

DATE: September 29, 1987

TO: Betsy McCullough, Committee Consultant
FROM: City Attorney
SUBJECT: Prohibition of Alcohol Consumption on Public Places

Reference is made to your memorandum of August 20, 1987 asking for comments on a draft proposal submitted by a Mission Beach group (Ocean Front Property Owners) for a ban on public consumption of alcohol in all public places described in the Mission Beach community. You asked for comments on all aspects of the proposal including the (in)advisability of using the phrase "sunset to sunrise" in the proposed ordinance and whether encroachments along Ocean Front Walk constituted a "public sidewalk."

As a starting point, I reviewed the letter attached to your memorandum dated June 19, 1987 which was sent to community planning groups by the Deputy City Manager. The letter expressed the Council's desire to poll communities throughout the City "to determine if various groups believe there is a problem with consumption affecting the public health, safety and welfare." The poll is designed to determine whether an adequate basis exists for legislative action. While the City has inherent broad police powers to enact local ordinances not in conflict with general laws, the City must be able to show that such an ordinance is reasonably related to promoting the public health, safety, comfort and welfare, and that the means to accomplish that promotion are reasonably related to the purpose. *Higgins v. City of Santa Monica*, 62 Cal.2d 24, 30 (1964). The proposed ordinance appears to be one product of that poll.

The recitals of the proposed ordinance state several conclusions regarding public drinking during hours of darkness. A factual basis for those conclusions is needed before the enactment of the proposed ordinance. The summer-long staff study of alcohol-related contacts encountered by the Beach Enforcement Team of the Police Department's Northern Division may supply the

required factual basis for the ordinance. The Labor Day weekend (September 5th-7th) was the end of the data gathering period for that report. The results of that study may indicate whether there is a need for additional regulation of the public consumption of alcohol within Mission Beach or other bay/beach areas. It is my understanding that the committee meeting set for September 16, 1987 has been postponed to October 21, 1987 pending evaluation of the Police Department report.

Your asked for comment on the ". . . (in)advisability of placing the phrase 'sunset to sunrise' in the Code." Use of that phrase poses an evidentiary hindrance since the time of sunset and sunrise is not fixed but continually changing and must be proven in contested cases. It would also make enforcement more difficult particularly in borderline cases where police officers would have to determine time of sunset and sunrise before issuing citations. A fixed period stated in the ordinance such as from 6:00 p.m. to 6:00 a.m. would obviate these difficulties.

Despite the practical evidentiary and enforcement difficulties, there is no legal impediment to use of "sunset to sunrise" in the proposed ordinance. The phrase is used in state statutes. See, California Vehicle Code sections 24250 and 24440 which regulate the use of lights during hours of darkness. Section 280 of the California Vehicle Code defines darkness as follows:

280. "Darkness" is any time from one-half hour after sunset to one-half hour before sunrise and any other time when visibility is not sufficient to render clearly discernible any person or vehicle on the highway at a distance of 1000 feet.

You also asked whether the area within the fences and walls of encroachments along Ocean Front Walk constitutes a public sidewalk. That area is described as "an undeveloped public right-of-way, twelve feet in width, which lies immediately to the east of the publicly improved portion of Ocean Front Walk in Mission Beach." See, Ordinance No. 0-16400 (New Series) adopted on April 8, 1985, a copy of which is attached as Enclosure (1). The undeveloped portion of the Ocean Front Walk right-of-way was referred to the City Planning Department for study and inclusion in a future work program pending demonstrated public interest and support. See, Resolution No. R-262782 adopted by the City Council on March 25, 1985, a copy of which is attached as Enclosure (2). If developed in the future, the area could be designated as a public sidewalk.

The primary legal issue raised by your memorandum is whether conduct such as public drinking can be regulated by the City Council in the encroached area. The encroached property owner has a fee interest in the encroached area subject to the City's undeveloped right-of-way. The City has the power and right to direct removal of the encroachments and develop the right-of-way. See, Memorandum of Law on subject: Ocean Front Walk Encroachments by Deputy City Attorney Harold O. Valderhaug, a copy of which is attached as Enclosure (3). Development of the

right-of-way would allow the City to regulate conduct in that public area. The encroaching property owners' rights to maintain fences and walls under the Encroachment Removal Agreements would prevent regulation of public conduct in the encroached area until the Encroachment Removal Agreements are terminated. Specific language in an ordinance including only the developed right-of-way within the regulated area would settle the issue. Such action would also clarify the boundaries of the regulated area for the officers enforcing the ordinance.

JOHN W. WITT, City Attorney

By

Joseph M. Battaglino

Deputy City Attorney

JMB:lfs:520.1(x043.2)

Enclosures

ML-87-102