

MEMORANDUM OF LAW

DATE: February 3, 1987

TO: Transportation and Land Use Committee
FROM: City Attorney
SUBJECT: Feasibility of Imposing Civil Penalties for
Violations of Local Land Use Ordinances

BACKGROUND

At the Transportation and Land Use Committee meeting of September 8, 1986, the City Attorney was directed to research and explore the feasibility of imposing civil penalties against violators of San Diego's zoning ordinances. Specifically, the Committee asked whether civil penalties may be imposed against owners or builders who apply for a conditional use permit or variance after having built such projects in violation of the Municipal Code or who refuse to seek the proper approval?

By way of a previous written report, the City Attorney has advised the Committee that there are currently three available enforcement techniques to use against such violators:

1) Administrative: San Diego Municipal Code (SDMC) . 101.0204 authorizes an automatic penalty for permit applications which have been filed after the use of the property has commenced in violation of the Municipal Code.

2) Criminal: SDMC . 11.12 allows violations of the Municipal Code to be prosecuted as misdemeanors with a maximum penalty of \$1000 and/or six months in jail.

3) Civil: SDMC . 11.17 establishes the option to enforce violations of the Municipal Code by filing a civil action seeking an injunction or court order requiring the owner or builder to file a permit application. This section currently does not provide for the imposition of civil penalties.

ISSUES

1. Whether a charter city may enact an ordinance imposing civil penalties against individuals who violate local zoning and land use regulations?

2. Whether California Government Code .. 36900 et seq. limit a charter city's authority to create a civil penalty greater than \$1000?

CONCLUSION

As a charter city, San Diego may have the authority to impose civil penalties against individuals who violate its land use ordinances.

Moreover, a charter city may prescribe more severe penalties

for violations of its ordinances than those established by state law where the regulatory aspects of their ordinances differ from those of the state. Thus, San Diego could enact an ordinance providing for civil penalties in excess of the \$1000 limit established by the California Government Code.

ANALYSIS

The origin of such authority to enact and enforce ordinances is found in the California Constitution. Article XI, section 5 empowers charter cities to make and enforce all ordinances and regulations with respect to municipal affairs. If any conflict arises with the general laws promulgated by the state relating to municipal affairs, the provisions of a municipal charter and subsequently adopted ordinances must prevail. *County of Los Angeles v. City of Los Angeles*, 219 Cal.App.2d 838, 844 (1963). Article XI, section 7 of the California Constitution establishes the police power of a city or county to make and enforce such ordinances not in conflict with the general laws of the state.

Charter cities have broad authority to promulgate land use and zoning ordinances consistent with their constitutionally delegated powers over municipal affairs and police regulations. See generally, *Melton v. City of San Pablo*, 252 Cal.App.2d 794 (1967); *Fletcher v. Porter*, 203 Cal.App.2d 313 (1962). Enactment of an ordinance which establishes the means of enforcement and penalties is a logical extension of a chartered city's power to regulate and control its municipal affairs. *Ex parte Green*, 94 Cal. 387 (1892).

A municipality has the choice to determine for itself the particular mode for enforcing any police, sanitary or other regulations within its limits. *City of Stockton v. Frisbie and Latta*, 93 Cal.App. 277, 289 (1928). Consequently, enactment of an ordinance establishing civil penalties for land use and zoning violations would appear consistent with a chartered city's powers to regulate such municipal affairs and promulgate police and sanitary regulations.

Moreover, in the case of *Hale v. Morgan*, 22 Cal.3d 388 (1978), the California Supreme Court recognized the power of the state to impose civil penalties in order to enforce state statutes. This case involved a civil action by a tenant to recover a \$100 per day civil penalty permitted by Civil Code . 789.3 for the illegal disconnection of utility service by his landlord. While the court held that a mandatory \$100 per day penalty was excessive under the circumstances, it acknowledged this civil cause of action and reviewed other civil penalties established under California law. The court concluded:

It is equally well accepted that a state may

impose reasonable penalties as a means of securing obedience to statutes validly enacted under the police power. . . . Imposition of civil penalties has, increasingly in modern times, become a means by which a legislature implements statutory policy.

Id., at 398.

Indeed, if we apply this rationale of the Supreme Court to charter cities, it would seem to authorize imposition of civil penalties with respect to their municipal affairs.

POSSIBLE STATE AND LOCAL LIMITATIONS

The next question is the extent of any limitations which may be imposed upon a charter city's authority to impose such civil penalties.

The law is somewhat antiquated in this area and thus unsettled in our modern era of home rule. At this juncture, however, it appears that a charter city may prescribe different penalties for violations of its ordinances than are prescribed by the general laws of state. See, *County of Los Angeles v. City of Los Angeles*, 219 Cal.App.2d 838, 844 (1963); *In re Isch*, 174 Cal. 180, 184 (1917); 60 Op. Att'y Gen. 83, 91 (1977).

California Government Code .. 36900 et seq. allows city legislative bodies to impose fines for violations of local ordinances subject to a \$1000 limit. This statute, however, does not restrict the authority of a charter city, like San Diego, to provide for penalties greater than \$1000. These statutes are general laws which apply where no different punishment is prescribed by the laws of this state. Since a local ordinance is a "law of this state," the governing body of a municipality has authority to provide different penalties, so long as such penalties do not exceed any maximum limits prescribed by its charter. *County of Los Angeles, v. City of Los Angeles*, 219 Cal.App.2d at 844.

Nor do these provisions of the California Government Code preempt a city's police power to enact an ordinance which imposes penalties for violations of land use and zoning ordinances. The California Government Code fails to demonstrate an intent by the legislature to occupy this field of enforcement and penalties in the land use arena to the total exclusion of local regulations. It would be inconsistent to permit cities to promulgate zoning and land use regulations but handcuff their ability to establish the type and amount of the penalties for such violations.

The power to enact an ordinance imposing civil penalties for land use violations is not without limitation. Article I, section 17 of the California Constitution prohibits the

imposition of excessive fines. As the court noted in *Hale v. Morgan*, 22 Cal.3d at 404, the determination of whether a statute or local ordinance imposes excessive fines must be determined on a case by case basis.

A municipality, however, may impose more severe penalties than those permitted under state law where the regulatory aspects of the ordinance differ from those of the state law. In *re Iverson*, 199 Cal. 582, 590 (1926). The municipal ordinance may involve a similar offense as long as it is not precisely the same offense covered by the state statute. In *re Borah*, 92 Cal.App.2d 826, 829 (1949). Accord, In *re Ah You*, 88 Cal. 99 (1891); *Ex parte Solomon*, 91 Cal. 440 (1891). Obviously, no state statutes exist prescribing civil penalties for land use violations. Thus, San Diego could impose greater penalties than the \$1000 limit established in the California Government Code.

This authority to fix a penalty is still bound by the municipalities' own charter. See generally, *Ex parte Cheney*, 90 Cal. 617 (1891).

A review of San Diego's charter indicates no apparent limitations on its authority to enact an ordinance establishing civil penalties for land use violations.

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