

# **Regular City Council Meeting**

## **April 9, 2012**

### **Agenda**

**7:30 p.m.**      **Call to Order**  
**Pledge of Allegiance**  
**Roll Call**  
**Minutes - March 26, 2012**  
                  **- April 3, 2012 Special Meeting**  
**Monthly Bills**  
**Approval of Agenda**  
**Public Comment – Mental Health Month**

- I.      **Old Business**
  - 1.      **Second Reading – Amendment to Ch. 38 Emergency Services (Cost Recovery Ordinance)**
  
- II.     **New Business**
  - 1.      **Farmer’s Market**
  - 2.      **Traffic Control Order**
  
- III.    **Manager’s Report**
- IV.    **Council Comments**
- V.     **Adjournment**

# AGENDA NOTE

Old Business: Item #1

**MEETING DATE:** April 9, 2012

**PERSON PLACING ITEM ON AGENDA:** Fire Chief Mike Kennedy

**AGENDA TOPIC:** Second Reading - An ordinance to amend the Code of the City of South Lyon by amending Article III of Chapter 38. (Cost Recovery Ordinance)

**EXPLANATION OF TOPIC: Note: Please see Parvin's Memo on this.** The City of South Lyon does not have an emergency cost recovery ordinance for fire or hazardous materials incidents. The absence of such an ordinance may inhibit or prevent the City from being able to recover expenses from situation where (1) there is a direct cost to the City as a result of a mutual aid agreement; (2) there is a hazardous substances incident; (3) there is a violation of law that has caused the City to incur an unusual expense; (4) there are downed or damaged power lines or other inherently dangerous conditions that involved fuel or energy-providing utilities (gas, electric, lighting) beginning two hours after notification; and (5) where there is a large scale Incident, defined in the ordinance to mean a significant event (like an explosion) that causes disruption for a substantial period of time (2 hours). This ordinance is meant to be revenue neutral and applies to all City departments.

**MATERIALS ATTACHED AS SUPPORTING DOCUMENTS:** Proposed ordinance revision (same as first reading) and proposed changes from Council Member Kramer.

**POSSIBLE COURSES OF ACTION:** Approve/do not approve the second reading to amend the Code of the City of South Lyon by amending Article III of Chapter 38.

**RECOMMENDATION:** Approve the second reading to amend the Code of the City of South Lyon by amending Article III of Chapter 38.

**SUGGESTED MOTION:** Motion by \_\_\_\_\_, supported by \_\_\_\_\_ to approve the second reading to amend the Code of the City of South Lyon by amending Article III of Chapter 38.

# Memo

**To:** South Lyon City Council  
**From:** Parvin Lee, City Attorney  
**Date:** April 8, 2012  
**Re:** Emergency Response Ordinance

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At Council's request, we have inquired of MDOT and the Federal Transportation Department as to the recommended form for Emergency Response Ordinances; whether the ordinance must find fault or spread the costs over all parties involved. Both MDOT and the FTD indicated that they are unaware of any case reaching the appellate level dealing with the issue. Local ordinances can be found that cut both ways, and there is little concern by these agencies since their position is that 95% of these issues will be resolved by insurance, and the 5% not insured will be uncollectable in any event.

Our research raises two concerns. First that the failure to have the ordinance identify a responsible party opens a challenge that the ordinance is a tax as opposed to a civil infraction. Second, failing to identify a responsible party opens the ordinance to a challenge of vagueness. I have attached a research memo dealing with these issues.

For these reasons, we recommend the ordinance be approved as originally presented to Council.

# MEMO

**To:** Parvin  
**From:** John  
**Re:** Recouping Emergency Cleanup Costs  
**Date:** 5/20/10

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You asked me to look into any possible issues regarding an ordinance designed to recoup the costs of an emergency cleanup. The potential issue here is whether the ordinance would constitute a tax. State and local governments cannot impose taxes under the guise of a regulatory fee. . *Iroquois Properties v City of East Lansing*, 160 Mich. App. 544, 564; 408 N.W.2d 495 (1987). In order for a fee to be deemed a tax, there must be no reasonable relationship between the fee and the expense of the service provided. *Gorney v Madison Heights*, 211 Mich. App. 265, 268; 535 N.W.2d 263 (1995). A regulatory fee will be construed as an illegal tax only where the revenue generated by the regulation exceeds the cost of the regulation. *Id.*

A unit of local government may institute a user fee, however, without violating the Headlee Amendment because, rather than being an exercise of the unit's power to tax, it is an exercise of the unit's police power to regulate the public health, safety, and welfare. See *MCL 41.181*; *MCL 333.12752*; *MCL 333.12753*; *Bolt*, 459 Mich. at 159; *Merrelli v St. Clair Shores*, 355 Mich. 575, 583; 96 N.W.2d 144 (1959).

Our Supreme Court addressed the distinction between a fee and a tax in *Bolt*:

Generally, a "fee" is "exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit." *Saginaw County [v. John Sexton Corp. of Michigan]*, 232 Mich. App. 202, 210; 591 N.W.2d 52 (1998)]; *Vernor v Secretary of State*, 179 Mich. 157, 164, 167-169; 146 NW 338 (1914). A "tax," on the other hand, is designed to raise revenue. *Bray v Dep't*

*of State, 418 Mich. 149, 162; 341 N.W.2d 92 (1983). [Bolt, 459 Mich. at 161.]*

The *Bolt* Court identified the three criteria of a fee as follows: (1) a user fee serves a regulatory purpose, (2) a user fee is proportionate to the necessary costs of that service, and (3) a user fee is voluntary. *Id. at 161-162*. "These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Graham v Kochville Twp, 236 Mich. App. 141, 151; 599 N.W.2d 793 (1999)*; see also *Bolt, 459 Mich. at 167, n 16*.

In our case, a cleanup fee would plainly serve a regulatory purpose—to facilitate the removal of public health hazards. And as long as the fee was proportionate to the cost of the service, the second prong would be satisfied as well. However, the third prong may present a challenge. One could argue that such a fee is not voluntary where the incident necessitating the cleanup was inadvertent rather than intentional or negligent. This is not fatal to the ordinance. For example, in *Wheeler v Charter Township of Shelby, 265 Mich. App. 657; 697 N.W.2d 180; (Mich. App 2005)*, the court upheld an ordinance that mandated residential trash hauling service. The court reasoned that "the lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a user fee and not a tax." *Id. citing Bolt, 459 Mich. at 167 n 16; Westlake Transportation, 255 Mich. App. at 616*.

The only remaining concern is that the language must be precise and clear. If an ordinance is vague, ambiguous or indefinite so that it is impossible to determine what the ordinance requires, the courts will hold the ordinance void. *Fass v Highland Park, 321 Mich 156, 32 NW2d 375 (1948)*. In other words, the meaning must be clear enough so

that persons who are potentially subject to the ordinance can determine what acts will violate it. *People of Dearborn Heights v Bellock*, 17 Mich App 163, 166, 169 NW2d 347 (1969).

**ORDINANCE AMENDMENTS TO CHAPTER 38  
EMERGENCY SERVICES**

The City of South Lyon Ordains:

**An ordinance to amend the Code of the City of South Lyon by amending Article III of Chapter 38.**

**ARTICLE III. EMERGENCY RESPONSE COST RECOVERY**

**Sec. 38-51 Purpose and intent.**

Costs for emergency services are a normal and budgeted public expenditure by the City in order to serve its residents, taxpayers, and the public at large. However, the City Council finds that certain kinds of emergency responses primarily benefit identifiable persons or property owners, or are necessitated by certain kinds of unlawful or improper conduct, such as driving under the influence, a hazardous substance incident, or a large-scale incident as defined in Sec. 38-52. The City Council further finds that such costs should be borne by the party responsible for those costs, as provided for in this Article, in order to avoid imposition of an economic hardship on the City.

**Sec. 38-52 Definitions.**

*“Costs of the emergency response”* shall mean the actual costs incurred by the City, and by any other governmental or intergovernmental entity providing services at the request or direction of the City’s Fire or Police Department, as the result of an emergency response to any incident involving driving under the influence, hazardous substance incident, large-scale incident, or other such incident as defined in this Article. Such costs shall include, without limitation: (a) all labor costs for City personnel (including wages, overtime, salaries, fringe benefits, and reimbursable expenses); (b) all costs for materials, supplies, and equipment utilized or damaged in connection with an emergency incident and emergency response; (c) all costs for the repair or replacement of publicly-owned property, buildings, facilities, and infrastructure damaged or destroyed in connection with an emergency response; (d) all costs for cleaning up, boarding-up, inspecting, testing, abating, mitigating, restoring at the site of an emergency response; (e) all costs for labor and services for which the City had to contract in connection with or as a direct or indirect result of an emergency incident and emergency response; (f) all costs for investigation, enforcement, and prosecution in connection with the incident or response; and (g) any other costs incurred by the City, and by any other governmental or intergovernmental entity providing services at the request or direction of the City’s Fire or Police Department, in connection with an emergency incident and emergency response.

*“Emergency response”* shall mean the dispatch, provision, response, and/or utilization of police, fire, emergency medical, rescue services, and/or other emergency services by the City, or by any other governmental or intergovernmental entity providing any such services at the request or direction of the City’s Fire or Police Departments, in response to a call for assistance from any person, property owner, government agency, emergency service provider, or other entity.

*“Hazardous substances incident”* shall mean an incident involving any chemical, substance, compound, mixture, or other material defined as, designated as, listed as, or having the same characteristics as any substance, compound, mixture or material listed as hazardous under the Fire Code adopted under Chapter 46 of this Ordinance Code, any other code adopted or enforced by the City, or any federal or state law or regulation.

*“Large-scale incident”* shall mean an incident, such as a tanker truck fire or explosion, a railroad derailment, gas well explosion, or the like that results in the disruption of day-to-day activities in the City and the use of City personnel or contracted resources for a prolonged period of time of more than 2 hours in duration.

*“Driving under the influence”* shall mean any individual, or individuals who are operating any motor vehicle of any kind while under the influence of intoxication liquor or a controlled substance or a combination of intoxicating liquor and a controlled substance in violation of the Michigan Vehicle Code or the Uniform Traffic Code as adopted by the City of South Lyon.

*“Responsible person”* shall mean any individual, firm, corporation, association, partnership, commercial entity, consortium, joint venture, or other entity that creates the need for a response, or who owns, operates, maintains, occupies, or controls any building, premises, or property in a manner that causes a response incident to arise. The phrase “creates the need for a response” is intended to include only those persons whose intentional or negligent actions caused the need for the emergency response.

**Sec. 38-53. - Liability for costs.**

The costs of an emergency response shall be assessed to and paid by the person(s) responsible for causing the response in the following circumstances:

1. Where the costs result from a charge, invoice, or other expense to the City for an emergency response to non-residential property by any other governmental or intergovernmental entity at the request or direction of the City pursuant to a mutual aid agreement.
2. Where the costs result from a hazardous substances incident, as defined in Sec. 38-51.
3. Where the costs result from a violation of law for which the responsible party has been convicted or found responsible in a court of law, including, but not limited to driving under the influence, to the extent the City has incurred a specific charge or invoice for a response to specific activity that would not otherwise have been incurred (e.g., for demolition or clean-up).
4. Where the costs result from (a) monitoring downed or damaged power lines or other inherently dangerous conditions by City personnel in order to protect the public health and safety, or (b) damages to public property, if such response involves a gas, electric, lighting, or other fuel- or energy-providing utility whose activities or facilities necessitated the response. Such costs shall be calculated beginning two (2) hours after notification to the public utility whose facilities are involved.



5. Where the costs result for a large scale incident, as defined in Sec. 38-52.
6. In the event of an emergency incident that involves a hazardous substances incident, to the extent the Michigan Natural Resources and Environmental Protection Act (being MCL 324.20101, et seq.) or any other law preempts the cost recovery provisions of this Article, the liability for and recovery of costs of the emergency response shall be governed by the Michigan Natural Resources and Environmental Protection Act or such other law, and the City may pursue collection of such costs of the emergency response in a civil action, pursuant to said laws.
7. Upon the third (3) response, or any response thereafter, to any incident involving a false alarm, faulty equipment, or improperly installed or maintained equipment or materials including, but not limited to, carbon monoxide detectors, fire or flow alarms, chimney fires, and smoke alarms.
8. The fire department shall be entitled to recover all costs and damages incurred in conjunction with any fire the extinguishment of which was hampered by the obstruction, removal, tampering or damaging of any fire hydrant or fire appliance required to be installed or maintained under this code, and shall be the joint and several responsibility of the person(s) responsible.

**Sec. 38-54 – Duty to Remove.**

It shall be the duty of any person, firm, company, corporation or other entity, who causes or has ownership or control of any property on which a spill, leakage or other dissemination of hazardous materials occurs to remove immediately such hazardous materials and undertake and complete a total cleanup of the area in such a manner as to insure that all leakage, spillage or other dissemination of hazardous material is fully removed and the area is fully restored to its condition prior to the placement, leakage, spillage or other dissemination of such hazardous materials. In the event any person, firm, company, corporation, or other entity fails to remove such hazardous material, the city shall have the right to enter into and/or upon the subject property and remove and conduct a cleanup of all such hazardous materials either by city employees, including the city fire department, or by contractors and agents of the city. All costs of such removal and cleanup shall be the responsibility of the person owning, operating and/or occupying or possessing the subject property, jointly and severally. In the event that such costs are not paid within 30 days of the city's demand for payment, the city may take whatever collection steps it deems appropriate including, but not limited to the placement of all such charges on the tax roll to be added to the taxes for such property for the next tax year as for real or personal property taxes and/or the placement of a lien on personal or real property owned by the responsible parties.

**Sec. 38-55. - Schedule of costs.**

The city council for the City of South Lyon shall by resolution adopt a schedule of the costs including therein the expense of an emergency response. This schedule shall be available to the public from either the city clerk or the police department.

- (a) Equipment costs for the fire department shall be based off of the current edition of the Federal Emergency Management Agency's "Schedule of Equipment Rates".
- (b) The DPW and Police Department shall base equipment costs off of their pre-determined rates.

The cost of an emergency response shall be a charge against the responsible party. Such charge constitutes a debt of that person or persons. The City Treasurer shall submit an invoice for costs pursuant to Sec. 38-56.

**Sec. 38-56. - Bill for services.**

The City Manager or the designee thereof, within 60 days of an emergency response, shall prepare a list of itemized costs and submit the same to the city treasurer. The city treasurer shall within ten days of receiving itemized costs incurred for an emergency response, submit a bill for the same by first class mail or personal service to a person liable for said expenses as enumerated under this article. Said bill shall require full payment within 30 days from the date of service.

**Sec. 38-57. – Appeal**

Any person receiving a bill may appeal all or any portion of the amount shown on such statement by filing a written request with the city clerk within 30 days of receipt of an invoice from the City. An ad hoc committee consisting of the city manager or designee, the city treasurer, and the immediate past mayor, or if he or she is unable to serve, a past council member appointed by the current mayor shall be created by resolution of Council. The Committee may waive or reduce the amount of any invoice.

**Sec. 38-58. - Failure to pay costs of emergency response.**

Any failure by the responsible person to pay the itemized costs within 30 days of service, or denial of any appeal, shall be considered a default. In case of default, the City of South Lyon shall pursue any remedy available at law or equity to recover the unpaid expenses of an emergency response, plus the City's attorney fees, court costs, litigation expenses.

**Sec. 38-59. - Civil nature of liability.**

This chapter shall be construed to be a responsibility and liability of a civil nature on the part of the responsible person. This shall not be construed to conflict, contravene, enlarge, or reduce any criminal liability or responsibility, including fines and/or costs which may be imposed by a judge under any valid local, state, or federal ordinance, statute, or law.

**Sec. 38-60. – Severability**

If one or more sections, provisions, phrases or words of this Ordinance are declared to be invalid by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance, which shall continue in full force and effect, and to this end, this Ordinance is declared to be severable.

**CERTIFICATION**

It is hereby certified that the foregoing Ordinance was adopted by the South Lyon City Council, Oakland County, Michigan, at a meeting of the Council duly called and held on the \_\_\_\_\_ day of \_\_\_\_\_, 2012.

**CITY OF SOUTH LYON**

By: \_\_\_\_\_  
Julie Zemke, City Clerk