MEMORANDUM OF LAW

DATE: August 14, 1995

TO: Chief B. Chris Brewster, Park and Recreation Department, Lifeguard Services Division

FROM: City Attorney

SUBJECT: San Diego Municipal Code Section 63.20.20

QUESTION PRESENTED

You have asked us to advise you whether San Diego Municipal Code ("SDMC") section 63.20.20, which prohibits commercial operations in beach areas without a permit, is constitutional and enforceable. You explained that one of your primary concerns is rentals and delivery of personal watercraft within the Park. Consequently, we will discuss that activity in this memorandum.

SHORT ANSWER

SDMC section 63.20.20 is constitutional and may be enforced as long as enforcement is not arbitrary or unreasonable.

BACKGROUND

The use of jet skis and wave riders (as personal watercraft are popularly known) is a popular recreational activity in Mission Bay Park ("Park"). These personal watercraft are small, motorized watercraft which are ridden and controlled generally by one person. There are apparently some businesses located outside the Park ("off-site businesses") which rent jet skis to the public for either pick-up outside or delivery at the beaches inside the Park boundaries.F

Currently there are commercial enterprises authorized to rent watercraft within the boundaries of Mission Bay Park. These businesse (the Bahia, Hilton, and Vacation Isle Hotels) lease Mission Bay Park property from the City, rent recreational watercraft from those locations, and pay a portion of profits to the City. Section 63.20.20 exempts City lessees and commercial fishermen from its prohibitions. This practice violates SDMC section 63.20.20 (attached as Attachment A). It is the off-site businesses' contention that they should be allowed to rent and deliver jet skis regardless of point of delivery.

You told us that you were involved in amending section 63.20.20, and that the primary purpose of the amendment was to regulate personal watercraft rental businesses. The delivery of jet skis by off-site businesses to customers inside the Park constitutes commercial activity

in violation of the statute. (There is no prohibition, however, against a customer transporting jet skis from the off-site business location to the Park). The reason for prohibiting off-site businesses from delivering jet skis in the Park is to preclude those businesses from utilizing that opportunity to enter into additional rental agreements with people already at the beach. You see this as a public safety issue since there is no way to control the type or condition of watercraft or the number of watercraft rented, unless the rental businesses are regulated in some way.

Citations for violations of the ordinance have been issued to some of the employees and owners of off-site jet ski rental businesses, but apparently not to other types of businesses. For example, delivery of food and merchandise, telephone calls, tow truck services, and the like have not been subject to citations. As a result, the off-site businesses claim that section 63.20.20 has been selectively enforced against them, and is therefore a violation of constitutional equal protection guarantees. An equal protection violation would arise if the "prosecutorial authorities' selective enforcement decision `was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.'" Murgia v. Municipal Court, 15 C.3d 286, 302 (1975) (quoting Oyler v. Boyles, 363 U.S. 448, 456 (1962)). It is our understanding that enforcement of this section is not based on an unjustifiable standard. The citing of off-site rental businesses is based on public safety concerns.

There is currently no procedure by which the off-site businesses may obtain permits to rent jet skis; consequently, City lessees have exclusive rights to rent jet skis. The off-site businesses have expressed a willingness to cooperate with the City in designing and implementing an acceptable permit procedure. (See Adamson letter to Councilmember Scott Harvey, Attachment B).

In addition, off-site rental businesses have complained that the ordinance is unconstitutional because it is vague and overbroad.

DISCUSSION

We begin our discussion with a general analysis of permit requirements in public parks, since a permit system for off-site jet ski rentals has been suggested by you and the off-site businesses. As we noted above, a permit system may alleviate several of the complaints of the off-site rental businesses.

We will also discuss the allegations that section 63.20.20 is vague and overbroad. In constitutional analysis, "vague" and "overbroad" are terms that are often paired or used interchangeably. "We have traditionally viewed vagueness and overbreadth as logically related and similar doctrines." Kolender v. Lawson, 461 U.S. 352, 358, n.8. (1983). However, there are subtle differences between them. As is more fully set forth below, vagueness refers to statutory language that is not clear or easily understood. Overbreadth refers to statutory language

that regulates or prohibits clearly legal activity in addition to any specific activity affected by the statute.

A. Permit Requirements for Commercial Enterprises

Permit requirements to operate commercial enterprises in public parks have been upheld repeatedly in the courts. In United States v. Carter, 339 F. Supp. 1394, 1396 (D. Ariz. 1972), the court upheld 36 C.F.R. 5.3 which prohibits "engaging in or soliciting any business in federal park areas, except in accordance with the provisions of a permit, contract, or other written agreement with the United States. . . ." In that case, the defendant rented boats and offered to deliver them to certain areas within federal park land. The court acknowledged the necessity for all business activities in the park areas to be carefully controlled, and approved the right of a single, permitted concessioner to provide all services within any given park unit.

The court enjoined that defendant from providing any service, specifically including the boat hauling and launching service, without a permit. Similar to the local jet ski situation, the injunction granted by that court did not prohibit anyone from renting and taking delivery of boats at defendant's place of business, regardless of where the renter of the boat may take and use the rented boat thereafter.

More recently, in U.S. v. Richard, 636 F. 2d 236 (8th Cir. 1980), cert. denied 450 U.S. 1033 (1981), the court held that 36 C.F.R. 261.10(c), which prohibited conducting any kind of business enterprise or performing any kind of work on national forest lands without authorization, precluded a canoe rental business located on private land from contacting potential customers in a national forest, hauling the canoes on forest service roads, and launching the canoes from a forest service boat ramp. Free Enterprise Canoe Renters Ass'n v. Watt, 711 F. 2d 852, 856 (8th Cir. 1983), concerned a Federal Park Service rule which prohibited "`the delivery or retrieval within the boundaries of Ozark National Scenic Riverways' of rented watercraft without a permit." The circuit court upheld permit requirements for rental and delivery of watercraft in a federal park. The court also held that the Forest Service could set the total number of permits at whatever level it calculated would best serve the needs of the public and its responsibility to protect the Ozark National Scenic Riverways. Competition for permits was also approved on the basis of objective and published criteria.

Similarly, a California court in Wilson v. Cook, 197 Cal. App. 3d 344, 351 (1987), held that a regulation prohibiting solicitation in a public park without a permit "serves a substantial government interest which is to maintain the natural character of state parks for the public's enjoyment by regulating commercial activity within the parks."

Courts in other states have also upheld the prohibition of commercial activity in parkland without a permit. In a case with facts similar to this issue, State of Colorado v. Clark General Store, 658 P.

2d 1385, 1386 (1983), the court upheld a state regulation which prohibited use of "parks and outdoor recreation land for a commercial purpose without first obtaining written permission from the Board Board of Parks and Outdoor Recreation."

Case law supports the requirement of permits for commercial activity in state and federal public parks. A permit system could be implemented that addresses the concerns of the off-site businesses and complies with legal requirements. As mentioned above, the court in Free Enterprise Canoe Renters, 711 F. 2d at 856, approved permit requirements, so it would not be unreasonable for the City to require insurance and particular safety standards as prerequisites for permits.

B. Vagueness. The off-site businesses have complained that there is no clear guidance as to what constitutes "carrying on any commercial operation" per section 63.20.20 and therefore that section is unconstitutionally vague. Both federal and state courts have addressed the concept of vagueness as it relates to statutory interpretation. A review of relevant cases reveals that existing statutes are normally upheld and not overturned by the courts unless they are obviously unconstitutional.

In Lockheed Aircraft Corp. v. Superior Court, 28 Cal. 2d 481, 484 (1946), the California Supreme Court held:

> All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears (citations omitted). A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.

The court in City of Costa Mesa v. Soffer, 11 Cal. App. 4th 378, 387 (1992) held: "A statute will be upheld against a claim of vagueness if its terms can be made reasonably certain by reference to other definable sources (citations omitted). A statute is not vague if an ordinary person exercising ordinary common sense can sufficiently understand and comply with its language."

A recent California case, In re Daniel W., 34 Cal. App. 4th 1792, 1798 (1995) (challenging a city's curfew law) quoted the U.S. Supreme Court's discussion on vagueness found in Kolender v. Lawson, 461 U.S. at 357 (involving a challenge to a statute that required persons loitering or wandering to provide identification). In Kolender, the Court had stated: "The void-for-vagueness doctrine requires that a penal

statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Id. at 357. Earlier, in American Communications Ass'n v. Douds, 339 U.S. 382, 412 (1949), the Supreme Court had held: "The applicable standard for vagueness, however, is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important."

As previously noted, the regulation at issue in Colorado v. Clark General Store, 658 P. 2d 1385 (1983), was attacked on the grounds that "commercial activity" was not strictly defined. The Colorado court cited two earlier federal cases, U.S. v. Richard, 636 F. 2d at 236 (finding that a canoe outfitter in a national forest was conducting business), and U.S. v Carter, 339 F. Supp. 1394 (D. Ariz. 1972) (finding that renting boats outside the park, but launching them inside the park, constituted conducting business within a park.) The court ultimately held that towing and launching boats did, in fact, constitute commercial activity in violation of the regulation.

Viewed within the context of the activities to which it applies, section 63.20.20 appears to us to be clear, sufficiently certain, and to provide fair notice so that a reasonable person would know what the statute prohibits.

C. Overbreadth. The off-site businesses allege that section 63.20.20 is overbroad since its language prohibits commercial operations whether or not a financial transaction takes place within the beach area. They argue that a strict interpretation of the section could conceivably prohibit telephone calls, food or merchandise deliveries, tow truck services, and other legal activities inside the Park. Similar charges were addressed by the court in City of Costa Mesa v. Soffer, 11 Cal. App. 4th at 387:

> "When a statute is attacked as unconstitutional on its face, the attacker cannot prevail by suggesting that in some future hypothetical situation constitutional problems may arise as to the particular application of the statute citations." In re Marriage of Siller, 187 Cal. App. 3d 36, 48 (1986). "The mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." (City Council v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984)).

As the court in Wilson held, a regulation prohibiting commercial activity within a park does not prohibit provision of a service within

the park. The court also held that the regulation in question:

> Does not prohibit a person from performing services within the park area if the services are incidental to a contract entered into outside the park area. For example, a boat repair service or a trailer rental service headquartered outside the park would not need a permit to service boats at the lake or to rent trailers for use at the lake provided there was no solicitation of or advertising for customers at the lake.

Wilson v. Cook, 197 Cal. App. 3d at 350 (second emphasis added).

The court's language in Wilson refutes the off-site businesses' allegation that the regulation also prohibits legal activities such as tow truck services, delivery of food and merchandise, and the like. As the case law holds, the possibility that a legal activity could be affected by section 63.20.20 does not, without more, mean that the statute is overbroad. Since section 63.20.20 does not prohibit normally legal activity, it is not unconstitutionally overbroad.

D. Potential Amendments to Section 63.20.20. It may be desirable to amend the Municipal Code to narrow the scope of the language of section 63.20.20 to alleviate allegations of unconstitutionality and to implement a permit procedure for rental of personal watercraft as well. The following suggestions are examples of changes that would address the off-site businesses' concerns:

1) If the word "services" were deleted from the statute, and it were made clear that "commercial operation" did not include particular services, there would be no ambiguity about whether activities such as utilization of public telephones or tow truck services, food and merchandise delivery, and the like violate the ordinance.

2) The area to which section 63.20.20 applies, defined as "beach area" pursuant to SDMC section 63.20 (attached as Attachment C), could be redefined so that areas to which the ordinance applies are more clearly delineated.

3) A particular number of permits could be issued to rental businesses located outside the Park which do not presently have permits. If the permits are granted in a reasonable and non-arbitrary fashion, on the basis of objective criteria, and not solely at the discretion of the City Manager or other City official, such a system would be upheld. Apparently, at least one of the off-site businesses is interested in assisting the City in such an effort.

CONCLUSION

San Diego Municipal Code section 63.20.20 is not vague or overbroad, nor does it violate equal protection requirements. Therefore, it is constitutional and enforceable. However, enforcement of the prohibitions contained therein must not be arbitrary or

unreasonable. Changes in the language of section 60.20.20 may alleviate any possible misunderstandings or allegations of unconstitutionality. We will be happy to discuss alternate wording with you at your convenience.

Thank you for your patience and cooperation.

JOHN W. WITT, City Attorney
By
Mary Kay Jackson
Deputy City Attorney

MKJ:mb:263(x043.2)
Attachments:3
cc Councilmember Harvey
Councilmember Stallings
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