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GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

MECKLENBURG COUNTY MECKLENBURG COUNTY, N.C.

11-CVS-10050

BY \_\_\_\_\_  
CEDAR GREENE, LLC and  
O'LEARY GROUP WASTE SYSTEMS,  
LLC,

Plaintiffs,

v.

CITY OF CHARLOTTE,

Defendant.

**SUMMARY AND  
DECLARATORY JUDGMENT**

This matter came before the undersigned Presiding Judge on November 15, 2011, pursuant to cross-motions for summary judgment filed by Plaintiffs Cedar Greene, LLC ("Cedar Greene") and O'Leary Group Waste Systems, LLC ("O'Leary," and collectively with Cedar Greene, "Plaintiffs") and Defendant City of Charlotte (the "City"), and a Motion to Dismiss filed by the City.

After considering the pleadings, briefs, depositions, affidavits, and citations of authority submitted by the parties, as well as the arguments of counsel presented during the hearing, the Court finds that Plaintiffs' Motion for Summary Judgment should be **GRANTED** and the City's Motion to Dismiss and Motion for Summary Judgment are **DENIED**.

**STATEMENT OF UNDISPUTED FACTS**

The Court finds that the following facts are undisputed:

1. Cedar Greene owns and operates a 224-unit residential apartment complex in the Charlotte, North Carolina, known as Cedar Greene Apartments, that pays the City for and is entitled to receive solid waste disposal services from the City.

2. O'Leary is a private contractor that provides collection and removal of solid waste services to apartment complexes, condominiums, and businesses in the greater Charlotte metropolitan area.

3. By local ordinance, and pursuant to authority to engage in "public enterprises" under Article 16, Chapter 160A of the General Statutes, N.C. GEN. STAT. § 160A-311, *et seq.* the City furnishes solid waste services to apartment complexes, condominiums, and trailer parks that maintain dumpsters or compactors for the storage and collection of solid waste within its corporate limits ("Multi-Family Complexes"), including Cedar Greene Apartments. The City acknowledges that its provision of services for the disposal of solid waste to Multi-Family Complexes is a "public enterprise" subject to the above statutes.

4. Pursuant to the City's ordinances, Cedar Greene has paid and does pay the City an annual fee for the disposal of all solid waste collected from Cedar Greene (the "Annual Disposal Fee"). *See* Charlotte Code § 10-141. The City levies the Annual Disposal Fee along with annual property taxes on each separate Multi-Family Complex in the City. *Id.* The amount of the Annual Disposal Fee levied by the City corresponds to the annual cost the fees charged by the City's designated landfill (as further defined below, "Disposal Fees") to dispose of the total amount of solid waste that a unit in a Multi-Family Complex produces during a year. Based on such calculations, the City assesses an Annual Disposal Fee on Multi-Family Complexes, including Cedar Greene, in the amount of \$27 per residential unit (*i.e.*, per each apartment or condominium).

5. The City provides weekly collection to Multi-Family Complexes through a private contractor, Republic Services, Inc. ("Republic"). Through that contractor, the City provides each Multi-Family Complex a fixed number of collections per week in accordance with

a formula based upon the ratio of residential units to dumpsters at the complex (the "Primary Collection"). The City does not provide for any additional weekday collections to such Multi-Family Complexes ("Supplemental Collection"), and any Multi-Family Complex which desires to receive such Supplemental Collection must privately contract for such services.

6. The City has entered into a contract with Republic to provide Primary Collection to all Multi-Family Complexes; this agreement does not cover Supplemental Collection, which it states shall be the "sole . . . responsibility" of the Multi-Family Complexes.

7. Cedar Greene qualifies as a Multi-Family Complex and, accordingly, receives Primary Collection on a once-per-week basis from the City through Republic.

8. The City provides for disposal of solid waste collected from Multi-Family Complexes through the reimbursement of fees charged at the City's designated landfill for the disposal of residential solid waste (again, "Disposal Fees"). The current Disposal Fee is \$ 27.50 per ton of solid waste. The City has agreed to reimburse, and does reimburse, Republic for all the Disposal Fees it pays on account of both Primary and Supplemental Collection for the disposal of Multi-Family solid waste at the City's designated landfill.

9. The City, despite the fact that it levies the Annual Disposal Fee based on the total amount of all solid waste each Multi-Family Complex produces a year, does not provide for disposal of solid waste collected during Supplemental Collection to all Multi-Family Complexes. Instead, the City, pursuant to its current policy and practice, only reimburses the Disposal Fees of those Multi-Family Complexes that hire Republic to provide Supplemental Collection, but not those who hire providers other than Republic for such Supplemental Collection.

10. Cedar Greene has sought to engage O'Leary to provide Supplemental Collection to Cedar Greene, and O'Leary has agreed to provide such Supplemental Collection at a lower

rate than the rate Republic charges, provided that the City provides for the disposal of supplemental waste from Cedar Greene through the reimbursement of its Disposal Fees. Yet, because the City will only reimburse Disposal Fees for the disposal of Cedar Greene's supplemental waste if Cedar Greene hires Republic to provide Supplemental Collection, and not to O'Leary or any other provider, Cedar Greene would have to forego the disposal services for which it has already paid through the Annual Disposal Fee in order to hire O'Leary. Cedar Green has thus been effectively precluded from hiring O'Leary to provide for Supplemental Collection service at a lower rate than that charged by Republic for the same service.

11. O'Leary has repeatedly represented to the City that it is prepared and willing to meet all uniformly applicable requirements the City may impose on providers of Supplemental Collection in order to receive reimbursement from the City of Disposal Fees collected from Multi-Family Complexes, including those requirements imposed on Republic in the Republic Agreement, such as (i) using designated vehicles for Supplemental Collection of solid waste from Multi-Family Complexes and (ii) disposal thereof in the County's designated landfill. Despite such representations, the City has informed O'Leary that it will continue its practice of only reimbursing Disposal Fees for supplemental waste from Multi-Family Complexes that hire Republic, and not to O'Leary or any other provider of such services.

12. The City acknowledges and the Court finds that, with regard to the City's provision of services for the disposal of solid waste, there is no substantial difference between the services provided to Multi-Family Complexes that hire Republic to provide Supplemental Collection, and those, such as Cedar Greene, that hire other providers, such as O'Leary, for such service, nor any substantial difference among such Multi-Family Complexes as customers for such supplemental disposal service.

13. The City's policy of only providing reimbursement of Disposal Fees for supplemental waste from Multi-Family Complexes to Republic—but not O'Leary or any other provider—has injuriously affected both Cedar Greene and O'Leary. As the City has made clear in response to O'Leary and Cedar Greene's inquiries, were Cedar Greene to hire O'Leary to provide Supplemental Collection, the City, under its current policy, would refuse to reimburse the Disposal Fees for Cedar Greene's supplemental waste. This policy discriminates against both Cedar Greene, which would have to forego the disposal services for which it pays, and O'Leary, whose customers would not receive such disposal services. Accordingly, both Cedar Greene and O'Leary are threatened with an immediate injury as a result of the City's policy regarding disposal of supplemental waste.

#### **CONCLUSIONS OF LAW**

Based on the foregoing facts, the Court makes the following determinations as a matter of law:

1. By operating, or contracting for the operation of, facilities to provide collection and disposal of solid waste to Multi-Family Complexes within its boundaries, the City is engaged in a "public enterprise" pursuant to and subject to the limitations contained in Article 16, Chapter 160A of the General Statutes. *See* N.C. GEN. STAT. §§ 160A-311(6) (defining the term "public enterprise" to include "[s]olid waste collection and disposal systems and facilities"); 160A-312(a) (granting the City "authority to . . . operate []and contract for the operation of, any or all of the public enterprises as defined in this Article to furnish services to the city and its citizens.").

2. N.C. GEN. STAT. § 160A-314(a), which authorizes the City to set rates for public enterprise services and make classifications as to types of services provided thereunder, prohibits

the City from engaging in unreasonable discrimination in the establishment of those rates or classification of such services. See *Ricks v. Town of Selma*, 99 N.C. App. 82, 84-85, 392 S.E.2d 437, 438 (1990) (“The statutory authority of a city [pursuant to N.C. GEN. STAT. § 160A-314(a)] to set rates for its services and to classify its customers is not a license to discriminate among customers of essentially the same character and services”); *Cabarrus Cnty. v. City of Charlotte*, 71 N.C. App. 192, 195, 321 S.E.2d 476, 479 (1984) (“It is a fundamental principle that a public utility, whether publicly or privately owned, may not discriminate in the distribution of services or the establishment of rates . . . . There must be substantial differences in service or conditions to justify differences in rates. There must be no unreasonable discrimination between those receiving the same kind and degree of service.”); *Town of Taylorsville v. Modern Cleaners*, 34 N.C. App. 146, 148, 237 S.E.2d 484, 486 (1977) (“Classification must be based on a ‘substantial difference’”); accord *Wall v. City of Durham*, 41 N.C. App. 649, 255 S.E.2d 739 (1979).

3. With regard to the City’s provision of services for the disposal of supplemental solid waste collected from Multi-Family Complexes, there is no substantial difference between the services provided to Multi-Family Complexes that hire Republic for Supplemental Collection, and those that hire O’Leary, nor any substantial difference among such Multi-Family Complexes as customers for such supplemental disposal service.

4. The City’s policy of providing disposal to only those Multi-Family Complexes that hire Republic to provide Supplemental Collection, and not O’Leary or any other collection provider, constitutes unlawful, unreasonable, and arbitrary discrimination in the provision of a public enterprise service and rates charged for such service, in violation of N.C. GEN. STAT. § 160A-314. Accordingly, the Court **GRANTS** Plaintiffs’ Motion for Summary Judgment on their claim under N.C. GEN. STAT. § 160A-314.

5. In addition to their claim that the City's policy of providing services for the disposal of solid waste to only those Multi-Family Complexes that hire Republic for Supplemental Collection violates, N.C. GEN. STAT. § 160A-314, the Plaintiffs also contend that such policy also contravenes their right to equal protection of the laws under Article I, Section 19 of the North Carolina State Constitution. However, because the Court finds that such policy exceeds the City's authority to set rates and classify its customers under N.C. GEN. STAT. § 160A-314, the Court need not address Plaintiffs' constitutional claims and makes no ruling in that regard.

6. The Court hereby orders that the City commence within 30 days of entry of this judgment the provision of disposal services for supplemental waste through the reimbursement of Disposal Fees for the benefit of all Multi-Family Complexes equally, without regard to the provider the Multi-Family Complex may choose to hire to provide Supplemental Collection, so long as that collection provider agrees to and complies with those uniformly-applicable requirements the City may prescribe for such service.

7. Consistent with the preceding paragraphs, the Court **DENIES** the City's Motion to Dismiss and Motion for Summary Judgment

**NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED** that the Plaintiffs' Motion for Summary Judgment is **GRANTED** and the City's Motion to Dismiss and Motion for Summary Judgment is **DENIED**, and the Court enters summary and declaratory judgment as set forth above.

This the 16<sup>th</sup> day of December 2011

*H. William Constangy*

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Hon. H. William Constangy  
Superior Court Judge Presiding