

May 25, 1993
REPORT TO THE COMMITTEE
ON PUBLIC SERVICES AND SAFETY

DRAFT ORDINANCE PROHIBITING THE PICKETING OF PRIVATE RESIDENCES

The Public Services and Safety Committee at its May 5, 1993, meeting discussed a draft ordinance to prohibit the picketing of private residences. The matter was continued in order to assess various concerns raised by committee members.

The purpose of this memorandum is to outline applicable case law and analyze legal issues of concern to the committee members. The applicable case law is found in *Frisby v. Schultz*, 487 U.S. 474 (1988), *Carey v. Brown*, 447 U.S. 455 (1980), and *Chicago v. Mosely*, 408 U.S. 92 (1972).

A summary of the three named United States Supreme Court cases is given below. The summary is followed by an analysis of the legal issues raised by committee members.

1. LEGAL STANDARD FOR ORDINANCE PROHIBITING PICKETING

In *Frisby*, the Supreme Court of the United States held that a town ordinance completely banning picketing "before or about" any residence was constitutional since the ordinance (1) was content neutral, (2) was narrowly tailored to serve a significant government interest -- the protection of residential privacy, and (3) left open ample alternative channels of communication for the dissemination of messages.

In *Carey*, the Supreme Court of the United States held unconstitutional an Illinois statute barring picketing of residences, except for peaceful picketing of places of employment involved in labor disputes. In *Carey*, a civil rights organization participated in a peaceful demonstration on the public sidewalk in front of the home of the Mayor of Chicago protesting the Mayor's failure to support mandatory public school bussing.

The Court held that the statute's differential treatment of labor and non-labor picketing could not be justified either by the State's interest in protecting the peace and privacy of the home or by the special character of the Mayor's residence as a "place of employment." The State's interest in providing special protection for labor protests could not, without more, justify the labor picketing exemption. Labor picketing was no more

deserving of First Amendment protection than were public protests over other issues, particularly the important economic, social, and political subjects about which appellees wished to demonstrate. *Carey*, 447 U.S. at 466.

In *Chicago v. Mosley*, a city ordinance made it a misdemeanor when a person knowingly pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute

Chicago v. Mosley, 408 U.S. at 93 (emphasis added).

An action was brought by Mosley who, seven months prior to enactment of the ordinance, frequently picketed Jones High School in Chicago by carrying a sign that read: "Jones High School practices black discrimination. Jones High School has a black quota." His lonely crusade was always peaceful, orderly, and quiet, and was conceded to be so by the City of Chicago.

The Supreme Court held the Chicago ordinance unconstitutional because it makes an impermissible distinction between labor picketing and other peaceful picketing.

2. EXCEPTIONS TO THE ORDINANCE

Councilmembers Vargas and Stevens related instances of picketing private residences of "slumlords" and persons violating City codes. They expressed an interest in being able to continue such activity.

The Supreme Court cases cited above would not permit an ordinance to distinguish between lawful and unlawful conduct based upon the content of the demonstrator's communication. Such exceptions would fail the content-neutral test and discriminate in the regulation of expression on the basis of the content of that expression.

However, alternate means of communicating messages to "slumlords" and code violators are available. The draft ordinance is restricted to the picketing of targeted private "residences" and "dwellings." The court made this clear in *Frisby* in the following: "Protestors have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching. . . . They may go door-to-door to proselytize their views. They may distribute

literature in this manner . . . or through the mails. They may contact residents by telephone, short of harassment." Brief for Appellants 41-42 (citations omitted). Frisby, 487 U.S. at 484.

The City of Brookfield ordinance, upheld in Frisby, simply provides in Section 9.24, subsection (2) of the city's Municipal Code as follows: "It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the City of Brookfield."

The draft ordinance, like a similar San Jose ordinance, provides in Section 52.2003 as follows: "It is unlawful to engage in picketing activity that is targeted at or is within three hundred (300) feet of a residential dwelling in the City of San Diego."

3. REQUEST TO WITHDRAW

Councilmember Wolfsheimer expressed concern that the draft ordinance might not be narrowly tailored and stated it might need a "request to withdraw" provision. While inserting a request to withdraw provision may be reasonable, after consultation with the Police Department, such modification is not recommended.

The Brookfield ordinance, upheld in Frisby, did not have a "request to withdraw" provision. Frisby does not mention a "request to withdraw" provision. The court did state as follows: "Because the picketing prohibited by the Brookfield ordinance is speech directed primarily at those who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it. The nature and scope of this interest make the ban narrowly tailored." Frisby, 487 U.S. at 488 (emphasis added).

The draft ordinance is narrowly tailored without the addition of a "request to withdraw" provision. Insertion of such a requirement would increase the risk of confrontation, create problems of proof and be undesirable in an emotionally charged atmosphere.

4. ALLOW FOCUSED PICKETING FOR A LIMITED TIME

The committee consultant suggested possible modification of the ordinance as follows: "Limit the time of found picketing to 2 hours/month or something similar."

Modification of the proposed ordinance to allow focused picketing of private residences for even a limited time is not recommended. The purpose of the proposed ordinance is to protect residential privacy. An allowance of time limits on picketing would negate that purpose and render enforcement impractical. An infinite number of people would each be entitled to limited picketing.

The Brookfield ordinance was enacted after brief periods of picketing. As the facts in Frisby indicate, Appellees and others

assembled outside a doctor's home on at least six (6) occasions between April 20, 1985 and May 20, 1985 for periods ranging from one to one and one-half hours. The size of the group varied from eleven (11) to more than forty (40). The picketing was orderly and peaceful. Nonetheless, the picketing generated substantial controversy and numerous complaints. Frisby, 487 U.S. at 476.

5. PROHIBITED PICKETING AREA

Modification of the draft ordinance to conform exactly with the language in the Brookfield ordinance is recommended. The three hundred (300) foot prohibited area would then be deleted from the draft ordinance.

A prohibited area of three hundred (300) feet or even less, could require closing public streets and sidewalks in "residential neighborhoods" that are considered public fora. As the court stated in Frisby, "All public streets are held in the public trust and are properly considered traditional public fora." Frisby, 487 U.S. at 481. The Court further stated on page 484: "General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by this ordinance. . . . Accordingly, we construe the ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited."

Frisby upheld a complete ban on picketing "before or about" any residence without requiring further specification.

CONCLUSION

Adoption of an ordinance regulating picketing is a policy decision. Should the Council decide to adopt one we would recommend modifying the draft ordinance to conform with the ordinance approved by the United States supreme Court in Frisby.

Respectfully submitted,
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