MEMORANDUM OF LAW

DATE: June 16, 1995

TO: Sharren L. Carr, Acting Deputy Director
Neighborhood Code Compliance Department

FROM: City Attorney

SUBJECT: Zoning Issues in Centre City East and Gaslamp Quarter

You have asked our office for suggestions on how to address two enforcement problems that you frequently encounter in the Centre City East and Gaslamp Quarter areas of the City. Specifically, you mentioned:

1. The loitering problem outside homeless service providers and liquor stores (alcohol outlets), and
2. Complaints from people who live in the Gaslamp Quarter about excessive noise emanating from nighttime commercial uses.

While there is no simple solution to either of these problems, this memorandum discusses available options.

I

The Loitering Problem

Background

The first question you have asked is whether anything can be done to curtail loitering outside homeless shelters and alcohol outlets. Currently, all service providers and alcohol outlets within the Gaslamp and Centre City areas are required to obtain a Conditional Use Permit ("CUP") in order to operate. The CUPs are generally conditioned upon, among other things, not allowing loitering in and around the business. Service providers and alcohol outlets that were operating before the requirement for a CUP, however, are legal nonconforming uses, and therefore are not required to obtain a CUP. Code Enforcement Officer Linda Hanley informed me that she has found the loitering problem to be equally bad with both the establishments that have CUPs and the preexisting (nonconforming) establishments. The major difference she observes is that the former has the loitering problem across the street from their business, and the latter has the loitering problem in front of their business.

Question One: Can we impose the same conditions found in the CUPs on the nonconforming businesses?

Answer: No.

Courts have consistently held that the right of businesses to continue the use they enjoyed at the time a zoning ordinance is enacted should be protected. Edmonds v. County of Los Angeles, 40 Cal. 2d. 642 (1953). In fact, the right to continue the business as it existed when the ordinance took effect is a vested right which cannot be taken away without due process of law. Cow Hollow Improvement Club v. Board of Permit Appeals of City and County of San Francisco, 245 Cal. App 2d. 160 (1966); Goat Hill Tavern v. City of Costa Mesa, 6 Cal. App. 4th 1519 (1992). In the case of the Centre City East and Gaslamp areas, alcohol outlets and service providers that were legally operating at the time that the CUP requirement took effect have a vested right to continue. That right generally cannot be ended without compensation as long as the nonconforming use remains substantially similar to the use that existed at the time the requirement for a CUP was adopted. Sabek, Inc. v. County of Sonoma, 190 Cal. App. 3d 163 (1987).

While the answer to the question of whether we can impose conditions on the nonconforming businesses is no, a different analysis is required for alcohol outlets than is required for social service agencies.

Alcohol Outlets:

The Twenty-First Amendment to the United States Constitution repealed prohibition, and returned to the states the power to regulate alcohol sales. Many states delegated this power to local municipalities, California did not. City of Rancho Cucamonga v. Warner Consulting Services, Ltd., 213 Cal. App. 3d 1338 (1989). In fact, 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.

California law specifically addresses alcohol outlets that preexist valid zoning ordinances. Business and Professions Code section 23790 provides that preexisting alcohol outlets must be allowed to remain so long as they keep the same classification of liquor license, and the business is "operated continuously without substantial change in mode or character of operation." Bus. & Prof. Code Section 23790(b). The code goes on to provide that a closure of less than thirty days for repair, or a closure of any length due to an act of God or toxic accident do not constitute a break in the continuous operation of the business. Bus. & Prof. Code Section 23790(b)(1) and (2). Therefore, as long as the nonconforming alcohol outlets operate as they did when the CUP requirement was enacted, they can continue to do so indefinitely, without being required to obtain a CUP.

Social Service Agencies:

Regulation of social service agencies, unlike regulation of alcohol outlets, is not preempted by state law. The City therefore has wider

latitude in dealing with them. San Diego Municipal Code ("SDMC") section 101.0303 sets forth conditions which can end a right to continue a nonconforming use:

1. If there are changes, restrictions, or enlargement of the use, it may act to end the right to continue a nonconforming use (a substantial change in mode or character of operation is required to end nonconforming alcohol outlets);

2. If the nonconforming use is discontinued for 12 months, the use is deemed to have been abandoned, and the right may be terminated (this applies to alcohol outlets as well);

3. If there are any repairs to the building that exceed 50% of the fair market value of the building, the nonconforming right can be terminated (this is not applicable to alcohol outlets); and,

4. If there is a fire, explosion, act of God, or act of the public enemy which destroys 50% of the fair market value of the property, the nonconforming right may be terminated. (An act of God (or toxic spill) does not terminate the right to operate a non-conforming alcohol outlet.)

In addition to the provisions of the SDMC, a nonconforming use can be terminated if the City provides the business with a sufficient amortization period. Here, the City would inform the business that they must stop the nonconforming use, and provide a reasonable period of time (amortization) for the owners to recoup their investment. National Advertising Co. v. County of Monterey, 1 Cal. 3d. 875 (1970). (Amortization is not an option for alcohol outlets.)

To determine how long the amortization period must be, a weighing process must be done. In this weighing process, the public gain to be derived from a speedy removal of the nonconforming use is weighed against the private loss which removal would entail. Metromedia, Inc. v. City of San Diego, 26 Cal. 3d. 848 (1980), rev'd on other grounds, 453 U.S. 490 (1981); City of Los Angeles v. Gage, 127 Cal. App. 2d. 442 (1954). The period of amortization, however, does not need to be so long as to leave the nonconforming right with no value at the date it is terminated. Tahoe Regional Planning Agency v. King, 233 Cal. App. 3d. 1365, 1397 (1991). The burden is on the establishment to show that the length of the amortization period is unreasonable. Id. at 1396. Most of the cases in this area involve amortization periods of several years.

Question Two: If we cannot impose conditions on the nonconforming establishments, is there any other way to lessen the number of people loitering in and around the area?

Answer: Yes.

Nuisance:

Notwithstanding the foregoing, if the operation of the nonconforming establishment constitutes a nuisance, the nuisance can be abated. Highland Development Co. v. City of Los Angeles, 170 Cal. App.

3d. 169 (1985). The use could then be ended, or the court could impose requirements on the businesses as a condition of their continued use. However, in order for a business to be declared a nuisance, it must be found to be "injurious to health, or . . . indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." Civ. Code Section 3479. It would be difficult to make an argument that the congregation of homeless in front of a business makes the business a nuisance.

Enforcement Options:

Since most of the businesses at issue here are not subject to conditions contained in CUPs, and do not constitute a nuisance, the question becomes one of what tools currently exist to manage the problem of loitering associated with them. The following are some suggestions:

San Diego Municipal Code section 52.20 makes it unlawful for any person to stand or sit on any sidewalk or crosswalk or occupy the same so as to obstruct the free use thereof by the public and passage thereon by the public and passage thereon by pedestrians.

Penal Code section 372 makes it a misdemeanor to obstruct the free use of public areas, and passage thereon. One case, People v. Jones, 205 Cal. App. 3d. Supp. 1 (1988), affirmed a conviction of a woman who blocked the street for a very short period to talk to a friend from her truck.

Penal Code section 303(a) makes it a misdemeanor for a person to loiter outside of a place where alcohol is served, and beg or solicit a person to purchase alcohol for them.

Penal Code section 647(e) makes it a misdemeanor to loiter or wander the streets without apparent reason or business and refuse to identify themselves and account for their presence when requested to do so by a police officer, if, the surrounding circumstances are such as to indicate to a reasonable person that public safety demands identification.

Penal Code section 647(f) makes it a misdemeanor to be drunk in public, i.e., unable to care for oneself, or to interfere with or obstruct the free use of the sidewalks or streets.

Penal Code section 647(i) makes it a misdemeanor to illegally lodge on private or public property without the owner's consent.

The foregoing enforcement options address the people that are loitering, but not the particular service provider or alcohol outlets that they are loitering around. Therefore, the police would have to be relied upon for enforcement. Further, the problem would be ongoing -- since nonconforming service providers and alcohol outlets can not have conditions placed on their continued operation, enforcement of the loitering problem would remain with the police department.

II
Noise Complaints in the
Gaslamp Quarter
Background

The second issue you have brought to our attention is noise, or sound levels, in the Gaslamp Quarter. As you know, the Gaslamp Quarter is a mixture of commercial and residential, with commercial noise levels allowed. The commercial sound level limits are 65 decibels between 7 a.m. and 7 p.m., and 60 decibels any other time. SDMC Section 59.5.0401. Code Enforcement Officer Linda Hanley informed me that she has gotten noise complaints from people who live in the area and, upon investigating, has found the sound readings generally found outside many of the businesses in the area to be between 70 and 75 decibels. She pointed out that the unique nature of the Gaslamp Quarter makes compliance with the maximum sound level requirements of SDMC section 59.5.0401, practically speaking, inconsistent with the present general use and character of the area.

Question: Can higher noise levels be allowed in the Gaslamp Quarter than are currently provided for in the Municipal Code?

Answer: Yes, however, it would necessitate an amendment to the Municipal Code.

One option that you suggested was that the businesses in the area could get a variance to allow the greater sound levels. However, the excessive sound level is not something that is unique to, or a problem of, the land, but rather something that is unique to the use of the land. As such, a variance would not be available.

The sound levels found in the Gaslamp Quarter are often in excess of those allowed in the Municipal Code. Since a variance is not an option, any change of the maximum sound levels in the Gaslamp Quarter would require an amendment to the Municipal Code. Such an amendment might establish, for example, an area consisting of a mixture of commercial, residential and historic structures, with a tradition of live entertainment for more than five (5) years, and provide for higher maximum sound levels than would currently be allowed. The findings necessary for the amendment might include, among other things, that people who chose to live in these areas (like the Gaslamp Quarter) were aware of the unique nature of the area and its noise levels before they chose to live there. The new sound level limit could be set at perhaps 70 or 75 decibels, consistent with the existing operations.

One potential attack on such an amendment is that the amendment would be inconsistent with the General Plan. The General Plan sets forth the maximum noise levels which are compatible with various activities. The General Plan states that one of its purposes is to "ensure that land use designations, zoning, and specific project development plans are consistent with adopted land use-noise level compatibility standards." Progress Guide and General Plan for the City

of San Diego, in Amendments through May 9, 1989, at 42. Table 2 in the Amendments lists sound levels above 65 decibels as incompatible with residential single family, multiple family, mobile homes and transient housing (anything above 75 decibels is incompatible with retail shopping centers, restaurants, and movie theaters). Since there is residential housing in the Gaslamp Quarter, and residential use is specifically encouraged under the Redevelopment Plan for the area, raising the sound level limit to 70 or 75 decibels would be inconsistent with the General Plan limit of 65 decibels.

An attack based upon the General Plan, however, would probably fail. The City of San Diego, as a charter City, is not required to make its zoning ordinances consistent with its General Plan. Government Code section 65803 specifically provides an exception to the requirement that a city's zoning ordinances comply with its general plan. It states, "except as otherwise provided, this chapter shall not apply to a charter city, except to the extent that the same a consistency requirement may be adopted by charter or ordinance of the city." Courts likewise have consistently held that zoning ordinances of charter cities do not have to be consistent with their general plan unless the charter explicitly requires consistency. Garat v. City of Riverside, 2 Cal. App. 4th. 259, 281 (1991); Verdugo Woodlands Homeowners etc. Assn. v. City of Glendale, 179 Cal. App. 3d. 696 (1986). Neither the Charter of The City of San Diego, nor the San Diego Municipal Code, require consistency with the General Plan.

While the City does not have a consistency requirement, at least one court has recognized a potential challenge to zoning ordinances which are inconsistent with a city's general plan. In City of Del Mar v. City of San Diego, 133 Cal. App. 3d. 401 (1982), the court, although finding that The City of San Diego's allocation of low income housing was not inconsistent with its general plan, stated:

> To the extent that a city approves a zoning ordinance which is inconsistent with the city's general plan, the inconsistency must at least give rise to a presumption that the zoning ordinance does not reasonably relate to the community's general welfare, and therefore constitutes an abuse of the city's police power.

Id. at 414-15.

The excerpt from the Del Mar case above, is "dicta," and no California case has cited this language during the thirteen years since it was decided. The bottom line is that although such an amendment to the Municipal Code would be inconsistent with the General Plan, it would nonetheless be legal, and a thorough findings of benefit would probably go a long way towards overcoming any presumption that the ordinance was not in the City's general welfare.

III

Conclusion

There is no practical way to impose the same conditions found in CUPs on the nonconforming service providers and alcohol outlets in the Centre City East and the Gaslamp Quarter areas of the City. The only way to address the loitering problems associated with these establishments is to enforce the provisions already in the San Diego Municipal Code and the California Penal Code concerning nuisance, public intoxication, and illegal lodging. As for allowing greater noise levels in the Gaslamp Quarter, while this can be done, it would require an amendment to the Municipal Code, and findings of benefit reflecting the unique nature of the area.

JOHN W. WITT, City Attorney
By
Douglas K. Humphreys
Deputy City Attorney

DKH:lc:612.2x630(x043.2)
ML-95-39