure has already paid for itself.

Clearly, we need independent legal counsel to deal with Hays and Envision. **This what Redding did when they suspected Hays of malfeasance**.

Accordingly, I respectfully request that the City Council;

- 1) Secure independent legal counsel to review, the conduct of our City Attorney(s) and make sure any contract with Envision requires Envision to maintain Lawyer's professional liability insurance to protect the city from Envision's errors and omissions.
- 2) Secure independent legal counsel to review any changes to the City's Contract with Envision. I am also making a public records request for the City's current contract with Envision and I am requesting a copy of the proposed replacement contract with Envision at least 5 days prior to any vote by the City Council to approve the replacement contract.
- 3) Table any changes to MERLO until you have secured independent legal counsel to review and approve our Attorneys' proposed changes to MERLO.

Thank you for your consideration,

Ron Bernasconi

Court ruling may put Lodi on the spot for millions

By Cameron Jahn -- Bee Staff Writer

Published 2:15 a.m. PST Wednesday, December 24, 2003

Two key Lodi city officials reacted in shock Tuesday to a federal judge's ruling that they say guts the city's high-stakes toxic cleanup lawsuit, leaving the taxpayers potentially liable for millions of dollars in legal costs.

U.S. District Judge Frank C. Damrell Jr. on Monday ruled that the city's cleanup ordinance conflicts with federal law and is unconstitutional.

Damrell said the city's legal strategy -- winning money from insurance carriers of polluting businesses -- is set up to benefit attorneys and investors rather than speed up environmental cleanups as Congress intended.

As a result, Lodi cannot recover the estimated \$22.3 million it has spent in legal expenses since 1996 or the more than \$7.5 million in interest costs on financing those expenses.

The city has invested \$6.3 million of its own money in lawsuits against several downtown businesses and their insurers. The balance of \$16 million spent on legal outlays was borrowed at credit-card interest rates from the investment banking firm Lehman Brothers of New York.

Lawyers for the city had pitched the loan as a no-risk way of financing a legal battle it otherwise could not afford. They said Lehman would be repaid only from insurance money won in settlements or judgments.

Some city officials now believe Lehman is not going to walk away from the loan and will try to recover the money from the city.

Lodi, with a population of 59,000, has an annual budget of about \$29 million.

"The way it appears to me, everything we've worked on for the last eight years has been thrown out," Councilwoman Susan Hitchcock said. "The people who are losing are the citizens of Lodi."

Lori Gualco, lead attorney for Guild Cleaners, one of the defendants, called the judge's ruling "the death knell -- it's all over for the city, basically."

But Michael Donovan, the head of the city's legal team, disputed Damrell's ruling. He said Monday's decision would not be a significant setback.

"I would say that the strategy is sound," Donovan said. "The trial judge has given us his opinion, and it's far from the final judgment on the matter."

The 40-page ruling was Damrell's harshest yet in the city's 3-year-old suit to compel dry cleaners and other businesses to remove industrial solvents that tainted an estimated 600 acres in the central business district.

In his ruling this week, Damrell granted two insurance companies, Fireman's Fund and Unigard, a permanent injunction preventing Lodi from enforcing a cleanup ordinance the city enacted in 1997.

Damrell agreed with an appellate court that said Lodi can't legislate its way out of liability in the cleanup because the city also is partly responsible for the contamination: The city's leaky sewer system may have allowed the pollutants to seep into the ground.

He also said the ordinance is the polar opposite of what Congress intended decades ago when it passed the federal toxic cleanup act, known as the Superfund law.

The law allows for limited cost recovery in cleanups but not "an opportunity to profit at the expense of the environment," Damrell said.

Lodi's ordinance compels businesses found responsible for the pollution to pay not only the cost of the cleanup but also to reimburse the city for all its legal and financial costs in bringing enforcement action.

The city's "cost recovery scheme generates the opportunity for a financial windfall for some few fortunate professionals, as well as Lehman Brothers, Inc., an investment bank, which has no interest in cleaning up the contaminated site," Damrell said.

The judge said Lodi's attorneys "have often produced unnecessarily voluminous or redundant filings and imaginative ploys that have sent this litigation needlessly down paths." That means "important remediation efforts have been brought to a grinding halt."

Lodi has a Jan. 12 trial date before Damrell, but some city officials now wonder whether to risk trial.

"It's as if the judge said, 'We've given you enough clues along the way but you haven't followed them, and we're telling you once and for all don't go this route because you'll be wasting your money,' " Hitchcock said.

The Lodi City Council will meet in closed session Dec. 30 to decide what to do.

Lodi Mayor Larry Hansen said the city is now in "limbo," suspicious of its expensive legal team and their risky strategy yet entirely reliant on those lawyers for advice.

"I try not to have knee-jerk reactions, but their credibility is definitely in question," he said. "I feel like we're losing control of the strategy."

Lodi cannot fire Donovan without consent of the Lehman Brothers investors, who remain anonymous.

Meanwhile, the city has launched an audit of Donovan's bills, which total more than \$14 million.

Hitchcock on Tuesday said she had already heard from a number of Lodi residents outraged by the city's legal quandary and looking to point fingers.

"This is really a travesty of poor management and poor leadership," she said. "I definitely think the public will hold people accountable" at the ballot box.