MEMORANDUM OF LAW

DATE: October 16, 1992

TO: Jack McGrory, City Manager

FROM: City Attorney

SUBJECT: Effect of Alleged Discrimination by the Boy Scouts of America on City Leases Property

INTRODUCTION

On August 25, 1992, Charles (Chuck) Merino received a notice from the San Diego County Council of the Boy Scouts of America, suspending his registration and participation in the Boy Scouts of America ("BSA"). For the past fifteen years, Mr. Merino has been employed by the El Cajon Police Department. For approximately four years prior to the notice, Mr. Merino had been serving as a volunteer Explorer advisor. Specifically, he had been the advisor to the Law Enforcement Post of the Explorer Scouts for the El Cajon Police Department.

Some six months prior to the receipt of the suspension notice, Mr. Merino became involved in the Citizens Patrol Program in North Park and Hillcrest. In so doing, he made public his homosexuality. Mr. Merino's suspension notice did not specifically mention his sexual orientation as the basis for his suspension. However, BSA by-laws prohibit registration and membership in the BSA to known or avowed homosexuals (see Attachment).

The City of San Diego has two leases with the BSA; the Balboa Park facility, which is the San Diego County Council headquarters, and the Aquatic Facility on Fiesta Island. Each lease has a "Compliance with Laws" clause which secures compliance, by the lessee, with all federal, state, and municipal laws. Additionally, in July of this year a letter was sent by the City Manager's office to the Council Headquarters indicating that the "Compliance with Laws" clause must be strictly obeyed. As a result of Mr. Merino's suspension and in response to a letter dated September 14, 1992, from Councilmember John Hartley, you have asked whether there has been a breach of the Compliance with Laws clause of the two BSA leases and, if so, what if any, options are available to the City at this time.

This memorandum addresses the following questions:

1. Is there evidence that the San Diego County Council of the Boy Scouts of America violated any federal, state, or municipal laws when it dismissed Mr. Merino on the basis of his sexual orientation?
2. If BSA has violated the law, what jurisdictional and constitutional defenses may be raised by the BSA; and what are the counter-arguments to those defenses?

ANALYSIS

I. Is there evidence that the San Diego County Council of the Boy Scouts of America violated any federal, state, or municipal laws when it dismissed Mr. Merino on the basis of his sexual orientation?

A. Does the Unruh Civil Rights Act prohibit arbitrary exclusion of on the basis of one's sexual orientation by enterprises such as the BSA?

Under California's early common law, enterprises which were affected with a public interest had a duty to provide service to all without arbitrary or unlawful discrimination. In re Cox, 3 Cal. 3d 205, 212 (1970). In 1897, statutory recognition was given to this common law doctrine by the enactment of the predecessor to the present Unruh Civil Rights Act ("the Act"). Id. at 213. From 1897 until 1959, when the Act was adopted, certain appellate court decisions revealed a judicial effort to "improperly" curtail "the scope of the public accommodation provisions" by narrowly defining the kinds of businesses that afforded public accommodation. Id. at 214.

Out of concern for, and in response to, these decisions, the Legislature in 1959 enacted the Act. The Act provides in pertinent part: "All persons . . . are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civil Code Section 51 (Deering 1990).

This language, and consequently the Act itself, had been broadened along two axis of judicial interpretation. Specifically, both the "business enterprise" clause and the list of protected classes of persons have been judicially expanded.

1. Has the definition of "business enterprise" been expanded to include organizations such as the Boy Scouts?

The California Supreme Court, in a series of decisions, has given an expansive reading to the provisions of the act governing which establishments are to be brought within the Act's parameters. The Supreme Court stated: "By its use of the

emphatic words 'all' and 'of every kind whatsoever,' the Legislature intended that the phrase 'business establishments' be interpreted 'in the broadest sense reasonably possible.'" Isbister v. Boys' Club of Santa Cruz, Inc., 40 Cal. 3d 72, 78 (1985).

In Isbister v. Boys' Club of Santa Cruz, Inc., the Court extended the definition of "business establishment" to include the Santa Cruz Boys' Club, a public recreation facility. The Court found "no reason to insist that profit-seeking be a sine qua non for coverage under the Act." Emphasis in original. Id. at 82. While the Court concluded that nothing in the language or history of the enactment of the Act called for excluding an organization simply because it is nonprofit; it also found that Santa Clara Boys' Club did possess business-like attributes. Id. at 82.

In a similar vein, California courts have also held that local chapters of the BSA are "business enterprises" for purposes of the Act. In Curran v. Mount Diablo Council of the Boy Scouts, 147 Cal. App. 3d 712 (1983), the Court of Appeals for the Seventh District held that "the Boy Scouts, of which the defendant is a part, is a business establishment within the meaning of the Unruh Act." Id. at 733. Finding that the BSA had sufficient business-like attributes to bring it within the purview of the Act, the court observed:

> The Boy Scouts of America is the owner of the copyright of the Boy Scouts' emblem and uniform, which are franchised to retail outlets throughout the United States. It derives great financial revenues from such franchising. In addition, the Boy Scouts of America is engaged in the book publishing business and publishes and sells a variety of books throughout the United States. Furthermore, the defendant maintains a retail shop in Walnut Creek, California, where it engages in extensive commercial activities.

Id. at 719.

It is clear, therefore, that the California courts have consistently broadened the scope of the Act through their interpretations of "business enterprise;" already holding that the BSA is governed by the Act. Under these findings, the BSA is to be scrutinized for compliance with the Act's protections and held to the same standards under the Act as other, more

traditional, business organizations. Coming within the scope of the business enterprise rubric is, however, only the first inquiry under the Act; in order for an entity to be held liable, the plaintiff must also be within the class of protected persons.

In In re Cox, 3 Cal. 3d 205 (1970), the California Supreme Court applied the Act to an exclusion of a patron of a business establishment for reasons not involving one of the specifically enumerated categories of the Act; i.e., race, color, etc. The Court held that the shopping center did not have the right to discriminate against a customer solely because of his association with a young man "who wore long hair and dressed in an unconventional manner." Id. at 210. Despite the listing of specific types of discrimination in the statute, the Court concluded that the Act prohibited all "arbitrary discrimination by a business enterprise" and that the listing was "illustrative rather than restrictive" of the types of discrimination prohibited by the Act. Id. at 212, 216-217.

Beginning with Cox in 1970, the Act has been construed to apply to several classifications not expressed in the statute. See e.g., Marina Point, Ltd. v. Wolfsun, 30 Cal. 3d 721 (1982) (families with children); O'Connor v. Village Green Owners Assn., 33 Cal. 3d 790 (1983) (persons under 18). Sexual orientation has also been found to be a classification worthy of the Act's protection. See e.g., Rolan v. Kulwitzky, 153 Cal. App. 3d 289 (1984); Hubert v. Williams, 133 Cal. App. 3d Supp. 1 (1982); see also, Stoumen v. Reilly, 37 Cal. 2d 713 (1951).

On facts substantially similar to those at bar, the Curran court overruled a demurrer and returned the case to the trial court for a hearing on the merits. In overruling the demurrer, the court stated:

> The primary purpose of the Unruh Act is to compel recognition of all persons in the right to the particular service offered by an organization or entity covered by the act.
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> . . . .
>
> Moreover, the statute's focus on the individual precludes the exclusion of persons based on a generalization about the class to which they belong.
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> Nor can an exclusion be justified only on the ground that the presence of a class of persons does not accord with the nature of the

> organization or its facilities. Here, plaintiff asserts that he was expelled from membership in Boy Scouts, and excluded from "Scouter" status therein, on the claim that he is not a good moral example for younger scouts due to his sexual preference of homosexuality. The Unruh Act prohibits arbitrary discrimination against homosexuals.

Curran, 147 Cal. App. 3d at 733-734, cited with approval in, Harris, Id. at 1155.

The above cited holdings lead to the conclusion that the San Diego County Council of the BSA may have violated the Act when it dismissed Mr. Merino. Clearly, under current case law, the BSA is a business enterprise for purposes of the Act. Mr. Merino's dismissal on the basis of his sexual orientation, if found to be arbitrary, is an act proscribed by the Act. Thus, the BSA may have violated a state law in contravention of a condition in their lease. Under the lease, such a violation may empower the City to cancel and terminate the lease and all powers and rights granted thereunder. It should be noted that the Curran case was first appealed and decided in 1983. We understand that, on remand, the trial court in Curran eventually found the BSA to be a business enterprise under the Act, but the BSA prevailed on the First Amendment issue discussed at page 9 of this memorandum. The case, at this time, is again under appeal.

B. Has the BSA violated the San Diego Human Dignity Ordinance?

San Diego Municipal Code ("SDMC") sections 52.9601 et seq., is known as the San Diego Human Dignity Ordinance ("HDO"). Enacted on April 16, 1990, the main purpose of this ordinance is to "protect and safeguard the right and opportunity of all persons to be free from discrimination based on sexual orientation." SDMC section 52.9601. Both Section 52.9605, governing establishments, and Section 52.9606(3), governing facilities and services supported by the City, may have been violated by the BSA when it dismissed Mr. Merino.

1. Has Section 52.9605 been violated by the BSA?

Section 52.9605 of the SDMC provides in pertinent part: "It shall be an unlawful business practice for any person to deny any individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any business establishment on the basis (in whole or in part) of such individual's sexual orientation." Unlike the Act, there is no need to determine whether Mr. Merino falls within a protected

class; discrimination on the basis of sexual orientation is specifically prohibited by the HDO. However, under this provision of the HDO, the defendant must act on behalf of a "business enterprise."

"Business enterprise" is defined under the HDO as any entity "which furnishes goods or services to the general public." Unfortunately, there is no judicial construction of this provision. As discussed, there is substantial case law on the Act's definition of business enterprise. However, the probative value of the judicial construction of the Act may be minimized because the language varies from the Act to the HDO; i.e., the Act reads "business enterprise of any kind whatsoever;" while the HDO covers business enterprises which provide goods and services to the general public.

Adding to the uncertainty of the definition of business enterprise is the lack of legislative history associated with the HDO. The legislative history of the Act was instrumental in guiding the courts to adopt as broad a definition as they did. No such history exists with the San Diego HDO. It is unclear, therefore, just how expansive the Council intended the term business enterprise to be.

As previously stated, the BSA indeed may have violated the business enterprise provision of the HDO when they dismissed Mr. Merino on the basis of his sexual orientation. However, there are major definitional gaps that have to be addressed by the courts in order to more fully understand the scope and breadth of the HDO. Until then, it is an "open question" whether in fact this provision of the HDO has been violated by the BSA in this case.

2. Has the BSA violated Section 52.9606(3) of the HDO?

Section 52.9606(3) of the SDMC provides:

> It shall be an unlawful service practice for any person to deny any individual the full and equal enjoyment of, or to impose different terms and conditions upon the availability of, any service, program or facility wholly or partially funded or otherwise supported by The City of San Diego, on the basis (in whole or in part) of such individual's sexual orientation.

Similar to Section 52.9605, this provision clearly sets forth the protected class. Thus, the sole inquiry, again, is whether the defendant is an "actor" for purposes of this provision.

This section of the HDO proscribes discrimination on the basis of sexual preference by any facility, program, or service funded, either in whole or in part, by the City. In leasing property to the BSA the City does not give money, per se, to the San Diego County Council of BSA, it does, however, subsidize their activities. The lease on the five acres in Balboa Park is one dollar per year, while the Fiesta Island lease is completely free. This appears to fulfill the requirement that the facility be "wholly or partially funded by the City." Based on the clear language of the provision, it appears the BSA violated Section 52.9606.

II. If BSA has violated the law, what jurisdictional and constitutional defenses may be raised by the BSA; and what are the counter-arguments to those defenses?

A. Can the BSA claim that Merino's release from the El Cajon Explorers was separate and distinct from the other facilities?

In the "Compliance with Law" provisions of both the Fiesta Island lease and the Balboa Park lease the BSA bound themselves to comply with all laws in the operation of the premises. As previously stated, Mr. Merino was dismissed from the El Cajon Explorer Post. Furthermore, there is no evidence to the fact that he was denied access to either the Balboa Park facility or the Fiesta Island facility. Thus, the BSA may claim that the actions of the organization, not associated directly with the leased premises, cannot serve as a basis for termination under the lease provisions.

This argument may fail as to the Balboa Park facility. The clause in the lease specifically requires the Boy Scouts to comply with all laws in the "operation of the facility." The Balboa Park facility operates as the headquarters of the County Council; the local governing body of the BSA. It was this body that ultimately made the decision to dismiss Mr. Merino. Thus, since the Balboa Park facility operates as the main office and governing facility, and because the attending action was taken by this governing body, it can be argued that the BSA did not comply with all laws in the "operation" of the premises. Supporting this argument is the fact that the dismissal letter received by Mr. Merino was sent from the Upas Street address.

An analogy can be made to federal laws pertaining to the jurisdiction of a corporation for jurisdictional purposes in a diversity action. A corporate entity is a citizen of the state where its headquarters or main corporate offices are located. See generally, 32A Am. Jur. 2d, Federal Practice and Procedure Section 1368 (1982). Once the headquarters are determined, the wide-ranging actions of the entire corporation can be imputed to

the main office. Here, headquarters are maintained at the Balboa Park facility and all actions for the San Diego County Council originate from that property.

Conversely, there is nothing to indicate that the operation of the Fiesta Island facility resulted in any discrimination towards Mr. Merino. This facility does not house any presiding entities of the local BSA, and it was not involved in the decision to dismiss Mr. Merino. Additionally, there is no evidence to support whether Mr. Merino was ever denied access to this facility or its services. It would appear, however, from the language in the letter of suspension that the BSA has suspended Mr. Merino from all the rights and privileges of BSA membership, and that this suspension would extend to the use of the Fiesta Island facility. Should this be the case, any discrimination associated with the Fiesta Island facility would unequivocally violate the lease.

Additionally, the Fiesta Island facility lease states: "In addition, LESSEE shall comply with any and all notices issued by the City Manager or his authorized representative under the authority of any such law, statute, ordinance or regulation." The City Manager has taken advantage of this provision, specifically notifying BSA that discrimination on the basis of sexual preference is not allowed on any City owned leaseholds. Thus, any discrimination by BSA on the Fiesta Island facility would not only violate state and municipal law, but would violate a specific notice of policy given by the City Manager. Any such action would be in contravention of the lease provision.

The leases do not specifically address the procedure to be used in order to determine if a law or statute has been violated. However, the Balboa Park lease does state that a finding by any competent court will be conclusive evidence as to the violation. Past experience indicates that the usual City procedure with respect to such provisions is for the City to make an initial finding of a violation. Then, if the violation is not corrected, the City as plaintiff may file a court action. The City would then rely on the court's judgement.

Based on the above analysis, an argument can be made that the BSA violated municipal and state laws in the operation of the Balboa Park premises. It is less clear, however, if such discriminatory behavior can be imputed to the operation of the Fiesta Island facility.

B. May the BSA raise freedom of association and supremacy clause defenses to actions challenging their policies?

The First Amendment to the United States Constitution protects the individual right of a person to freely associate

with whomever he or she chooses. Associations that amount to truly private institutions are entitled to this freedom. The private or public nature of the organization is determined by the selectivity of the membership process. In Bd. of Dirs. of Rotary Int'l. v. Rotary Club, 481 U.S. 537 (1987), a case not unlike the Curran case, the United States Supreme Court held the Unruh Act applicable to the Rotary Club International; and found that the order of the California Appellate Court that women be admitted to the Rotary Club did not infringe upon the constitutional guarantee of freedom of association. The Court indicated it has protected freedom of association in two distinct senses:

> First, the Court has held that the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships. Second, the Court has upheld the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities.

Id. at 544.

The BSA are chartered pursuant to a congressional grant and cannot therefore, be religious in nature. Additionally, 36 U.S.C. Section 23 (1981) indicated the purpose of the organization is to train boys in scout craft and to teach them patriotism, courage, self-reliance and kindred virtues, all of which are laudatory goals, but none of which appear to embrace any areas of protected speech.

The inquiry may then be, whether BSA is an "intimate or private relationship" for purposes of freedom of association. In Rotary Club the Court said:

> In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship.

Id. at 546.

Based on these factors, and the inclusivity rather than exclusivity of the BSA organization in general, freedom of association may not protect the BSA in this instance.

In dicta the Curran appellate court stated, "an

organization with no limits on its membership and with no standards for admissibility, is simply too obviously unselective in its membership policies to be adjudicated a private club." Curran, 147 Cal. App. 3d at 731. In applying this standard to the BSA, the Curran court found that the BSA was not a private entity deserving of freedom of association protection. The court found that BSA was open to all boys in the community and was "serving the general public." Therefore, the court in overruling the demurrer held that the BSA did not meet the definition of "truly private association," and, consequently, did not warrant first amendment protection. Id.

Finally, in Curran the BSA also argued that enforcement of the Act against them would violate the supremacy clause. The BSA argued that because they were authorized under the Charter granted it by Congress in 1916 (see, 36 U.S.C. Section 21 (1981)) any state law infringement would violate the supremacy clause. However, the Charter only allows BSA to promulgate laws "not inconsistent with the laws of the United States of America or any State thereof, ..." 36 U.S.C. Section 22 (1981). Thus, the court held, "there is no supremacy clause problem." Id. at 734.

As we have earlier noted when the Curran case was tried last month in Los Angeles County, the Los Angeles Superior Court determined the BSA had a legitimate first amendment freedom of association defense. That ruling is now on appeal.

CONCLUSION

It appears from the above analysis that BSA may have violated the Act. Additionally, it is reasonable to assume the BSA may have violated San Diego's HDO. Each of these violations may be a breach of the compliance with laws clause of the BSA leases with the City unless the BSA can show that its conduct is protected by the First Amendment.

The City may notice the BSA of the apparent violation and request that BSA cure the violation. In the event BSA fails to cure the violations, the City may file an unlawful detainer action against BSA alleging a material breach of the lease agreements. The City may also choose to take no action under the lease unless or until Mr. Merino obtains judicial relief on his own behalf. Mr. Merino has the ability to pursue injunctive relief under either the Act or the HDO.

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By
Sharon A. Marshall
Deputy City Attorney

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Attachment

cc Christiann Klein
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