

June 23, 1994
REPORT TO THE COMMITTEE
ON PUBLIC SERVICES AND SAFETY

PROSTITUTION LOITERING ORDINANCE

BACKGROUND

By memorandum of May 23, 1994, Councilmember Judy McCarty, Chair of the Public Services and Safety Committee, requested a prostitution loitering ordinance for discussion at the July 6, 1994, meeting of the Public Services and Safety Committee. This report responds to that request.

BAKERSFIELD ORDINANCE

Attached is a copy of a proposed City of Bakersfield ordinance prohibiting loitering with the intent to engage in a prostitution-related offense. The Office of the City Attorney of the City of Bakersfield requested an opinion from the Attorney General on whether the proposed ordinance was preempted by California Penal Code section 647 which provides in pertinent part as follows:

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

- (a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view.
- (b) Who solicits or who agrees to engage in or who engages in any act of prostitution

. . . .

PREEMPTION

In *Gates v. Municipal Court*, 135 Cal. App. 3d 309 (1982), the First District Court of Appeal held that a San Jose municipal ordinance which made it unlawful to "remain or loiter in or about any public place for the purpose of soliciting an act of prostitution or lewdness" was preempted by state law which fully occupies the field of criminal sexual conduct.

The court in *Gates* cited the California Supreme Court case of *Lancaster v. Municipal Court*, 6 Cal. 3d 805, 807-808 (1972),

which opined that it is settled that state law has preempted the field of criminal sexual activity.

Gates also cited the California Supreme Court case of *In re Lane*, 58 Cal. 2d 99 (1962). Gates points out that the Lane court invalidated a city ordinance prohibiting an unmarried person from "resorting" to numerous specified places for the "purpose of having sexual intercourse" or "participating in a lewd act." The court found that the entire field of criminal sexual activity, including prostitution (Penal Code Section 647(b)), was preempted by state law providing that any sexual conduct not criminalized by state penal statutes "shall not be criminal in this state." *Id.* at 103-104.

The City of Bakersfield, in requesting an Attorney General's opinion, correctly notes that there is a complete absence of a state Penal Code provision to address the issue of loitering with intent to engage in a prostitution-related offense.

STATE LEGISLATION

The absence of a state Penal Code provision to address the issue of loitering with intent to engage in a prostitution related offense suggests possible sponsorship of amendments to the Penal Code to either make it unlawful to loiter for the purpose of prostitution-related activities or to allow local regulations to supplement state law.

This office will monitor the Attorney General's action on the City of Bakersfield's request for an opinion and prepare any draft legislation the Committee seeks to sponsor.

Respectfully submitted,
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City Attorney

JMB:jp:520.1(043.1)
Attachment
RC-94-26