

August 5, 2002

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

ALTERNATIVES FOR REGULATION OF OFF-LEASH DOG AREAS

INTRODUCTION

At the June 11, 2002, City Council meeting, Councilmember Toni Atkins requested information concerning the use of off-leash dog areas [Dog Areas] within the City. Specifically, the question was asked whether the City has recourse against those people who either violate established rules in Dog Areas, or who are extremely abusive to other Dog Area users. The matter was referred to the City Attorney.

DISCUSSION

The City has several options for regulating Dog Areas. First, the City may amend the Municipal Code to include specific Dog Area rules. Either criminal penalties, or civil penalties through an administrative system, may be imposed for violation of those rules. Second, the City may establish a permit system for use of Dog Areas. Violation of Dog Area rules could cause revocation of the permit, thus taking away a person's right to use the area. Finally, for situations where a person behaves extremely abusively toward other area users in such a way that would constitute a public nuisance, the City may be able to pursue an injunction against the perpetrator.

Ordinance Adoption

_____ On June 11, Council established Dog Areas within several City of San Diego parks. Within these Dog Areas, dog owners are not required to have their dogs on a leash. As part of the companion actions adopted on that same day, Council adopted several rules and policies applicable to the use of Dog Areas, which are described in the "Advisories and Rules and Regulations for Posting at Off-Leash Areas," included in City Manager's Report No. 02-130 [Regulations]. The Regulations include rules that are expected to be followed by Dog Area users. Some examples of rules found in the Regulations include that dogs must be leashed while entering and leaving the Dog Area; aggressive dogs, declared dangerous dogs, and dogs in heat are prohibited; dogs must have current license and vaccinations; the dog owner must remain in the Dog Area with the dog; and dogs must be under voice, whistle, or hand-signal control. The Regulations, however, do not include a mechanism for enforcement by police officers or other enforcement authorities. Even without the ability to enforce the Regulations, law enforcement officers are still able to enforce other applicable provisions of the law found in such codes as the

California Penal Code, the San Diego County Code, or the San Diego Municipal Code.

One way for the City to enforce Dog Area rules is to amend the Municipal Code to include those rules. Violation of the rules can either carry criminal penalties or, through an administrative system, can provide for civil penalties. Adoption of a law prohibiting specified behavior may include provisions found in the Regulations or may include other provisions addressing other types of conduct within the Dog Areas. A City is empowered to “make and enforce within its limits all local, police, sanitary, and other ordinances and regulations . . .” Cal. Const. art. XI, § 7. In addition, the San Diego Charter directs that the “City Council shall by ordinance adopt regulations for the proper use and protection of said park property . . . and provide penalties for violations thereof.” San Diego Charter § 55. In the exercise of its police power, a city has broad discretion in determining what is reasonable in endeavoring to protect the public health, safety, morals and general welfare of the community. *Carlin v. City of Palm Springs*, 14 Cal. App. 3d 706, 711 (1971).

Although the City has broad police powers, the power has limits. As long as an adopted ordinance is a valid exercise of the City’s police power and does not infringe on a person’s First Amendment right of free speech, the ordinance prohibiting specified behavior will withstand legal challenge. Exercise of the City’s police power must be reasonably related to a legitimate governmental purpose. *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 159 (1976). A reasonable basis in fact to support the legislative determination of the regulation’s wisdom and necessity must exist. *Consolidated Rock Products Company v. City of Los Angeles*, 57 Cal. 2d 515, 522 (1962). The test as to whether a law enacted pursuant to a valid exercise of the police power is “whether it has any reasonable tendency to promote the public health, morals, safety or general welfare of the community.” *Carlin*, 14 Cal. App. 3d at 711. Here, if Council adopted an ordinance governing the use of Dog Areas, the ordinance should include requirements promoting the health and safety of the public within Dog Areas, such as those found in the Regulations. If the law directly related to the public health, morals, safety or general welfare of the community, it would be upheld as a valid exercise of the City’s police power.

After deciding what behavior within Dog Areas is prohibited, violation of the law could be made a crime, punishable as either a misdemeanor or an infraction. San Diego Municipal Code § 12.0201. This would allow law enforcement officers to cite people violating the law, and would subject those people to criminal fines and sanctions.

In the alternative, violation of the law could trigger civil fines and penalties within the structure of an administrative system. *See* San Diego Municipal Code § 12.0801 et seq. Through this option, the City would follow Municipal Code procedures of notice to the person violating the rules. The City would also follow provisions of the Municipal Code to assess penalties against the person violating Dog Area rules. San Diego Municipal Code § 12.0804, 12.0805. A hearing may be held to assess the civil penalties imposed. San Diego Municipal Code § 12.0808.

Permit System

_____ Another alternative is to establish a permit system for the use of the Dog Areas. Under this approach, only individuals holding a permit to use the area could do so. A person who desires to use a Dog Area would apply to the City for a permit. The permit would be subject to specific rules. If the permit holder violates those rules, the permit could be revoked and the

person could no longer utilize the Dog Area. In California, the City of Woodland already provides for this approach for control of its off-leash area. The relevant code includes terms for application of an off-leash permit, rules for use of the off-leash area, and conditions for the revocation of such permit. Yolo County Code 6-1.401.1. *See* Exhibit A, Yolo County Ordinance.

Although a plausible alternative, the administration and enforcement of this system may be burdensome. The City may offer permits without charge to Dog Area patrons, or some of the costs associated with the permit may be offset by charging a fee for the permit. If a fee is charged for the permit, it must be reasonable and can only be imposed in order to defray policing expenses. *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 116-17 (1943). The fee must be necessary to cover the reasonable costs of the system, and cannot be used for any other purpose than to meet those costs. *Cox v. State of New Hampshire*, 312 U.S. 569, 577-78 (1941); *United States Labor Party v. Codd*, 527 F. 2d 118, 119 (2nd Cir. 1975).

Public Nuisance and Injunction

During Council discussion on June 11, the question was raised whether the City could obtain a restraining order or injunction against individuals who harassed and were abusive to other Dog Area users. The specific type of abusive behavior that Council was concerned about was not discussed, and analysis of whether an injunction would likely be issued against a person would need to be done on a case-by-case basis. However, in general, if the abusive behavior was considered to be a public nuisance, the City may then be able to seek an injunction against that person.¹ Cal. Civ. Code 3491. The granting of an injunction under these circumstances is solely within a court's discretion.

A city has the authority to specify, by ordinance, what activities or uses of city property constitute a nuisance, and is able to enact regulations designed to eliminate or reduce the occurrence of a nuisance to protect the general welfare. Cal. Const. art. XI, 7; Cal. Gov't Code 38771, 38773.5; *City of Costa Mesa v. Soffer*, 11 Cal. App. 4th 378, 382-83 (1992). City ordinances regulating nuisances are not limited to acts that are nuisances under state law. *People v. Johnson*, 129 Cal. App. 2d 1, 5 (1954). A public nuisance is one that affects a community or neighborhood, or a considerable number of people at the same time, although the extent of the annoyance or damage inflicted upon each individual may be unequal. Cal. Civ. Code 3480. A public nuisance is considered to be an act which interferes with the interests of the community or the comfort or convenience of the general public and interferes with the public health, comfort, and convenience. *Venuto v. Owens-Corning Fiberglass Corporation*, 22 Cal. App. 3d 116, 123 (1971).

The Municipal Code defines a "public nuisance" as "any condition caused, maintained or permitted to exist which constitutes a threat to the public's health, safety and welfare or which significantly obstructs, injures or interferes with the reasonable or free use of property in a neighborhood, community or to any considerable number of persons." San Diego Municipal Code 11.0210. Although the type of abusive behavior that the Council was concerned about was not discussed in detail, if the behavior is so extreme, outrageous, and abusive as to affect the community's use and enjoyment of the Dog Areas, it is arguable that the behavior could constitute a public nuisance, and this alternative may then be pursued.

After a person's behavior is considered a nuisance, the City may petition a court for an injunction against the abusive person. *See* Cal. Civ. Proc. Code 527, 731. An injunction is an order requiring a person to refrain from a particular act, or to do a particular act. Cal. Civ. Proc. Code 525. A court will determine the issuance of a preliminary injunction by balancing the hardships to the parties, and the court will exercise its discretion in favor of the party more likely to be injured. *Family Record Plan, Inc. v. Mitchell*, 172 Cal. App. 2d 235, 242 (1959). This alternative is probably more difficult to pursue than the other alternatives outlined in this Report. Courts generally are hesitant to order a person to refrain from a particular behavior unless the behavior is extreme and injurious. In addition, an injunction will not be issued if the person's behavior is considered expression under the First Amendment. However, with more facts as to a particular incident, this office could better assess the likelihood of obtaining an injunction and the viability of pursuing this particular remedy.

CONCLUSION

In regulating Dog Areas, the Council has several alternatives to consider. It can criminalize violation of Dog Area rules, or can pursue permit or administrative systems for civil remedies. Finally, in certain limited circumstances, a person's behavior may be declared a public nuisance and an injunction may be imposed.

Respectfully submitted,

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CASEY GWINN
City Attorney

DEB:cdk:pev
Attachment: Exhibit A
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