

November 23, 1992
REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

ORDINANCE PROTECTING ACCESS TO HEALTH CARE FACILITIES

The Public Services and Safety Committee by motion at its October 14, 1992 meeting requested the City Attorney to draft an ordinance for the City of San Diego identical to a City of San Jose ordinance protecting women seeking access to or departure from a health care facility. The draft ordinance is to be docketed within thirty (30) days before the full City Council. A copy of the requested draft ordinance is attached.

For the reasons stated herein, we recommend against enacting the draft ordinance in its entirety.

MINOR CHANGES

Several minor changes have been made to clarify and maintain uniformity and consistency with the San Diego Municipal Code. Section 10.08.010 (Obstructing Pedestrians on Public Ways) and Section 10.08.020 (Obstructing Entrances to Places of Public Assembly) in the San Jose ordinance have been omitted. San Diego Municipal Code section 52.20 already prohibits such obstructions.

CALIFORNIA PENAL CODE SECTION 602.11

Recent legislation, Assembly Bill 1097, Lee, approved by the Governor on September 26, 1992, added Section 602.11 to the California Penal Code. Section 602.11(a) provides that "Any person, alone or in concert with others, who intentionally prevents an individual from entering or exiting a health care facility, place of worship, or school, by physically detaining the individual or physically obstructing the individual's passage shall be guilty of a misdemeanor" Specific punishments are stated for first, second, third and subsequent offenses.

A first offense is punishable by a county jail sentence and a maximum fine of two hundred and fifty dollars (\$250.00). A second offense is punishable by a mandatory five (5) day county jail sentence and a maximum fine of five-hundred dollars (\$500.00). A third offense is punishable by a mandatory thirty (30) day county jail sentence and a maximum fine of two thousand dollars (\$2,000.00).

Section 52.1001(a) of the draft ordinance is most likely preempted by Penal Code section 602.11. Both provisions relate

to the physical detention or obstruction of a person's passage to or from a health care facility. Penal Code section 602.11 is more complete and specific in listing the elements to be proved and in providing punishment for first, second and subsequent offenders. Section 52.1001(a) of the draft ordinance, while not identical, fairly duplicates the state law. For this reason we recommend against enacting this sub-section.

Section 52.1001(b) of the draft ordinance making it unlawful for a person to withdraw upon request to a distance of at least eight (8) feet from the person who made the request is not duplicated in Penal Code section 602.11 or any other provision of state law. It meets the federal constitutional requirements of a valid time, place and manner restriction by leaving open ample alternative means for communicating with the same audience in the same forum. When targets are willing to grant protesters proximity, the ordinance imposes no restrictions on speech at all. It is only when targets are unwilling to grant proximity that protesters are constrained by the ordinance, and then only in a minimal fashion: protesters are free to pursue even unwilling targets within the buffer zone as long as they remain eight (8) feet away.

The purpose of Section 52.1001(b) of the draft ordinance is to prohibit harassing and intimidating activities by demonstrators that are not specifically prohibited in Penal Code section 602.11.

CREATION OF A PRIVATE RIGHT OF ACTION

Section 52.1002 creates a third party civil cause of action for violations. The broad police power of a charter city over matters not in conflict with state law, including how an ordinance will be enforced, furnishes authority for the City Council to enact Section 52.1002. Legislative enactments are presumptively constitutional. *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961). All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. *In re Benson*, 172 Cal. App. 3d 532, 534 (1985).

California case law neither specifically authorizes nor prohibits the creation of private causes of action by a municipality. One view is that a municipal ordinance cannot create a civil liability against a person violating it, and in favor of persons injured by its violation, since that is a sovereign power of the state. 1 Am. Jur. 2d Section 61. However, the California Court of Appeal (Second District) rejected challenges to a private action brought under West Hollywood's city ordinance prohibiting discrimination against persons with AIDS. *Jasperson v. Jessica's Nail Clinic*, 216 Cal.

App. 3d 1099 (1989). Jasperson supports the position that California courts will accept the creation by municipalities of third party civil causes of action.

CONCLUSION

The proposed ordinance would amend Chapter V, Article 2, of the San Diego Municipal Code by adding a new Division 10 entitled "Public Access to Health Care Facilities" and new Sections 52.1001 and 52.1002 to protect against impeding access within one hundred (100) feet of a health care facility and creating a private civil right of action for violations.

We recommend against enactment of the draft ordinance in its entirety. Section 52.1001(a) is preempted by state law. If enacted in its entirety, this office will approve the ordinance for form only.

We have prepared an amended ordinance omitting Section 52.1001(a). The amended ordinance preserves the essential "bubble protection" provision which requires withdrawal upon request to a distance at least eight (8) feet from the user of the health care facility. The amended draft ordinance is available for introduction at your request.

Respectfully submitted,
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City Attorney

JMB:jp:011.2.4(043.1)

Attachment

RC-92-72

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