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REPORT TO THE COMMITTEE ON PUBLIC
SAFETY AND NEIGHBORHOOD SERVICES

PROPOSED ZERO TOLERANCE OF GRAFFITI
TAGGERS ORDINANCE

SUMMARY

The Committee on Public Safety and Neighborhood Services requested that the City Attorney prepare a draft ordinance that would increase penalties for graffiti violators, designed to conform as closely as possible to a proposal made by the Chair. Virtually all of the Chair's requests have been incorporated into the draft ordinance. However, an opinion by the Attorney General makes local government criminal laws against graffiti of limited practical value, because state prohibitions on graffiti supersede local laws making graffiti a crime.

The Committee also requested information about state and local laws limiting the sale and distribution of graffiti tools. State law gives the City authority to regulate the sale and display of graffiti tools such as aerosol paint containers, glass etching products, and marking pens. Municipal Code provisions currently regulate the sale and display of certain graffiti tools, but these regulations can be strengthened to cover a variety of graffiti tools not yet covered by the Municipal Code provisions. The Neighborhood Code Compliance Department favors an amendment to our Municipal Code, in line with one enacted by the City of Los Angeles and approved by the California Supreme Court – to limit access to certain broad-tipped indelible marking pens frequently shoplifted by graffiti vandals and used in their vandalism. Also – in another proposal supported by the Neighborhood Code Compliance Department – the display ordinance's restrictions could be tightened to make it more difficult for taggers to shoplift graffiti tools.

The City has authority to place a sales tax on graffiti tools. The City must enter into a contract with the Board of Equalization to collect and enforce the sales tax. Further, the Committee must provide guidance about what graffiti-related devices it would like to tax and which ones should be exempt. A two-thirds vote of the electorate is required by Proposition 218 to impose this sales tax because the proceeds would be used only for graffiti cleanup, prevention and educational activities, making it a special tax.

The Committee also requested that the City Attorney evaluate whether it could impose a tax on the sale of graffiti tools, and how any such tax would need to be approved. The City has

express authority to impose a sales tax on graffiti tools such as spray paint and marking pens.

This report also includes a discussion of a state-authorized program that, if the City were to meet certain conditions, would require the County's probation officers to seek restitution to the City from juvenile taggers for the costs of enforcing graffiti laws and abating graffiti. The program, however, includes provisions that would likely cost more to the City than it would recover, and would impose significant document collection obligations on City staff. The report also includes a proposal suggested by the Neighborhood Code Compliance Department, incorporated into the draft ordinance, to facilitate cost recovery for graffiti abatement efforts by the Department.

LAWS GOVERNING GRAFFITI

State Law Addressing Graffiti

State law extensively regulates graffiti, its punishment, and its abatement. The main statute discussing graffiti is Penal Code section 594, which makes graffiti punishable as a felony-misdemeanor "wobbler" (depending on the prosecutor's or judge's discretion) if the graffiti causes \$400 or greater in damage. Section 594 makes graffiti a misdemeanor if the damage is less than \$400. State law provides for enhanced penalties for graffiti committed against houses of worship or cemeteries. Penal Code §§ 594.3-594.35.

State law gives courts authority and discretion to require those convicted of graffiti, either as adults or juveniles, to participate in graffiti cleanup community service work. Penal Code § 594(c). Courts must order those convicted of graffiti or other crimes, whether placed on probation or not, to pay restitution to victims for damage caused by their crimes. Penal Code § 1202.4.

State law also regulates tools used to commit graffiti, discussed in more detail below. State law and the California Supreme Court afford cities authority to regulate the sale of graffiti tools and implements. Penal Code § 594.5; *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893 (1993).

In addition, state law authorizes local governments to create nuisance abatement and graffiti cost recovery laws. Government Code § 53069.3; Government Code § 38773 et. seq. Further, as discussed in more detail below, the City has authority to impose a sales tax on spray paint, writing and marking implements, with proceeds from the sales tax used to abate graffiti. Also, discussed in more detail below, state law gives the City authority to have juvenile probation officers recover costs of graffiti enforcement and removal. Welfare & Institutions Code §§ 742.10-742.22.

State law, however, supersedes cities' ordinances that make committing graffiti a crime. A 1995 Attorney General opinion, 78 Op. Att'y Gen. 143, concluded that "A charter city

ordinance making it a crime to place graffiti upon real or personal property located within the city would be void due to its duplication of state criminal statutes.” Further, the field of criminal sentencing and consequences of crime is likely preempted by state law. *Abbott v. City of Los Angeles*, 53 Cal. 2d 674 (1960).

San Diego Municipal Codes Regulating Graffiti

Section 54.0405(a) of the Municipal Code prohibits graffiti “[t]o the extent not otherwise provided for by state law...”. Because Penal Code section 594 prohibits graffiti anywhere, graffiti bans are always “provided for by state law.” The Municipal Code, to the extent it criminalizes graffiti, is likely unenforceable. Prosecutors almost always charge offenders with violating the state statute instead of Section 54.0405(a). The State is authorized to make some offenses felonies, and penalties under state vandalism laws are higher than the Municipal Code’s penalties. Vandalism is a “wobbler,” which is an offense that can be charged as a felony or misdemeanor, not under state law.

State law does allow local governments to address graffiti violations with civil penalties, and allows localities to regulate instruments and tools used in creating graffiti. Section 54.0404 authorizes (and Penal Code section 594.5 permits) the City to seek civil penalties, injunctions, or other administrative remedies typically used in code enforcement. Municipal Code §§ 54.0404-05. City ordinances also allow the City to administratively seek to remove the graffiti itself from public or private property. Municipal Code §§ 54.0407-09. Existing law also provides for cost recovery for City expenses in addressing graffiti (§ 54.0410), parental responsibility for graffiti by juveniles (§ 54.0411), and authorizes rewards for information leading to the apprehension or conviction of taggers (§ 54.0413).

The Municipal Code also regulates the display and sale of graffiti tools. Section 54.0414 limits the display of certain graffiti tools, making them less accessible to minors. Section 58.07.1 prohibits minors from possessing, and others from furnishing to minors, aerosol spray cans.

THE COMMITTEE’S REQUEST AND THE ATTACHED DRAFT ORDINANCE

At its March 29, 2007 meeting, the Committee requested “an ordinance that is as close as possible to the Chair’s proposal” to address 11 specific proposals. A copy of the Chair’s proposal is attached to this report.

The Chair requested that the ordinance include a statement of purpose indicating that graffiti was associated with criminal street gang activity. The draft ordinance accompanying this report complies with this request, indicating in Section 1 the link between graffiti and criminal street gangs. The language appears in proposed Section 54.0401(c). This change presents no legal issues.

The Chair requested that offenders who violate the City's graffiti laws "are to be prosecuted, to pay for their damages, and to face other penalties." The request that offenders be prosecuted is also accomplished through amendments to Section 54.0401, expressing the desire that criminal offenders be prosecuted for violations of both state and city graffiti laws. Section 54.0401 is also amended to indicate the Committee's desire that all offenders be prosecuted, be compelled to pay restitution, and be ordered to perform community service to clean up graffiti in the City of San Diego. State laws already require offenders convicted of graffiti and other crimes to pay restitution to their victims (*see, e.g.,* Penal Code § 1202.4). State law also authorizes courts to order some offenders to perform community service to eradicate graffiti. *See, e.g.,* Penal Code § 594(c). Section 54.0412 of the Municipal Code presently requires courts sentencing juvenile violators of the City's graffiti ordinance to perform at least 24 hours of community service. This section is amended to require this penalty be imposed on both juveniles and adults who are convicted of violating the City's graffiti prohibition. While these changes are incorporated into the draft ordinance, it must be remembered that the Municipal Code's law making graffiti a crime is likely superseded by state law.

Third, the Chair requested that all graffiti violators be charged with misdemeanors and be subject to mandatory minimum penalties. The change to Section 54.0412 makes community service mandatory upon conviction of violating Section 54.0405. Section 54.0404 is amended by the draft ordinance to require that violations of Section 54.0405(a) be prosecuted as misdemeanors, not infractions.

The Chair requested that all juvenile offenders be ordered to clean up their own graffiti and be ordered to do community service. This requirement already exists functionally in Section 54.0412, and as noted above, may be superseded by state law. In case they are not superseded, the requested changes are incorporated in Section 54.0412, as amended by this draft ordinance. The Welfare & Institutions Code provides authority for cities to pass an ordinance which would obligate county probation officers working on convicts' cases to seek and require restitution to the City for its costs in abating graffiti. This is discussed in more detail near the end of this Report.

The Chair's fifth request was for an ordinance that "Requires juvenile taggers to have curfew restrictions for a minimum of six months and to include limits on the juvenile from being in the company of other juveniles in public without a parent or guardian present." To some extent, this proposal cannot constitutionally be enacted. In addition to concerns about juvenile sentencing being preempted by state law, the proposal raises some other insurmountable legal issues. The proposal is so broad that instead of going to work, parents would need to attend school with their children so that their children would have parental supervision while around other juveniles. Even if exceptions are added to address this problem, the proposal, as broad as it is, may implicate First Amendment concerns, such as freedom of speech and association. Nonetheless, conditions requiring juveniles to avoid contact with known gang members are

frequent probation conditions for juvenile convicts. Efforts to create broader conditions limiting juveniles' freedom of association violate minors' First Amendment rights, according to the recent California Supreme Court decision *In re Sheena K.*, 40 Cal. 4th 875 (2007). Curfews already exist for juvenile taggers and others. See Municipal Code § 58.0102. Existing laws and the frequency with which judges prohibit juvenile taggers from associating with other gang members address the Committee's concerns, and the City is not in much of a position to strengthen these restrictions.

The Chair's sixth request was to have juvenile taggers' community service terms be doubled for recidivists. The seventh request is that adults convicted of violating Section 54.0405 to perform at least 48 hours of community service. The draft ordinance includes modifications modification to Section 54.0412 to accomplish these goals. Specifically, all violators, juvenile or adult, would be required to perform 48 hours of community service, with recidivists, both adult and juvenile, required to perform at least 96 hours of service. These provisions may be superseded, however, by state laws covering graffiti and sentencing.

The eighth request was for adult convicts' fines and community service to be doubled for repeat violations of Section 54.0405(a). As discussed above, this ordinance doubles the minimum community service requirements for both juvenile and adult convicts violating Section 54.0405. Since there are no minimum fines for violating section 54.0405, there are no minimum fines to double.

The ninth through eleventh requests by Committee were to require the Police Chief, City Attorney, and Neighborhood Code Compliance Department to submit annual reports to the Committee about graffiti enforcement and abatement. This draft ordinance places this obligation on the Mayor and the City Attorney rather than on individual departments in order to provide the Mayor's Office with flexibility to assign the tasks of preparing and presenting the report to the appropriate officials as the City's government structure goes through its reorganization. The Chair's proposal placed this reporting requirement into the Municipal Code. City staff reporting requirements are not required to be in the Municipal Code as the Council may request information at anytime. Accordingly, this draft ordinance places it into the ordinance, but not in the Municipal Code.

In short, some of the Committee's proposed changes to the Municipal Code are incorporated into this draft ordinance, although state-law preemption likely will mean that few if any of them will meaningfully affect the criminal justice process. More success, however, might be attained by some of the Committee's additional suggestions for anti-graffiti legislation.

LEGISLATION REGULATING THE SALE AND DISPLAY OF GRAFFITI TOOLS

Both state and local laws regulate the sale or display of graffiti tools. The City has authority to tighten restrictions on the display and sale of graffiti tools and instruments. For the Committee's convenience, the draft ordinance contains changes to the section limiting display of graffiti tools recommended by officials in the Department of Neighborhood Code Compliance tasked with enforcing the ordinance. Nonetheless, if the Committee is interested in toughening restrictions on graffiti tool display and sale, it should provide guidance about what items' display and sale it would like restricted, and to what degree it would like these items' display regulated.

State Laws

Penal Code section 594.1(a) prohibits any person or business, other than a parent or guardian, from furnishing to a minor any "etching cream or aerosol container of paint that is capable of defacing property..." The section provides for a number of exceptions to this prohibition. The law does not apply to sales of 6-ounce containers of etching cream or aerosol paint to minors under the supervision of the minor's "parent, guardian, instructor, or employer." Penal Code § 594.1(a)(4). Minors are also authorized to use aerosol paint or etching cream at school-related activities under the supervision of instructors. Penal Code § 594.1(a)(5). Retailers selling etching cream or aerosol paint must post signs indicating that vandalism is a crime. Penal Code § 594.1(c).

It is illegal for anyone to possess etching cream or aerosol paint in public view at any "posted public facility, park, playground, swimming pool, beach, or other recreational area... unless he or she has first received valid authorization..." Penal Code § 594.1(d). Section 594.1(e) also prohibits minors from possessing etching cream or aerosol paint in public for the purpose of defacing property. Section 594.2 prohibits possession of drill bits and glass-etching equipment for the purpose of defacing property.

Section 594.5 gives local government regulatory authority over the sale of graffiti tools and over civil remedies for graffiti blight: "Nothing in this code shall invalidate an ordinance of, nor be construed to [preclude] the adoption of an ordinance by, a city... if the ordinance regulates the sale of aerosol containers of paint or other liquid substances capable of defacing property or sets forth civil administrative regulations, procedures, or civil penalties governing the placement of graffiti or other inscribed material on public or private, real or personal property."

State law does not place any limits on the display of graffiti tools. In *Sherwin-Williams*, the California Supreme Court held local ordinances regulating the display of graffiti tools was not preempted by state law.

Local Laws and Potential for Amendments

Municipal Code section 54.0414 requires any commercial enterprise “to display for sale, trade or exchange” aerosol paint containers or glass etching products to place them “in an area from which the public shall be securely precluded without employee assistance.” Specifically, these items must be kept in “(1) a completely enclosed cabinet or other storage device which shall be permanently affixed to a building or building structure, and which shall at all times except during access by authorized representatives, remain securely locked; (2) in an enclosed area behind a sales or service counter from which the public is precluded from entry; or (3) in an area under direct visual supervision of employees at all times during business hours.” Municipal Code § 54.0414(b).

Section 54.0414 does not regulate the display of Sharpies or other marking tools. The Committee might consider amending Section 54.0414 to limit the display of certain pens commonly used by taggers. The Committee, however, ought to provide guidance about what types of pens should be kept behind lock and key. It is for the Committee to decide whether this prohibition should include only certain specified types of marking implements or should cover everything from Sharpies to markers commonly used by children for coloring books. In *Sherwin-Williams*, the California Supreme Court approved of a Los Angeles ordinance limiting the display of “marker pens with tips exceeding four millimeters in width, containing anything other than a solution which can be removed with water after it dries...” *Sherwin-Williams*, at 901 n. 4, quoting Los Angeles Municipal Code § 47.11. In case the Committee is interested in enacting this type of ordinance, Section 4 of the draft ordinance includes amendments to Section 54.0414 to broaden its scope to mirror Los Angeles’ ordinance.

The Department of Neighborhood Code Compliance has also expressed some concern over abuse of an exception to the display ordinance. Currently, Section 54.0414 allows retailers to keep these items unlocked and readily available to the public if they are in an area “under direct visual supervision of employees at all times...” The Department has indicated that often these items may be in a highly visible area, but are not supervised and are thus easily accessible to taggers interested in shoplifting graffiti tools. The Department has requested that this exception be eliminated, and the draft ordinance includes this change in case the Committee chooses to enact it.

Municipal Code section 58.07.1(a) makes it illegal to sell or furnish aerosol spray paint to a minor unless the person who sells or furnishes the paint provides supervision over the minor’s use of it. Subdivision (b) makes it illegal for minors to have aerosol paint on public or private property unless the minor has the consent of the property owner.

Unlike Penal Code section 594.1, the Municipal Code does not prevent the sale of glass etching products or Sharpies or other marking pens to minors. Nor does the Municipal Code prohibit possession of glass-etching materials or Sharpies by minors. The sale/furnishing provision in Section 58.07.1(a) also could be tightened up. As written, Section 58.07.1(a) would not prohibit a 19-year-old tagger from handing a spray-paint can to a 17-year-old tagger if the

19-year-old watches the juvenile deface property. The Committee might consider conforming Section 58.07.1 with the restrictions in Penal Code section 594.1.

The Committee might also broaden the ban on minors possessing graffiti tools in Section 58.07.1(b). That prohibition could be expanded to cover glass etching products and certain marking pens in addition to aerosol paint containers. Further, the ordinance could be modified to also require supervision by a parent, guardian, legal employer, or instructor when a minor possesses aerosol paint, glass etching products, or certain marking pens.

Particularly if the Committee is inclined to expand the prohibition on sales or furnishing of these items to minors, or possession of these items by minors, the Committee might consider what exceptions ought to apply. State law authorizes minors to use these devices when supervised by employers or instructors. In order to draft such changes, our Office needs additional guidance from the Committee about whether, and to what extent, the Committee would want to further regulate sales of these items, as well as what, if any additional exceptions the Committee would like to add.

This past February, a federal appeals court in New York placed some limits on a city's prohibition on sales of graffiti tools to minors, relying on the First Amendment as the basis for its rulings. The court in *Vincenty v. Bloomberg*, 476 F.3d 74 (2d Cir. 2007) considered a New York City ban on the sales to everyone under 21 years old of graffiti tools and banned possession, other than on their own property, of graffiti tools by those under 21. The court found that applying the ordinance to those between 18-21 years old (adults who were under 21) violated free speech rights. The opinion does not really explain why a prohibition on graffiti tools sales actually implicates free speech rights, and it seems to be a one-of-a-kind opinion. Nonetheless, if the Committee is interested in affecting sales of graffiti tools to those over 18 years old, it may be more prudent to impose reasonable restrictions rather than an outright ban.

TAXING GRAFFITI TOOLS

The Committee has requested an opinion about whether a city could tax graffiti tools, and what type of vote would be required to put such a tax in place. The City has authority to tax graffiti tools, but to impose such a tax would require a two-thirds vote of the electorate. Revenue & Taxation Code § 7287 et. seq. authorize city governments to enact a sales tax on graffiti tools and marking implements. The city could impose up to a \$0.10 tax per paint container and up to a \$0.05 per pen sales tax. Rev. & Tax. Code § 7287(a). The City would need to make a contract with the State Board of Equalization to collect the tax, and that agency would be entitled to recover its costs. Rev. & Tax. Code §§ 7287.2(a), 7287.6(a). Revenues from the tax could only be used for "removal and prevention of graffiti, or for educational programs for at-risk youth to combat graffiti vandalism..." Rev. & Tax Code § 7287.6(b).

Article XIIC, section 1, of the California Constitution, added by Proposition 218, defines a “special tax” as “any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.” Article XIIC, section 2(a) says that all local government taxes are either general (taxes used for general government purposes) or special taxes. Section 2(d) says in pertinent part, “No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote.”

The tax authorized by Revenue & Taxation Code sections 7287-7287.10 is a “special tax.” It is designed to curb graffiti, and proceeds from the tax may only be used for graffiti cleanup, prevention, and educational activities. As a special tax, it can only be approved by a two-thirds vote of the citizens of the City of San Diego.

COMPELLING RESTITUTION

The Chair had also expressed interest in compelling offenders to pay for the damage caused by their tagging. Currently, the City seeks restitution from offenders convicted in criminal cases, and courts are obligated to order restitution to victims, whether private citizens or government entities, whenever an offender is convicted, per Penal Code section 1202.4.

The Legislature has enacted an additional program (Welfare & Institutions Code sections 742.10-742.22) to allow cities to recover restitution from juvenile taggers through a county’s probation department. While superficially appealing, this program looks like a bad deal for the City, and if the City were to participate, the City may spend more money implementing the program than it would recover from the juvenile offenders.

To put this program in place, the city must gather cost estimates, reviewed every three years, for the average costs of enforcement of graffiti laws and abatement of graffiti. Welfare & Institutions Code § 742.14(b)-(c). Further, the City would have to provide in a timely manner information to probation officers about the precise cost of apprehending each minor. Welfare & Institutions Code § 742.14(e). The City would also have to promptly provide information about the cost of abating each instance of graffiti for which criminal charges were filed. Welfare & Institutions Code § 742.14(f). Failure to promptly gather this information could mean that the city is unable to recover its costs through the juvenile court process. Welfare & Institutions Code § 742.10(g).

Gathering this information could be quite costly or time-consuming. The deadlines might on occasion be quite quick, since some juveniles taken into custody might be brought to court, plead guilty, and be sentenced within three days of their arrest. Many juvenile offenders are indigent, and they (and their parents) cannot or will not pay the court-ordered expenses. Even if they do, the county can keep 15% of any money brought in for the city as its own costs, and the

statute does not clearly require the county to pay the city first before collecting its 15% of court-ordered cost-recovery funds.

It is not at all clear whether enacting an ordinance per Welfare & Institutions Code §§ 742.10-742.22 would do the City any good or would actually cost the City because of the labor-intensive statistics-collection obligations the code would place on the City. It is recommended that the Committee direct the Mayor's Office to submit an analysis of the costs and benefits of enacting an ordinance pursuant to Welfare & Institutions Code sections 742.10-742.22, including an opinion about whether efforts that would be required to comply with the information-gathering requirements might be better spent on current graffiti-abatement and enforcement efforts.

COST RECOVERY

The Department of Neighborhood Code Compliance has requested an additional change to the Municipal Code. Currently, Section 54.0410 authorizes the City to recover its graffiti abatement costs from property owners. Existing law only allows the City to recover from property owners if the City has abated graffiti on their property five times in a 12-month period.

The Department has requested that Section 54.0410 be amended to allow recovery in additional circumstances in order to encourage property owners to keep their property clear of graffiti. The draft ordinance includes these proposed changes to Section 54.0410, which would authorize the City to recover its costs if the City has to abate graffiti on the same piece of property twice within a 12-month period. The director of the Neighborhood Code Compliance Department would retain discretion not to seek cost recovery from property owners who are too disabled or financially strapped to clean the property, or otherwise to avoid seeking cost recovery when other extraordinary circumstances are present.

CONCLUSION

In conclusion, here is a summary of what is and is not included in the draft ordinance:

The Chair's proposal to have the Municipal Code reflect the relationship between graffiti and gang violence is incorporated into Section 1 of the draft ordinance.

The Chair's proposal that offenders be prosecuted for tagging offenses, be ordered to pay restitution, and be ordered to perform community service are largely incorporated into Sections 1, 2, and 4.

The Chair's proposal that all taggers be prosecuted with misdemeanors and be subject to mandatory community service is incorporated to the extent possible in Section 2 and 4 of the draft ordinance.

The Chair's request that juvenile taggers be subject to curfews and be prohibited from associating with other juveniles in public without parental supervision is not included in the draft ordinance because it cannot constitutionally be implemented.

The Chair's requests to increase mandatory minimum community service terms for offenders is incorporated into Section 4 of the draft ordinance. To the extent the Chair sought to double the mandatory minimum fines for taggers, the request is not in the ordinance because there are no mandatory minimum fines.

The Chair's request to have various departments report annually to the Committee is incorporated into Section 6 of the draft ordinance.

The proposal supported by the Neighborhood Code Compliance Department to limit the display of graffiti tools is incorporated into Section 5 of the proposed ordinance.

Neighborhood Code Compliance Department's request to further permit cost-recovery efforts against property owners when NCCD abates graffiti is incorporated in Section 3 of the draft ordinance.

Respectfully submitted,

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