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REPORT TO THE COMMITTEE ON PUBLIC
SAFETY AND NEIGHBORHOOD SERVICES

PROPOSED ZERO TOLERANCE OF GRAFFITI
VANDALISM ORDINANCE

SUMMARY

The Committee on Public Safety and Neighborhood Services requested that the City Attorney work collaboratively with the Committee's staff to prepare an ordinance in keeping with the Chair's proposed zero-tolerance approach to the graffiti problem in San Diego. The Committee was interested in four specific aspects of graffiti enforcement: (1) penalties for committing graffiti vandalism, (2) limiting the display or sale of implements commonly used by graffiti vandals, (3) imposing a tax on graffiti tools, with proceeds to be used for anti-graffiti education and abatement programs, and (4) increased oversight of graffiti enforcement and abatement by the Committee to ensure the effectiveness of the City's efforts.

This collaborative process has produced the draft ordinance accompanying this report. The draft ordinance requires vendors of broad-tipped indelible-ink markers commonly used by graffiti vandals to keep them secure. It further tightens security requirements for displaying graffiti tools, eliminating an exception presently in the Municipal Code that is easily abused.

The proposed ordinance also updates our Municipal Code's treatment of graffiti offenses. The effort to update the graffiti laws in the Municipal Code is spurred by an Attorney General opinion indicating that state law preempts cities from criminalizing graffiti. The draft ordinance repeals problematic provisions of the code and expresses the Council's intent that that graffiti vandals be prosecuted to the fullest extent of the law, and that prosecutors seek the maximum penalties against graffiti vandals authorized by state law, including restitution to their victims.

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, however doing so would require a two-thirds vote of the public in conformity with Proposition 218.

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. Under section 594, felony graffiti violators can be sentenced to up to three years in state prison (or additional prison time depending on the offender’s criminal history), up to \$10,000 in fines, full restitution to victims of their vandalism, and community service. The vandalism statute has been altered at least a half-dozen times since 1998, and the general trend has been to increase penalties for vandalism.

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.

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 DRAFT ORDINANCE

The draft ordinance, created in a collaborative effort between the Committee’s staff and the City Attorney’s Office, amends Sections 54.0401, 54.0405, and 54.0414 and repeals Section 54.0412 of the Municipal Code. Through these changes and through an uncodified section, the draft ordinance makes the following changes:

1. Requiring Vendors to Secure Broad-Tipped Indelible Ink Markers.

Existing law requires vendors to keep spray paint and glass etching products secure, so that they are less subject to shoplifting. The draft ordinance adds to the list of objects that must be secured broad-tipped indelible-ink markers, devices commonly used by graffiti vandals. Markers that must be secured are those with a tip that is 4 millimeters or broader and that use ink that is not water-soluble. This definition conforms with that used by the cities of Los Angeles and San Francisco.

2. Tightening Security Regulations for Graffiti Implements.

Existing law requires that vendors of graffiti implements keep these implements in a secure area to prevent shoplifting. One method for accomplishing this is to keep graffiti implements in an open area that is under constant supervision by store employees. The Neighborhood Code Compliance Department indicates that some vendors purport to follow these rules, but do not constantly supervise their stock of graffiti tools, allowing for easy access to them by shoplifters. The draft ordinance removes this option for securing graffiti implements, leaving vendors with only more effective methods to secure their stock of implements that may be used for graffiti.

3. Updating the Municipal Code and Seeking Aggressive Prosecution of Graffiti Offenders.

Currently, the Municipal Code considers graffiti vandalism to be both a crime and a nuisance. As noted above, however, the Attorney General has opined that state law has preempted these types of laws, making them void. The draft ordinance removes the problematic provisions from the Municipal Code and encourages prosecutors to pursue graffiti vandalism to the fullest extent permitted by state law. This benefits law enforcement by eliminating confusion among police officers and other law enforcement personnel about what offenses to charge those who commit graffiti vandalism.

4. Increasing Oversight of Graffiti Enforcement and Abatement Efforts to Ensure Their Effectiveness.

The draft ordinance adds a new requirement that the Mayor's Office and the City Attorney's Office annually report to this Committee about graffiti abatement and enforcement efforts. This permits the Committee to exercise more oversight of graffiti abatement and enforcement efforts.

LEGISLATION REGULATING THE SALE OF GRAFFITI TOOLS

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.”

Local Laws and Potential for Amendments

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.

If the Committee wishes to address the sale or possession of graffiti implements, the City Attorney's Office would need guidance from the Committee about how to address the following questions: Exactly what items sold to minors should be prohibited? Exactly which items should minors be barred from possessing? Should there be any exception allowing minors to possess these items when under the supervision of their parents, employers, or instructors? Should there be exceptions allowing minors to possess these items in certain places, such as certain employers or art classes?

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. authorizes 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.

RECOMMENDATION

The City Attorney recommends that the Committee approve the attached draft ordinance for consideration by the City Council. If the Committee is interested in taking additional actions to regulate or tax graffiti implements, the Committee must provide our Office with additional guidance.

Respectfully submitted,

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