

MEMORANDUM OF LAW

DATE: March 12, 1992

TO: Jack McGrory, City Manager

FROM: City Attorney

SUBJECT: City Regulation of Fortified Wines

At its November 20, 1991, meeting, the Public Services and Safety Committee ("PS&S") directed the City Attorney and City Manager to prepare an ordinance banning the sale of fortified wine either city-wide or as extensively as possible. This memorandum of law presents a legal analysis of the City's power to regulate sale, possession or consumption of fortified wines and some legislative courses of action consistent with that power.

1. State Regulation of Alcoholic Beverages

Upon adoption of the Twenty-first Amendment to the United States Constitution and repeal of Prohibition in 1933, the taxation and regulation of the manufacture, distribution and sale of alcoholic beverages were delegated to the individual states.

The California Constitution gives the Department of Alcoholic Beverage Control exclusive power to license and regulate the manufacture, importation and sale of liquor. "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, ' 22.

California has an extensive alcoholic beverage control system which is codified in the Alcoholic Beverage Control Act pursuant to California Business and Professions Code section 23000, et seq.

The Department of Alcoholic Beverage Control may deny an application for a license to sell alcoholic beverages if issuance of such license would create a law enforcement problem, or if issuance would result in or add to an undue concentration of licenses and the applicant fails to show that public convenience or necessity would be served by such issuance. (Cal. Bus. & Prof. Code ' 23958). In the absence of proof by the applicant that public convenience or necessity would be served, a license cannot be issued, in any "61.3 area." The formula for a "61.3"

area is met when an area has a reporting crime statistic twenty percent (20%) greater than the average citywide for all crime reporting districts (census tracts) and a ratio of license to population that exceeds the county-wide ratio. (Cal. Admin. Code, title 4, ' 61.3 (1984).)

Since about September 1987, every Alcoholic Beverage Control license issued to establishments in "61.3 areas" have been conditioned with a prohibition against the sale of fortified wines. The San Diego Police Department has protested every license application submitted during that period. The protests were withdrawn when the applicants showed "public convenience or necessity" for the permits and agreed to standard conditions including a condition prohibiting the sale of fortified wines.

2. City's Land Use Authority to Regulate Alcoholic Beverages

A City's land use authority may provide authority to regulate alcoholic beverages. A city ordinance, to be valid, must concern an area of alcoholic beverage regulation not preempted by state control. *Olsen v. McGillicuddy*, 15 Cal. App. 3d 897, 900-901 (1971). To determine whether the legislature intended to occupy a particular field to the exclusion of all local regulation, we may look to the "whole purpose and scope of the legislative scheme." *Id.*

The legislature allows city regulation of alcoholic beverages where there exists a valid city zoning ordinance. The Department of Alcoholic Beverage Control cannot license or regulate the sale of intoxicating liquor to a new establishment where there is a contrary valid city zoning ordinance. This limitation on state authority is stated in the following:

Business and Professions Code section 23790, which provides: "No retail license shall be issued by the Department for any premises which are located in any territory where the exercise of the rights and privileges conferred by the license is contrary to a valid zoning ordinance of any county or city...."

Business and Professions Code section 23791, which provides: "Nothing in this division interferes with the powers of cities conferred upon them by section 65850 to 65861, inclusive zoning in the Government Code."

Business and Professions Code section 23790.5, which provides: "It is the intent of the legislature in enacting this section to ensure that local government shall not be preempted in the valid exercise of its land use authority pursuant to section 23790, including, but not limited to, enacting an ordinance requiring a conditional use permit."

The traditional purpose of the conditional use permit is to enable a municipality to exercise some measure of control over the extent of certain uses which, although desirable in limited

numbers, could have a detrimental effect on the community in large numbers. *Neighborhood Action Group v. County of Calaveras*, 156 Cal. App. 3d 1176, 1184 (1984) (quoting from *Van Sicklen v. Browne*, 15 Cal. App. 3d 122, 126 (1971) which involved service station use). The hierarchy of the conditional use permit is as follows: the conditional use permit derives its authority from the zoning statute (Gov't Code section 65901); the zoning law must comply with the adopted general plan (Gov't Code section 65860); and the adopted general plan must conform with state law (sections 65300, 65302). A permit action taken without the compliance of the hierarchy of land use laws is simply invalid. *Neighborhood Action Group v. County of Calaveras*, 156 Cal. App. 3d at 1183-1185.

Any establishment selling alcoholic beverages in the central and southeast police areas must obtain a Conditional Use Permit. SDMC ' 101.0515A.

Conditions may be imposed upon the permit which relate to one or more of the following elements of the operation:

1. The permitted hours for alcohol sales.
2. The quantity and size of the containers.
3. Any related entertainment uses.
4. The minimum square footage requirement of the premise and maximum square footage for alcoholic beverages sale and display.
5. The sign requirements and restrictions pertaining to or referencing alcoholic beverages.

SDMC ' 101.0515D.

Existing establishments offering alcoholic beverages for sale must apply for a Conditional Use Permit if any of the following occur:

1. The establishment changes its type of liquor (ABC) license within a license classification;
2. The operation of the establishment is abandoned, discontinued or suspended for a continuous period of 12 months, as defined in Section 101.0303 of this Code;
3. Any modification occurs which results in increased square footage of the premises where the alcohol related business is conducted;
4. The establishment is found to be in violation of Section 101.0213.B. (nuisances) of this Code;
5. Pursuant to a hearing before the Department of Alcoholic Beverage Control, the ABC license is revoked or suspended for a period of more than 30 days; or
6. There is substantial change in the mode or character of operation of the establishment.

Since about 1987, every applicant for a Conditional Use

Permit to sell alcoholic beverages in the Central and Southeast Police areas have been conditioned with a prohibition against the sale of fortified wines. The San Diego Police Department Vice Section has protested every Conditional Use Permit Application submitted during that period. The protests were withdrawn when the applicants showed "public convenience or necessity" for the permits and agreed to standard conditions including the condition prohibiting the sale of fortified wines.

3. Zoning Statutes to Regulate Alcoholic Beverages

Zoning enabling statutes may authorize a city to regulate alcoholic beverages. By regulating the use of land to promote community health, safety and general welfare, a city can attack alcohol-related harms within its community.

Government Code section 65300 requires that cities establish a planning agency and develop and maintain a "comprehensive, long-term general plan" for the physical development of the municipality's land. The plan must "consist of a statement of development policies and shall include....diagrams and text setting forth objectives, principles, standards and plan proposals." Gov't Code section 65302. The plan must address eight elements: land use, circulation, housing, conservation, open space, noise, geological and seismic hazards and safety from fire. *Id.*

Pursuant to section 65850 of the Government Code, a city may adopt ordinances which generally regulate the use of buildings, structures and land.

Thus, as a general rule a "valid zoning ordinance" regulating alcoholic beverages would survive a state preemption attack. The narrower issue to resolve is whether a City can use its zoning powers to ban the sale of fortified wine by means of a "valid zoning ordinance."

This issue was raised in a case which held that a San Leandro City ordinance requiring a use permit to operate a cocktail bar or lounge within two hundred (200) feet of a residential district was a "valid zoning regulating liquor for the protection of the neighborhood's "health, safety, peace, morals, comfort, and general welfare" *Floresta, Inc., v. City Council of San Leandro*, 190 Cal. App. 2d 599, (1961). The court also concluded at 607 that the San Leandro ordinance was only a geographic restriction of place of sale and use of liquor and not an incursion into the state's general power to regulate and to limit the sale of alcohol.

Floresta involved on-sale liquor establishments rather than off-sale establishments. The proposed ban on fortified wine sales targets off-sale establishments. The distinction between on-sale and off-sale establishments is significant because the

Floresta court limited its holding to on-sale establishments at 606 by the following: "We adjudicate the propriety of a license for a cocktail bar or lounge....The social impact of a cocktail bar obviously differs fundamentally from that of a store which sells liquor for consumption off the premises."

An ordinance banning the sale of fortified wines by stores for consumption off of the premises would not fit the Floresta test of a "valid zoning ordinance" and would most likely be considered an invalid incursion into the state's general power to limit the sale of alcohol. Assuming a valid police power objective and reasons for treating fortified wines differently than other liquors sold at the premises, an ordinance banning the sale of fortified wines by stores for consumption on premises could meet the Floresta test of a "valid zoning ordinance" but would serve no useful purpose if the legislative aim is to ban sales of fortified wines for consumption off premises.

4. Hearings Required

Any proposed land use zoning ordinance requires a public hearing before the Planning Commission (SDMC ' 101.0206) and consideration of the Planning Commission's action at a public hearing before the City Council (SDMC ' 101.0207 et seq.).

Traditionally, zoning has regulated the use and not the user and "in general, zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users." *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 133 (1980). The legislative findings should reveal that the ordinance bears some relationship to the public health, safety, morals or general welfare by producing evidence of its effectiveness. The effectiveness of certain alcohol zoning ordinances "can be nullified when available restrictions are forced onto an unconsenting community; the effectiveness can be evaded through cross border purchasing, bootlegging, importation, and switches to alternate beverages." (Griffen, Notes, Zoning Away The Evils of Alcohol, 61 S. Cal. L. Rev. 1373, 1402 (1988).)

5. Presumption of Validity

Once a city ordinance is enacted, then every intendment is to be made in favor of zoning ordinances and the courts will not, except in clear cases, interfere with the exercise of the police power thus manifested. It is presumed that the measure, as a whole, is justified under the police power and adopted to promote the public health, safety, morals and general welfare. *Clemons v. City of Los Angeles*, 36 Cal. 2d 95, 98 (1950). Only a minimum showing of rationality is necessary to enable a liquor zoning ordinance to withstand constitutional attack. *Trustees of Mortgage Trust of America v. Holland*, 554 F.2d 237, 238 (1977).

6. State Law Protection of Existing License Holders

Any "valid zoning ordinance" regulating the sale of alcoholic beverages is subject to the rights of businesses already licensed by the Department of Alcohol Beverage Control. The rights of users of property as those rights existed at the time of the adoption of a zoning ordinance are well recognized and have always been protected. *Edmonds v. Los Angeles County*, 40 Cal. 2d 642, 661 (1953). Accordingly, a provision which exempts existing nonconforming uses is ordinarily included in zoning ordinances because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of nonconforming use. *Sabek, Inc. v. County of Sonoma*, 190 Cal. App. 3d 163, 166 (1987).

It is the general rule that a zoning ordinance may not constitutionally operate to compel immediate discontinuance of an otherwise lawfully established use of business. *Livingston Rock, Etc., Co. v. County of Los Angeles*, 43 Cal. 2d 121, 127 (1954). This principle is codified in section 23790 of the Business and Professions Code which exempts businesses already operating under licenses issued by the department from any restrictions of a new ordinance. Business and Professions Code, in its entirety, provides as follows:

' 23790. Issuance of Retail License Contrary to Zoning Ordinance.

No retail license shall be issued for any premises which are located in any territory where the exercise of the rights and privileges conferred by the license is contrary to a valid zoning ordinance of any county or city. Premises which had been used in the exercise of those rights and privileges at a time prior to the effective date of the zoning ordinance may continue operation under the following conditions:

- (a) The premises retain the same type of retail liquor license within a license classification.
- (b) The licensed premises are operated continuously without substantial change in mode or character of operation.

For purposes of this subdivision, a break in continuous operation does not include:

- (1) A closure for not more than 30 days for the purposes of repair, if that repair does not increase the square footage of the business used for the sale of alcoholic beverages.

(2) The closure for restoration of premises rendered totally or partially inaccessible by an act of god or a toxic accident, if the restoration does not increase the square footage of the business used for the sale of alcoholic beverages.

Amended Statutes 1982 ch. 474 ' 1. Amended Statutes 1989 ch. 95 ' 1.

Section 23790 operates as a "grandfather clause" protecting existing sellers of alcoholic beverages. The City of Glendale failed to "grandfather" existing owners in its alcohol zoning ordinance which resulted in litigation and a finding of unconstitutionality. *Mussalli v. City of Glendale*, 205 Cal. App. 3d 524 (1988).

The Second District Court of Appeals decided in *Mussali* that the service station owner was exempted under section 23790. The court also buttressed its conclusion with California Constitution article XX, section 22, which gives the state the exclusive right to regulate the sale of alcoholic beverages.

7. Sale of Fortified Wine as Nonconforming Use

A nonconforming use is defined as "a use which does not comply with present zoning provisions but which existed lawfully and was created in good faith prior to the enactment of the zoning provision." *Black's Law Dictionary*, 948 (5th ed. 1979). The sale of fortified wine by present licensees following the enactment of a valid zoning ordinance prohibiting such sales would be within the definition of a nonconforming use.

A city can sometimes eliminate a nonconforming use by payment of just compensation for the nonconforming use. *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 881 (1980) (where amortization period which ranged from one to four years which was based on the depreciated value of the sign was not unreasonable on its face). However, The City of San Diego allows for the continuance of nonconforming uses provided no enlargement or addition to such uses are made. SDMC ' 101.0303. This protection of nonconforming uses is similar to that provided in California Business and Professions Code section 23790.

8. Alcohol Restrictions in Gaslamp Quarter Planned District

The Gaslamp Quarter Planned District restricted uses are outlined in San Diego Municipal Code section 103.0408 F (uses involving sale of alcoholic beverages in the entertainment district). The Gaslamp Quarter provision relating to fortified wine provides in section 103.0408(F)(3)(b)(5) as follows: "No wine shall be sold with an alcoholic content greater than 15 percent by volume." The restricted uses in Gaslamp Quarter resulted from findings of the San Diego City Counsel on July 26,

1982, that the revitalization of the Gaslamp Quarter "was necessary to effect the public purposes declared in California Redevelopment Law (Health and Safety Code section 33000 et. seq.)" based upon certain conditions characterizing the project area. SDMC ' 103.0400.

9. Alcohol Restrictions in Centre City East

By Resolution Number R-274771 adopted on November 21, 1989, The City Council of The City of San Diego directed the City Manager and Planning Director to initiate changes in development controls pertaining to the sale of alcoholic beverages within the Centre City area of the City of San Diego similar to those in existence in The Gaslamp Quarter Planned District.

The process involved in extending the Gaslamp Quarter alcohol restrictions to the Centre City Planning Area was described in the first paragraph of a City Attorney Memorandum dated November 29, 1989, from Chief Deputy City Attorney Frederick C. Conrad to the City Manager as follows:

Your request for preparation of an ordinance as noted above should be directed to the Planning Department. Since the proposal will affect the use of land by changing the regulations, it will be necessary for the matter to be set for a public hearing before the Planning Commission. Following the public hearing, the matter will be referred to this office for preparation of the ordinance to be presented to the City Council.

10. City's Power to Regulate Consumption

The proposed ban on the sale of fortified wine is aimed at alcohol-related problems in the City of San Diego. One feasible course of action available to the City Council is to regulate consumption of open bottles of all alcoholic beverages on public streets throughout the city. An ordinance prohibiting the drinking of liquor in a public place does not conflict with general law. *People v. Brewer*, 223 Cal. App. 3d 990 (1991).

The City of San Diego already regulates the consumption and possession^F

Brewer held unconstitutional that portion of the City of Oakland's Municipal Ordinance prohibiting the possession of alcoholic beverages. In *Brewer*, the ordinance read as follows: "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.

In light of *Brewer*, changes may be proposed amending SDMC ' 56.54 to conform with the case holding.

of alcoholic beverages in certain areas in San Diego, including beaches and parks in Mission Beach and Ocean Beach, pursuant to San Diego Municipal Code section 56.54. The City also regulates the possession of open alcoholic beverage containers on posted premises pursuant to San Diego Municipal Code section 56.56. See also, the following code sections:

San Diego Municipal Code section 63.20.5 (f) which prohibits any person to have, possess or use any cup, tumbler, jar or container made of glass and used for carrying or containing any liquid for drinking purposes upon any beach or adjacent sidewalk area in the City of San Diego:

San Diego Municipal Code section 85.10 which prohibits any person who is under the influence of intoxicating liquor or narcotic drugs, to be in or about any motor vehicle while such vehicle is in or upon any street or other public place;

Penal Code section 647(f) which prohibits public drunkenness;

Business and Professions Code section 25602 which prohibits every person who sells, furnishes, gives or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person;

Business and Professions Code section 25658(a) which prohibits persons who sell, furnish, give or cause to be sold, furnished, or given away, any alcoholic beverage to anyone under the age of 21 years; and Business and Professions Code section 25662 (b) and (p) which prohibits minors from possessing alcoholic beverages.

The adoption of a new ordinance that specifically prohibits the public consumption of alcohol in certain areas or at certain times as distinct from the sale or possession, may complement the existing state and local laws regulating alcoholic beverages.

SUMMARY AND ANALYSIS

A. The City may prohibit the public consumption but not the sale of alcoholic beverages, including fortified wines, under its broad "police powers." *People V. Brewer*, 223 Cal. App. 3d. 990 (1991).

B. To avoid state preemption, any restrictions on the sale of fortified wines would have to meet the requirements of a "valid zoning ordinance" enacted following public hearings and appropriate findings. The purpose of a zoning ordinance is to regulate the use of land not the user.

C. Public hearings and legislative findings need to indicate that the proposed "valid zoning ordinance" bears some

relationship to the public health, safety, morals or general welfare by producing evidence of its effectiveness.

D. Under the Floresta test, courts will uphold City regulation of the sale for on premises consumption of alcoholic beverages based on a "valid zoning ordinance" but will find the City preempted when it attempts to regulate sales for off premises consumption. *Floresta, Inc., v. City Council of San Leandro*, 190 Cal. App. 2d 599 (1961).

E. The rights of existing businesses further frustrate the purpose of any ban on the sale of fortified wines. Unless there is "a substantial change in mode or character of operation," existing businesses operating under state law are protected or exempted from any "valid zoning ordinance." Business and Professions Code section 23790. Only new businesses or those changing their mode or character of operation would be affected by enactment of a "valid zoning ordinance." A similar provision protects the sale of fortified wines in the event it becomes a nonconforming use. (SDMC ' 101.0303.)

F. Establishments in the Central and Southeast Police Districts are required to apply for a Conditional Use Permit to sell alcoholic beverages. Such permits may impose conditions on permitted hours, quantity and size of container, related entertainment uses, square footage requirements and sign requirements and restrictions. SDMC 101.0515. There is no express condition prohibiting the sale of fortified wines.

G. Since about September 1987, every new applicant for a Conditional Use Permit to sell alcoholic beverages in the Central and Southeast police areas has accepted as a condition of its permit a prohibition on the sale of fortified wines. Such applicants agreed to this condition or prohibition when issuance of the permit was protested by the San Diego Police Department Vice Section.

H. Since about September 1987, every new applicant for an Alcoholic Beverage Control license in areas of "undue concentration," known also as "61.3" areas, has accepted as a condition at its license a prohibition on the sale of fortified wines. Such applicants agreed to this condition or prohibition where issuance of the license was protested by the San Diego Police Department Vice Section.

I. Every Conditional Use Permit issued for establishments in the Gaslamp Quarter Planned District offering for sale alcoholic beverages has been conditioned with a prohibition against resale of fortified wines. SDMC ' 103.0408(F)(A)(b)(5). Since its enactment in 1986, this provision has not been legally challenged in court.

J. Subject to the rights of existing businesses and other

limitations discussed above, this office is prepared to draft appropriate regulations on the sale of fortified wines.

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By

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