

September 20, 2002

REPORT TO THE COMMITTEE ON PUBLIC
SAFETY AND NEIGHBORHOOD SERVICES

PROHIBITING SPECTATORS AT ILLEGAL SPEED CONTESTS

INTRODUCTION

This Report addresses a proposal to amend the San Diego Municipal Code prohibiting spectators from attending an illegal speed contest or illegal exhibition of speed. The amendment change also makes it unlawful for a person to be present as a spectator where preparations are being made for such illegal activities. A violation of these amendments would be a misdemeanor.

Adoption of this proposal will provide law enforcement officers and prosecutors with a powerful tool to combat the dangers created by illegal street racing and exhibitions of speed. Our experience in San Diego shows that hundreds of spectators at illegal racing sites throughout the City fuel the illegal racing activity merely by their presence. The ability to prosecute the spectators at illegal street races and exhibitions of speed will significantly curb this criminal activity. This ordinance will allow the Police Department to minimize the hazards associated with illegal street racing and protect the safety of pedestrians and motorists. The proposed ordinance is aimed at a very specific, limited population and will give proper notice to citizens as to what activities are lawful and what activities are unlawful. Such an ordinance is constitutional because it promotes a compelling governmental interest and is narrowly tailored to further that interest.

BACKGROUND

Illegal street racing, also known as “drag racing,” has been occurring in San Diego for decades. In 1960, 2,000 racers and spectators were involved in a “riot” on El Cajon Boulevard. During the 1970s, hundreds of racers and spectators continued to race on City roads, causing a major racing magazine to designate San Diego as one of the top street racing locations in the country. The numbers of racers and spectators slightly decreased during the 1980s to mid-1990s, and began to rise again in 1998, when estimates of 1,000 participants were common. Today, magazines and Internet sites continue to spotlight San Diego as a prime spot for illegal street racing in the nation.

The rise in popularity of illegal speed contests in San Diego has brought with it an increase in deaths related to racing. During a 120-day period from July 1998 to October 1998, there were an astonishing eight deaths and eleven injuries directly related to illegal street racing in San Diego County. During this time, police throughout the country, including the San Diego Police,

attempted to alleviate the problem by strictly enforcing existing laws. The short-term effect was minimal, and there was no long-term impact. Most recently, San Diego's illegal street racing fatality rate has been termed "epidemic." In 2002, there have been twelve fatal accidents on City streets, with five related to illegal street racing.

Illegal street racing in the City has grown into a serious community problem, immediately threatening public peace, property, health and safety. In the late night and early morning hours, hundreds of illegal street racers and spectators converge on various public streets, primarily in commercial or industrial areas. These juveniles and adults block the streets with their cars, set up improvised racetracks complete with individuals acting as race starters, and drag race until police arrive. When patrol cars descend on an illegal racing site, the racers and spectators jump back into their cars and caravan to other locations, where they race until the police catch up with them. The racers, traveling at high speeds from location to location, cause traffic congestion and danger to other drivers. The racers are highly sophisticated, using cell phones, police scanners, and other electronic devices to communicate with each other to avoid arrest. They also communicate through the Internet, providing information on illegal racing events and advice on how to avoid detection and prosecution, often staying one step ahead of law enforcement.

Illegal street racing attracts other criminal activity—juvenile curfew violations, gambling, fights and disturbances, littering, drinking in public, urinating in public, trespassing, and vandalism, including graffiti and destruction of property. The San Diego Police Department regularly patrols racing sites and conducts undercover operations to curb the illegal racing. However, police staffing is not always adequate to handle the enormous crowds that gather at the illegal racing sites. Furthermore, it takes high levels of police staffing and coordination to observe, arrest, and build strong cases against the illegal racers. Attempts to eliminate the problem using speed bumps, tow-away zones, street closures, and other means have not provided a lasting solution. The presence of spectators at these events encourages criminal activity and creates an environment in which illegal activities flourish.

DISCUSSION

I.....Preemption

.....A local ordinance prohibiting spectators at illegal speed contests or exhibitions of speed is not preempted by existing law. The statutory scheme of California Vehicle Code section 23109 does not address the problem of spectators at these illegal events. California Vehicle Code section 23109(a) makes it unlawful for a person to engage in any motor vehicle speed contest on a highway. Pursuant to subsection (b), it is unlawful to aid or abet in any motor vehicle speed contest on any highway. Finally, subsection (c) makes it illegal for a person to engage in any motor vehicle exhibition of speed on a highway, or to aid or abet such illegal activity.

II..... Courts Have Held Spectator Statutes Are Constitutional

.....A. Other Spectator Statutes

.....California law currently makes it a misdemeanor for any person to be present as a spectator at various animal fights. The California Penal Code prohibits spectators at animal fights, including dog fights. Cal. Penal Code 597b, 597.5(b). Similarly, the California Penal Code makes it a misdemeanor for any person to be present as a spectator where preparations are being made for animal fights. Cal. Penal Code 597c.

.....In upholding the constitutionality of the statute prohibiting spectators at animal fights, the California Court of Appeal distinguished the noncriminal act of merely catching a glimpse of an animal fight in progress from being knowingly present for that purpose. *People v. Superior Court (Elder)*, 201 Cal. App. 3d 1061 (1988). In *Elder*, which involved a cockfight, the court ruled the term “spectator” was not vague. The court found “in appropriate cases, courts have resolved similar questions involving statutes which, in broad language, have prohibited arguably lawful activities by resorting to a sensible but narrow interpretation of the statutory language. Such judicial analysis of legislative language is justified as furthering the obvious legislative purpose.” *Id.* at 1072. The court stated, “knowingly present spectators who purposefully watch cockfighting encourage the ‘sport.’ By contrast, a witness to a murder or other crime does not, under ordinary circumstances, encourage the crime.” *Id.* at 1073. The court noted, “[w]ithout the presence of spectators who purposefully watch the animal fighting, much of the “sport” in animal fighting would be eliminated.” *Id.* at 1073-74.

.....The court also referred to California Penal Code section 597.5(b), relating to fighting dogs. The court found that the wording of that statute was more precisely tailored by the Legislature to include the specific intent requirement. California Penal Code section 597.5(b) provides that a spectator has to be “knowingly present” with the intent to be present at the exhibition. *Id.* at 1074.

.....Similar spectator statutes in other states have also been found to be constitutional. A North Carolina court found the statute proscribing being a spectator at a dogfight was not vague. *State v. Arnold*, 557 S.E.2d 119 (N.C. App. 2001). In that case, a police officer was at the scene for a significant amount of time and the defendant had sufficient time to understand the situation and remove himself from the illegal exhibition. In another dogfighting case, a Colorado statute was found to be not vague where an investigative reporter taping the illegal event was a knowingly present spectator. *People v. Bergen*, 883 P.2d 532 (Colo. App. 1994). A Tennessee appellate court found a statute was sufficiently

specific and not vague by prohibiting persons from being knowingly present at cockfights. *State v. Tabor*, 678 S.W.2d 45 (Tenn. 1984). And in Utah, the court found that a sensible application of its ordinance would require a person to be present as a spectator in the sense of one purposefully and intentionally attending and observing a cockfight, as opposed to a mere passerby. *Peck v. Dunn*, 574 P.2d 367 (Utah 1978). While these decisions are not binding in California, they support the reasoning relied on by California courts. Where spectators by their presence encourage criminal behavior, the Legislature has taken action to hold them criminally liable.

.....B. Ordinance Is Not Overbroad

To successfully challenge a statute as overbroad, a party “must demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in which the [statute] cannot be applied constitutionally.” *People v. Hernandez*, 231 Cal. App. 3d 1376, 1382 (1991) (quoting *New York State Club Assn. v. City of New York*, 487 U.S. 1, 14 (1988)). “The mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.” *Id.* (quoting *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984)). Often the concern is that the statute will impose criminal liability on persons who are just passing by and that merely happen to catch a glimpse of the illegal activity.

The spectator ordinance proposed here will be aimed at a limited population. The ordinance will clearly define that these are the people who assemble to watch speed contests or exhibitions of speed, or preparation for such illegal activities. The ordinance also contemplates specific intent by stating that it applies to persons who are knowingly present as spectators, thereby eliminating innocent bystanders. When an ordinance is so limited to a class or group of people, it is constitutional...

C. Ordinance Is Not Vague

Due process of law requires that a penal statute be sufficiently definite to give fair warning. People of ordinary intelligence must be able to understand what conduct is prohibited. And the police must be provided with at least minimal guidelines to prevent arbitrary and discriminatory enforcement. A statute is void for vagueness if its terms are so vague that people of common intelligence must guess at its meaning. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); *Tobe v. City of Santa Ana*, 9 Cal.4th 1069, 1106-1107 (1995); *People v. Mitchell*, 30 Cal. App. 4th 783, 799800 (1994); *People v. Serrano*, 11 Cal. App. 4th 1672, 1675 (1992).

Due process requires only a reasonable degree of certainty. *Mitchell*, 30 Cal. App. 4th at 799; *Tobe*, 9 Cal. 4th at 1107. The United States Supreme Court has consistently held that lack of precision alone does not violate due process. All the Constitution requires is that the language of a statute “conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.” *Roth v. United States*, 354 U.S. 476, 491 (1957); *Lockheed Aircraft Corp. v. Superior Court of Los Angeles County*, 28 Cal. 2d 481, 484 (1946).

A statute cannot be held void for uncertainty if any reasonable and practical construction can be given to its language. The courts are obligated to preserve a statute by giving meaning to any uncertain terms by reference to other definable sources or to the common human experience. *People v. Heitzman*, 9 Cal. 4th 189, 209 (1994); *Mitchell*, 30 Cal. App. 4th at 799. The complainant must demonstrate that the law is impermissibly vague in all of its applications. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 497 (1982).

To ensure this ordinance complies with due process, it was drafted so as to require a knowing presence. Its “sensible application” will require a person to be knowingly present as a spectator in the sense that spectators must purposefully and intentionally attend and observe an illegal speed contest or exhibition of speed, or the preparations for such illegal activities. Being a mere passerby is not proscribed by the statute.

D. Ordinance Does Not Violate Right To Assemble

.....When spectators gather at illegal speed contests and exhibitions of speed, the Constitutional right to assemble is not necessarily implicated. The Supreme Court has identified two kinds of associations entitled to First Amendment protection—those with an “intrinsic” or “intimate” value, and those that are “instrumental” to forms of religious and political expression and activity. *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1110 (1997) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984)). Of the first, the court has said that it is “central to any concept of liberty” and is exemplified by personal affiliations that “attend the creation and sustenance of a family-marriage . . . ; the raising and education of children; and cohabitation with one’s relatives.” *Id.* The second type of association that merits First Amendment protection is composed of groups whose members join together for the purpose of pursuing “a wide variety of political, social, economic, educational, religious, and cultural ends.” *Id.* This instrumental right of protected association is directly related to the “individual’s freedom to speak, to worship, and to petition the government for the redress of grievances” because without it these liberties themselves could scarcely exist, much less thrive. *Id.*

.....Persons gathered for the purpose of watching an illegal speed contest or exhibition of speed, or

preparation for such illegal activities, do not fall into either of the classes of people protected by the First Amendment. The spectator ordinance proposed here only applies to persons who are knowingly present as spectators at such illegal events. The ordinance will not prohibit speech or any form of conduct that is apparently intended to convey a message, or assembly for the purpose of demonstrating a group's support of, or opposition to a particular point of view. Prohibiting persons from gathering for such unlawful activities hardly impairs citizens' rights "to ... assemble freely to consult for the common good." Cal. Const. art. I, 3.

.....The California Vehicle Code proscribes speed contests and exhibitions of speed. "[N]either 'free speech' nor 'peaceful picketing' is a license to flout traffic laws." *People v. Horton*, 9 Cal. App. 3d Supp. 1, 13 (1970) (citing *Cameron v. Johnson*, 390 U.S. 611 (1968) (holding that picketing may be stopped where it interferes with ingress to and egress from public buildings) and *Adderley v. Florida*, 385 U.S. 39 (1966) (holding an assemblage improper where it blocked vehicular traffic to a jail)). The clear aim of this proposed ordinance is to discourage illegal speed contests and exhibitions of speed by prohibiting the gathering of an audience for the unlawful activity.

III.....Other Jurisdictions In California Have Ordinances Prohibiting Spectators At Illegal Speed Contests And Exhibitions Of Speed

.....Local jurisdictions may exercise police powers to protect public health and safety. Frustrated by the inability to combat the serious risk posed by illegal speed contests and exhibitions of speed, three municipalities have recently passed spectator legislation: the City of Los Angeles, the County of Los Angeles, and the City of Ontario. It is too soon to tell whether those ordinances have had an impact on reducing illegal street racing and exhibitions of speed in those communities.

IV..... Penalties For Violation Of The Proposed Ordinance

.....As set forth in San Diego Municipal Code section 12.0201, violators of the proposed spectator ordinance will be subject to arrest for a misdemeanor offense, punishable by up to six months in the County Jail and a \$1,000 fine.

.....**CONCLUSION**

.....Illegal street racing and exhibitions of speed are significant problems in the City of San Diego, threatening the public peace, property, health, and safety of citizens. By passing the proposed ordinance and reducing the number of spectators at these illegal activities, we can eliminate much of the “sport” of speed contests and exhibitions of speed. The proposed ordinance is the best way to address this problem. The City Attorney recommends adoption of this proposal.

..... Respectfully submitted,

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