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February 16, 2010

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

ADOPTION OF EMERGENCY CURFEW REGULATIONS ORDINANCE

INTRODUCTION

Since 1947, the City has had a curfew ordinance setting a curfew for juveniles under the age of eighteen. In 1997, the 1947 ordinance was found unconstitutional. *Nunez by Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997). In response, the City adopted an emergency ordinance on June 18, 1997, O-18415, effective immediately, and adopted a "due course" ordinance on July 1, 1997, O-18416, effective July 31, 1997. *See* San Diego Charter section 17 (governing ordinances and effective dates).[1] According to the City Attorney Report[2] accompanying the emergency ordinance, the City relied on a Dallas ordinance in drafting the 1997 ordinance. The Dallas ordinance had been upheld in *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993), and was cited with approval in the *Nunez* case. 114 F.3d at 940 n.2.

The 1997 ordinance is found at sections 58.0101, 58.0102, and 58.0103 of the San Diego Municipal Code. The ordinance makes it unlawful for a minor (a juvenile under the age of eighteen) to be present in any public place or on the premises of any establishment (a private business to which the public is invited) between the hours of 10:00 p.m. and 6:00 a.m. the following morning. The minor's parent or guardian is also liable for knowingly permitting, or by insufficient control allowing, a curfew violation. The ordinance contains a list of defenses to a prosecution, and a procedure for the police to follow in investigating curfew violations.

On May 28, 2008, A.G., a minor, was stopped for speeding by a California Highway Patrol officer. She was brought in to juvenile court for various offenses, including a violation of the City's curfew ordinance. The trial court made a true finding with respect to the curfew violation. A.G. appealed, alleging that the City's curfew ordinance was unconstitutional. On February 4, 2010, the Fourth District Court of Appeal (Court) found the City's curfew ordinance unconstitutional. *In re A.G.*, 2010 WL 378098 (Cal. App. 4th Dist) 11. (Opinion.)[3] Hence, we recommend that you repeal the current curfew ordinance and adopt the emergency ordinance accompanying this Report, which makes changes to cure the defects noted by the Court.

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[1] Charter section 17 is currently superseded by Charter section 295 for the trial period of the strong-mayor form of government. Charter § 260(a).

[2] *See* City Attorney Report: Adoption of Ordinance Relating to Juvenile Curfew (June 17, 1997)

[3] The City was not a party to trial court case or the appellate case. The District Attorney handles juvenile cases, and the California Attorney General handles the appeals from those cases.

DISCUSSION

The 1997 ordinance made it unlawful for a minor to be in a public place or establishment between 10:00 p.m. and 6:00 a.m. the following day. San Diego Municipal Code § 58.0102 (a). The ordinance contains a list of defenses (also referred to as exemptions by the Court in *In re A.G.*) to that charge. The exemptions include being on an errand on behalf of a parent; engaged in employment activity; attending certain school, religious, or other recreational activities supervised by adults and sponsored by some type of civic organization or similar entity; and exercising First Amendment rights. San Diego Municipal Code § 58.0102(c). A police officer must first ascertain whether any of the defenses apply before issuing a citation or making an arrest for a curfew violation. San Diego Municipal Code § 58.0102(d).

In the case of *In re A.G.*, the Court found the exemptions were not broad enough and therefore unconstitutionally burdened a minor's right to travel and violated First Amendment rights. Specifically, the Court found that although the ordinance appropriately exempts minors attending certain official school, religious, or other recreational activities, it does not exempt the minor's travel to and from those activities. (As we note in our letter to the Attorney General, attached, the ordinances passed by the Council in 1997 actually contained the "travel" exemption for such activities, but the ordinance as it appears in the web version of the Municipal Code does not[4]). Secondly, the Court found that although the ordinance protects a minor's exercise of First Amendment rights, it does not protect a minor's travel to and from those activities, unless accompanied by an adult. Finally, the Court found that the ordinance lacked an exemption that would allow a minor to travel from one exempt activity to another.

Additionally, the Court may have added a need for additional exemptions beyond the need to address "travelling to and from" the current exempt activities. After discussing the "travel" issues in the Opinion, the Court went on to say the following:

> Finally, the ordinance contains no "going to or coming home from" exemption that would permit a minor safely to pass from one exempt location to another, *which circumscribes a minor's ability to attend activities like an evening study group hosted in a fellow student's home (or even a social occasion at that home) and limits the minor to attending those events only when the minor is certain the work (or festivities) will end with enough time to allow the minor's pre-curfew return home. Thus, the ordinance sweeps within its ambit entirely benign (or even laudable) conduct, and the People offer no articulation of how circumscribing such benign conduct directly and materially furthers the underlying governmental interests of preventing crime and victimization.*

[4] The Clerk's Office has informed us that procedures currently exist that did not exist in 1997 to better prevent mistakes in publication.

> . . . The San Diego curfew ordinance suffers from both defects: it imposes de facto restrictions on or conditions to the exercise of First Amendment rights (as well as restricting or conditioning the minor's ability to attend certain official school, religious, or other recreational activities), *and it restricts the minor's ability to engage in activities after 10:00 p.m. in otherwise safe (and potentially supervised) environments without any suggestion that going directly to (or returning directly home from) those locales implicates the juvenile crime and juvenile victimization goals of the ordinance.*

In Re A.G., 2010 WL 378098 at 11 (emphasis added) (footnote omitted).

One reading of this language is that the Court was creating a new exemption related to activities occurring in private homes because the examples provided by the Court as "benign" seem to relate to activities at a private home. Our concern is that those examples do not correspond to the exempt activities, nor do they correspond to the general requirement of allowing travel in between exempt activities, and arguably creates a new category of exemptions. Should that category exist, those exemptions (studying at a home, a social occasion, festivities, "benign" conduct) would severely impact the effectiveness of our curfew ordinance. It is unclear to us how to create that category, if indeed, that is what the Court wanted.

Reading the case in its entirety, we think, instead, that the Court was principally concerned with the lack of "travel to and from" language as previously discussed. Moreover, the ordinances approved of in other cases cited by the Court did not contain such expansive language, and mirror more closely what the Council passed in 1997. *See*, e.g. *Qutb v. Strauss,* 11 F. 3d 488 (5th Cir. 1993), *Hutchins v. District of Columbia,* 188 F. 3d 531 (D.C. Cir. 1999).

However, as discussed above, it is unclear what the Court meant. We have asked the Attorney General to seek clarification from the Court of Appeal or to request that the Court strike the above-cited language (see attached letter to the Attorney General). If the Attorney General chooses not to seek clarification, or if he does and the Court declines to clarify its Opinion, it is possible we will see further challenges to the ordinance based on the *In Re A.G.* case.

We have brought to you an emergency ordinance which addresses the Court's concern over a lack of "travel" language in connection with certain exemptions. Specifically, we add the "to and from" language to the exemption involving official school, religious, or other recreational activity; we add similar language to exempt travelling to and from the exercise of First Amendment activity; and we add a more general travelling exemption for travel between exempt activities.

Given the concerns noted by the Court, and a lack of symmetry between the 1997 emergency, "due course" and published curfew ordinance, we recommend the record be made clear that the City is repealing all of its curfew ordinances in their entirety. Therefore, we have

amended San Diego Municipal Code Chapter 5, Article 8, by adding a new Division 1 entitled "Curfew Regulations." Other than the earlier described "travel" language, we have substantially replicated the 1997 "due course" ordinance.[5]

CONCLUSION

We recommend that you adopt the proposed emergency ordinance. While we believe grounds exist for implementation of this ordinance as an emergency measure under Charter section 295, such ordinances may be challenged on the grounds that a true emergency does not exist. Adopting this emergency ordinance will allow the police department to reinstate enforcement immediately. We will bring forward a "due course" ordinance to replace the emergency ordinance to allow the police department to continue uninterrupted enforcement. At the time of drafting the emergency ordinance, it was unknown what the Attorney General would do, and what the Court may do. Therefore, this Office recommends waiting until those issues are resolved before we bring the "due course" ordinance forward so that, if necessary, we can incorporate any additional changes that may be needed.

Respectfully submitted,

JAN I. GOLDSMITH, City Attorney

By Mary T. Nuesca
Mary T. Nuesca
Chief Deputy City Attorney

MTN:amt
Attachment
RC-2010-5

[5] The "due course" ordinance omitted the definition of "establishment"; we have included that definition. The web version did not replicate the penalty section of the "due course" ordinance; we replicated the "due course" penalty provision. There are other non substantive differences between the 1997 versions and our recommended ordinance. None of these differences were at issue in the *A.G.* case.

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February 11, 2010

VIA FACSIMILE AND HAND DELIVERY

Gary W. Schons, Sr. Assistant Attorney General
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San Diego, CA 92101-3711

In re A.G., No. D053991
2010 WL 378098

Dear Mr. Schons:

We have reviewed *In re.A.G.* [the Opinion] and the history of our curfew ordinance. San Diego Municipal Code § 58.0101, *et. seq.* We want to bring to your attention the following. With respect to the ordinance itself, it appears that the parties and the Court relied on the published version of the City's Municipal Code, which is on the City's website as an Official City Document. As you know, the current ordinance was drafted in response to *Nunez by Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997). According to a City Attorney Report[1] the City modeled the current ordinance after a Dallas ordinance that was upheld in *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993), and cited with approval in the *Nunez* case. 114 F.3d at 940, n.2. In 1997, the City adopted an emergency ordinance on June 18, 1997, O-18415, effective immediately, and adopted a "due course" ordinance on July 1, 1997, O-18416, effective July 31, 1997. *See* San Diego Charter section 17 (outlining procedures for ordinances).[2] Both ordinances contained the following language with respect to the exemption involving school, religious, and other recreational activity:[3]

> [A]ttending an official school, religious, or other recreational activity supervised by adults and sponsored by the City of San Diego, a civic organization, or another similar entity that takes

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[1] *See* City Attorney Report: Adoption of Ordinance Relating to Juvenile Curfew (June 17, 1997)
[2] Charter section 17 is currently superceded by Charter section 295 for the trial period of the strong-mayor form of government. Charter § 260(a).
[3] The same language was present in the Dallas ordinance. *Qutb*, 11 F.3d at 498.

> responsibility for the minor, or going to or returning home from, without any detour or stop, an official school, religious, or other recreational activity supervised by adults and sponsored by the City of San Diego, a civic organization, or another similar entity that takes responsibility for the minor;

San Diego Ordinance O-18415 (June 18, 1997); San Diego Ordinance O-18416 (Jul. 1, 1997) (emphasis added).

The published version of the Municipal Code does not contain the underlined language.[4] The Court of Appeal, in *In Re A.G.*, ruled that the absence of that language in the Code was significant, and ultimately a fatal flaw in the ordinance.

It appears to us that the Court was also concerned that the ordinance, while exempting the expression of First Amendment activity, did not provide an exemption for travelling to and from the exercise of First Amendment activity. *In Re A.G.*, 2010 WL 378098 (Cal. App. 4th Dist) 11. Further, the Court was concerned that the ordinance did not contain a general exemption for travelling between otherwise exempt activities. *Id.*

It is our intent to recommend to the City Council that a new curfew ordinance be adopted which will essentially replicate the current ordinance with the following additions:

1. We will add the "to and from" language to section 58.0102(c)(7)—that is, we will add the language that is missing from the published version of the Municipal Code to the exemption involving official school, religious, or other recreational activity.

2. We will add similar language to exempt travelling to and from the exercise of First Amendment activity (SDMC § 58.0102(8)).

3. We will add a more general travelling exemption for travel between exempt activities.

We want to bring to your attention our concern that the Opinion contains language that may not be germane to the holding, but could cause confusion and further lawsuits. Specifically, the Court says:

> Finally, the ordinance contains no "going to or coming home from" exemption that would permit a minor safely to pass from one exempt location to another, which circumscribes a minor's ability to attend activities like an evening study group hosted in a fellow student's home (or even a social occasion at that home) and limits the minor to attending those events only when the minor is

[4] There are other discrepancies between the emergency, due course, and published versions. None of those discrepancies involve the exemptions or defenses contained in San Diego Municipal Code section 58.0102(c).

> certain the work (or festivities) will end with enough time to allow the minor's pre-curfew return home. Thus, the ordinance sweeps within its ambit entirely benign (or even laudable) conduct, and the People offer no articulation of how circumscribing such benign conduct directly and materially furthers the underlying governmental interests of preventing crime and victimization.

Id. at 11.

As noted above, we understand that the Court has found that City's ordinance should provide an exemption for travelling between otherwise exempt activities. "Finally, the ordinance contains no 'going to or coming home from' exemption that would permit a minor safely to pass from one exempt location to another . . . ." However, instead of ending that sentence at that point, the Court went on to provide examples related to activities at a private home. Our concern is that those examples do not relate to the general requirement of allowing travel in between exempt activities, and arguably creates a new category of exemptions. If such a category were put into place (studying at a home, a social occasion, festivities, "benign" conduct), it would severely impact the effectiveness of our curfew ordinance. Further, it is unclear to us how to create that category, if indeed that is what the Court wanted.

In a later part of the Opinion, the Court does seem to focus on the areas we have already identified.

> The San Diego curfew ordinance suffers from both defects: it imposes de facto restrictions on or conditions to the exercise of First Amendment rights (as well as restricting or conditioning the minor's ability to attend certain official school, religious, or other recreational activities), and it restricts the minor's ability to engage in activities after 10:00 p.m. in otherwise safe (and potentially supervised) environments without any suggestion that going directly to (or returning directly home from) those locales implicates the juvenile crime and juvenile victimization goals of the ordinance.

In Re A.G., 2010 WL 378098 at 11.

We ask that you consider asking the Court to strike the identified language as superfluous. We think, if left in the Opinion, that language will lead to further confusion. As other cities in California have similar ordinances, we think the Opinion is one of significance not

just for San Diego but for all of California. Indeed, the Court noted that such ordinances have a long history both in California and other jurisdictions around the country. *Id.* at 6.

We stand ready to provide you with any further information you may need in this matter.

Sincerely yours,

JAN I. GOLDSMITH, City Attorney

By Mary T. Nuesca

Mary T. Nuesca
Chief Deputy City Attorney

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