

September 12, 1994
REPORT TO THE COMMITTEE
ON PUBLIC SERVICES AND SAFETY

REGULATIONS ON PUBLIC CONSUMPTION OF ALCOHOL AND OPEN
CONTAINERS

By memorandum dated August 23, 1994, Councilmember Christine Kehoe requested the City Attorney to provide a report to the Public Services and Safety Committee on whether changes are needed to the City's existing ordinances banning the public consumption of alcoholic beverages. Specifically, the memorandum requested responses to three questions. The questions and responses follow a short answer to the general question and a brief discussion of the applicable state and local law on public consumption of alcoholic beverages and possession of open containers.

SHORT ANSWER

No changes are recommended to the existing ordinances banning the public consumption of alcoholic beverages.

The San Diego Police Department has enforcement authority under several provisions of the San Diego Municipal Code and state law to cope with alcohol offenses.

PUBLIC CONSUMPTION OF ALCOHOLIC BEVERAGES

The California Constitution states "the State of California . . . shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State." Cal. Const. art. XX, Section 22 (emphasis added). The California Constitution does not address the issue of consumption of alcohol.

California courts have interpreted article XX, section 22 to mean that state law preempts local regulations dealing with possession of open containers of alcoholic beverages but allows cities to regulate the public consumption of alcoholic beverages.

In *People v. Butler*, 252 Cal. App. 2d Supp. 1053, 1055 (1967), the court analyzed a City of Fresno ordinance that made it unlawful to drink "any beer, wine, or other intoxicating beverage on any street, sidewalk, alley, highway or playground" (emphasis added). The court held the ordinance was not preempted because the consumption of alcohol in public is open to local regulation. *Id.* at 1055, 1058.

The *Butler* decision was cited with approval in *People v. Brewer*, 235 Cal. App. 3d 909, 912 (1991), which involved an Oakland ordinance

providing:

No person shall drink or have in his possession an open container of any alcoholic beverage: (1) On any public street, sidewalk, or other public way; (2) within 50 feet of any public way while on private property open to public view without the express permission of the owner, his agent, or the person in lawful possession thereof.

Id. at 911.

In *Brewer*, the defendant was standing in front of a liquor store drinking from a container wrapped in a brown paper bag. Id. He was detained by police for violating the Oakland ordinance. Id. at 912. The trial court held, and the appellate court agreed, that "the Ordinance's attempted regulation of possession was preempted by the exclusive power of the state under Cal. Const. art. XX, Section 22, but that Oakland did have the power to prohibit consumption." Id. at 912. The court then determined that the ordinance's preempted and unconstitutional segment, dealing with possession, could be severed, leaving a valid segment dealing strictly with consumption. Id. at 914.

A local ordinance prohibiting possession of alcoholic beverages in public buildings and parks was again held preempted by state law in *People v. Ramirez*, 25 Cal. App. 4th Supp. 1 (1994). In *Ramirez*, the defendant was convicted of violating a Downey ordinance for carrying an ice chest containing a six-pack of beer through a public park. Id. at 2. The court reversed the conviction, stating the "the city has no authority to regulate the possession of alcohol in public places, including parks." Id. at 4.

The holdings in these three cases illustrate that cities are allowed to regulate public consumption of alcoholic beverages while state law regulates the possession of alcoholic beverages.

The City of San Diego enacted San Diego Municipal Code (SDMC) section 56.54 to regulate the public consumption of alcoholic beverages. Section 56.54 prohibits the public consumption of alcoholic beverages in certain areas.

OPEN CONTAINER LAWS

The general rule stated in case law holds that local authorities are preempted from regulating the possession of open alcoholic beverage containers. However, local authorities are authorized by state law to regulate the possession of open containers of alcoholic beverages under certain conditions. California Penal Code (PC) Section 647e and California Business and Professions (B&P) Code Section 25620 are state laws which allow local regulation under certain conditions.

PC Section 647e was added to the California Penal Code in 1983 by Assembly Bill 96 (Moore). It was enacted as urgent legislation to alleviate the attendant problems of persons who congregate with opened

alcoholic beverages on posted premises licensed with a retail package off-sale alcoholic beverage license, such as harassment of customers or the perpetration of unlawful activity. PC Section 647e empowers a city, county or city and county to pass a local ordinance prohibiting the possession of an open alcoholic beverage container on or around posted businesses with "off-sale" liquor licenses. Any person who enters or remains on the posted property, including the parking lot or any adjacent public sidewalks, shall be guilty of an infraction.

The San Diego City Council implemented PC section 647e on September 26, 1983. It enacted SDMC section 56.56, which prohibits possession of open alcoholic beverage containers on posted premises with "off-sale" liquor licenses.

B&P Code section 25620 states that if a city or county prohibits consumption of alcohol in certain publicly owned areas, any person possessing an open container in those areas is guilty of an infraction. The possession of an open alcoholic beverage container in any of the areas specified in Section 56.54 can be charged as an infraction in violation of B&P Code section 25620. Persons under 21 years of age can be charged with a misdemeanor. B&P Code Section 25662(a).

QUESTION NO. 1:

How can we best respond to open containers and drinking on the streets? I am concerned with the widespread problem of open consumption of alcohol on our public streets, at bus shelters, walls and benches near the public right of way, and other places.

RESPONSE:

San Diego Police Department beat officers and neighborhood police teams are enforcing laws relating to public consumption of alcoholic beverages and possession of open alcoholic beverage containers. Enforcement is usually in response to a complaint or observation of loitering groups with open containers. Groups of alcohol consuming loiterers are often targeted for enforcement because of the potential for illegal activity associated with public drinking. The laws being enforced are summarized below in response to question no. 3.

QUESTION NO. 2:

How can we strengthen our existing Code to deal with public drinking and often the vagrancy and illegal activity associated with public drinking?

RESPONSE:

A survey on the effectiveness of a ban on alcohol was conducted in April, 1994, in each area command of the San Diego Police Department. The Department concluded that SDMC section 56.54 is a useful enforcement tool especially where large groups tend to congregate and engage in alcohol related loitering. See attached City Manager's Report No. 94-268, dated September 8, 1994.

A recent amendment to SDMC section 56.54 expanded the ban on consumption to include the San Ysidro business district. Continued

monitoring of SDMC section 56.54 as an enforcement tool may reveal a need for further expansion of its scope.

QUESTION NO. 3:

How can we strengthen enforcement of existing Codes? Sometimes the police cannot do anything unless someone is caught in the act of consuming alcohol. I need clarification on the regulations and how gaps in enforcement can be closed.

RESPONSE:

The San Diego Police Department has extensive enforcement authority on alcohol related violations. It is not limited to enforcement of SDMC section 56.54, which requires proof of public consumption of an alcoholic beverage in one of the specified prohibited areas. An outline of other enforcement tools available to police officers in the regulation of alcohol offenses is as follows:

- a. Any person under the age of 21 years who has any alcoholic beverage in his or her possession on any street or highway or in any public place or in any place open to the public is guilty of a misdemeanor in violation of B&P Code section 25662(a).
- b. A person possessing an open alcoholic beverage container in any of the areas specified in Section 56.54 can be cited for an infraction in violation of B&P Code section 25620.
- c. A person found in any public place under the influence of intoxicating liquor and unable to care for his or her own safety or the safety of others can be arrested for a violation of PC section 647(f).
- d. A person found in possession of an open alcoholic beverage container in areas posted under SDMC section 56.56 is chargeable with an infraction, in violation of that section.
- e. California Vehicle Code section 23222(a) prohibits open alcohol containers in motor vehicles: "No person shall have in his or her possession on his or her person, while driving a motor vehicle upon a highway, any bottle, can, or other receptacle, containing any alcoholic beverage which has been opened, or a seal broken, or the contents of which have been partially removed."
- f. SDMC section 63.20.5(e) makes it "unlawful for any person to possess or use any container made of glass upon any beach or adjacent sidewalk area in the City of San Diego." SDMC section 63.0102(7) also prohibits the possession of glass containers on beaches and in parks. The intent of these provisions is to protect the public from broken glass in parks, and on beaches or adjacent sidewalk areas.

No gaps in enforcement of these laws have presently been identified by the Police Department survey. This office will monitor the laws and case law dealing with public consumption and open alcoholic beverage containers and continue to keep the San Diego Police Department advised of significant developments.

Respectfully submitted,

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City Attorney

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Attachment

RC-94-37