

May 21, 1991

REPORT TO THE COMMITTEE
ON PUBLIC FACILITIES AND RECREATION

ALTERNATIVES FOR LIMITING ALCOHOL CONSUMPTION AT CITY BEACHES

At its meeting on Monday, May 13, 1991, in response to the City Clerk's presentation of a qualified referendum petition commonly known as "Ban the Ban" (Docket Item No. 200), the City Council voted to rescind its prior ordinance (Ordinance No.

O-17609 (N.S.)) prohibiting the consumption of alcohol at most city beaches and shoreline parks and some inland parks 24 hours per day. The City Council adopted Resolution No. R-277906 granting the referendary petition and introduced an Ordinance (City Attorney No. O-91-167) repealing Ordinance No. O-17609 (N.S.).

At the same time, the City Council directed the City Manager and the City Attorney to make a report to the City Council via the appropriate Council Committee analyzing the following issues:

1. What City laws remain, if any, to limit alcohol consumption at City beaches and parks following repeal of Ordinance No. O-17609 (N.S.)?
2. May the City Council lawfully adopt an ordinance along the lines of Councilmember Wolfsheimer's proposal entitled "Boost the B.A.N." (Beach Alcohol Nodes), copy attached?
3. What other options are available?
4. May the City readopt the total alcohol ban that had been in place at La Jolla Shores Beach and boardwalk, Kellogg Park, and North Park Community Park from August 1, 1990, through February 1, 1991? This prior ban was adopted by Ordinance No. O-17477 (N.S.), on June 2, 1990. Ordinance No. O-17477 (N.S.) was not referended.

Response to Question No. 1.

Because of the referendum petition, Ordinance No. O-17609 (N.S.) has never officially become effective. Therefore, three (3) sections of the San Diego Municipal Code ("SDMC") pertaining to alcohol bans which Ordinance No. O-17609 had purported to repeal, are still in effect: Sections 56.29, 56.29.1, and 56.54. Copies of these three (3) ordinance sections are attached for your convenience. These three (3) Municipal Code sections prohibit the consumption of alcohol totally in some areas or during specified hours in other areas. These three (3) sections are summarized as follows:

Section 56.29 was adopted in 1944 and prohibits "possession of any intoxicating liquor, other than beer or wine, on Mission Beach Amusement Center."

Section 56.29.1 was adopted in 1949 and prohibits "possession of any intoxicating liquor on Santa Clara Point in Mission Bay Park."

Section 56.54 originated in 1977 and has been amended several times since then. It prohibits alcohol consumption in the downtown areas and sidewalks bounded on the south by Market Street and Imperial Avenue, on the west by Pacific Highway, on the north by Ash Street and on the east by Eleventh Avenue and Interstate 5 (sidewalk cafes are excluded). It also prohibits alcohol consumption in certain beach areas, as follows:

- 1) From Ratkay Point on Sunset Cliffs along the waterfront of the ocean and waters of Mission Bay to the northerly boundary of the Mission Bay Channel entrance between midnight and 6:00 a.m.

The beach area starting at northerly boundary of Mission Bay Channel entrance including the waterfront of the ocean and waters of Mission Bay to the southerly limits of the City of Del Mar, between 10:00 p.m. and 6:00 a.m.;

- 2) Fiesta Island and all public beaches and public recreation areas within Mission Bay Park between 10:00 p.m. and 6:00 a.m.;

- 3) all public parking lots within Mission Bay Park;

- 4) west parking lot of the jetty at 600 block of San Diego Place;

- 5) parking areas around The Plunge and roller coaster, 3000-3200 Ocean Front Walk, 3000-3200 block Mission Boulevard, and 700 block Ventura Place;

- 6) La Jolla Shores parking lot, 8300 block Camino del Oro;

- 7) 600 block Tourmaline Street;

- 8) public parking lots at several beach areas located on Bacon Street, Voltaire Street, Brighton Street, Newport Avenue, Abbott Street, Sunset Cliffs Boulevard and Ladera Street.

Response to Question No. 2.

Although future Council action regarding the same subject matter as the referended ordinance would not be totally prohibited, whatever action is taken must be done in good faith and must result in "essentially different" legislation. *Reagan v. City of Sausalito*, 210 Cal. App. 2d 618 (1962). The Municipal Code does not place any restrictions on when such "essentially different" legislation could be adopted. Therefore, we turn to the state Elections Code for guidance. Elections Code section 4055 indicates that an ordinance cannot be enacted for "a period of one year after the date of its repeal by the legislative body or disapproval by the voters" unless the matter is submitted to the voters. *Referendum Committee v. City of Hermosa Beach*, 184 Cal. App. 3d 152 (1986).

Presumably, therefore, an ordinance that is "essentially different" could be adopted within less than one year.

The task then is to apply this test to Councilmember Wolfsheimer's proposal to see whether it is "essentially different" from the ordinance that was referended. Unfortunately, there are no legal guidelines in statute or case law to make that determination. It must be pointed out, however, that a court of law would be the ultimate decisionmaker as to whether a law was "essentially different" from that referended.

Councilmember Wolfsheimer proposes to prohibit the consumption of alcohol generally and, instead, establish several "nodes," or areas, where consumption of alcohol would be permitted in four (4) beach areas: Ocean Beach, Mission Beach, Pacific Beach and La Jolla. As long as those "node" areas are not so restricted as to become effectively a total ban on alcohol consumption, the proposal would arguably be "essentially different" from that referended and therefore perhaps pass the legal test. The greater number of exceptions to a total ban, the more likely a court would conclude that an ordinance limiting alcohol consumption in some fashion is "essentially different" from one prohibiting all alcohol consumption.

Another provision in Ms. Wolfsheimer's proposal raises substantial legal questions. She suggests having regional alcoholic beverage wholesalers and retailers furnish portable toilets at these "nodes." Among the major legal questions are: 1) whether an assessment district would have to be established; and, 2) if so, who should be assessed and where should be the boundaries? 3) If not, what other legal mechanisms are available to finance and maintain such a service? 4) Should the service be mandatory or voluntary? In short, the suggestion needs further refinement in order for us to focus our response.

Response to Question No. 3.

Other options are available. One would be to place time limits on the consumption of alcohol in designated beach and park areas (beyond those established in SDMC sections 56.54, 56.29 and 56.29.1), for example, to prohibit consumption of alcohol between the hours of 8 p.m. and 8 a.m. This option appears to us to satisfy the "essentially different" test.

Alternatively, the Council could adopt an "essentially similar" ordinance to the one referended. But if the Council does so, the ordinance would have to be placed on a City-wide ballot pursuant to SDMC section 27.2501 et seq., before it could become effective.

Response to Question No. 4.

The issue presented by the fourth question is whether readoption (or extension)F

There could not be a true "extension" since the term of the total ban in these areas expired at the end of February 1991. of the total ban of alcohol consumption in La Jolla Shores Beach, Kellogg Park, and North Park Community Park would be "essentially

different" from the ordinance that was referended. The answer is necessarily uncertain.

On the one hand, these areas were subject to a total ban for six months up through February 1991 under prior legislation that was not referended. (Ordinance No. O-17477 (N.S.)) Arguably, therefore, to readopt the ban in these areas would be "essentially different" because, in contrast to the referended ordinance, the proposal narrowly defines the geographic area to be subjected to a total ban.

On the other hand, since these several areas were specifically mentioned in the referended ordinance as being subject to the total ban, arguably, to readopt a total ban in these areas would be "essentially similar" to the referended ordinance; hence, it would be prohibited. This argument is supported by the fact that the prior ban (that was not referended) covered the fall and winter months, presumably a time when fewer people would be affected by the legislation. To adopt an ordinance imposing a total ban in these areas now would take effect in the summer months and therefore presumably would affect many more persons.

On balance, we believe that a total ban on alcohol consumption in La Jolla Shores, Kellogg Park and North Park Community Park during the summer months arguably would not be found to be "essentially different" from the referended ordinance and therefore would be prohibited.

SUMMARY

Several City ordinances remain to limit or prohibit alcohol consumption at many City beaches and parks following repeal of referended Ordinance No. O-17609 (N.S.). (SDMC sections 56.29, 56.29.1, and 56.54). Copies of these ordinances are attached to this report.

Many options short of a total ban on alcohol consumption on City beaches and parks remain available to this Council, including establishing time limits for consumption of alcohol at City beaches and parks and establishing "nodes" where alcohol may be consumed, as long these "nodes" are big enough so as not to effectively create a total ban on alcohol consumption. The Council may even adopt the same or substantially similar ordinance as that referended, so long as the ordinance is placed on a City-wide ballot before it becomes effective. Although the answer is not absolutely certain, we believe that a total ban on alcohol consumption in La Jolla Shores, Kellogg Park and North Park Community Park during the summer months would arguably be prohibited.

Respectfully submitted,
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City Attorney

CCM:jrl:011.2.2(043.1)
Attachments
RC-91-28