The City Attorney
City of San Diego
MEMORANDUM
236-6220

DATE: July 17, 1986

TO: Janis Sammartino Gardner, Deputy City Attorney

FROM: Fritz Ortlieb, Legal Intern
SUBJECT: Downtown Sidewalk Ordinance

BACKGROUND

It has been brought to the attention of the City Manager that some sidewalks in the downtown area are consistently found to be in an unsanitary condition. Citizen complaints have noted that litter and garbage are prevalent, particularly on streets south of Broadway. Additionally, the complaints have expressed concern about urine and excrement left by transients in doorways adjacent to the sidewalks. Some of the abutting buildings are presently unoccupied.

QUESTION PRESENTED

Whether the City could adopt an ordinance requiring downtown property owners to hose their sidewalks daily; if so, may it apply only to the downtown area, or must it apply city-wide?

CONCLUSION

Yes, such an ordinance would probably be upheld as a valid exercise of the City's police powers. As the problem is localized in the downtown area, the scope of the ordinance may be limited in application only to this area. However, there is a possibility, albeit slight, that such an ordinance may be found unreasonably burdensome on the owners and tenants so as to constitute a deprivation of due process. The City's interest in health and safety provides a presumption of reasonableness which renders this possibility remote.

A more realistic problem is that of enforcement. The City already has an ordinance requiring owners and tenants to clean their sidewalks which apparently suffers from lack of enforcement. Therefore the enforcement of the proposed law, which requires even more of the owners than the existing one, should be a primary concern.

DISCUSSION

It is not uncommon for a municipal corporation to adopt an ordinance under the powers of its charter requiring owners of property abutting public sidewalks to maintain the sidewalks in a

clean and safe condition. The City of San Diego has itself enacted such an ordinance in San Diego Municipal Code ("Municipal Code") Section 44.0119B., which reads:

> The property owner, tenant, or person in responsible charge of premises abutting on any portion of a public street or area between the premises and street line which is maintained as a park or parking strip shall maintain any public walkway thereon in a condition free from litter, waste material1, and plant growth.

While the ordinance imposes a duty upon abutting owners to keep their sidewalks clean, it does not go so far as to require that the sidewalks be cleaned daily. Since the problem of litter, garbage, and excrement odors in the downtown area is a persistent fact, such a requirement may be considered as an effective means of abatement. However, this consideration must lend some attention to constitutional limits.

The situation presently existing on the downtown streets may properly be described as a public nuisance insofar as it is injurious to the public health and well being. If this contention is debatable, the issue would have no effect on the City's power to regulate. A municipality's power to regulate is not limited to existing nuisances but also extends to things or acts which may potentially injure the public health. Laurel Hill Cemetary v. San Francisco, 152 Cal. 464 (1907), affirmed 216 U.S. 358 (1910). Accordingly, the appropriate legislative body may make and enforce ordinances to regulate such act or thing, although it may never have been offensive or injurious in the past. Re Application of Mathews, 191 Cal. 35 (1923).

1"Waste matter means rubbish, solid waste, and any liquid wastes, including but not necessarily limited to, oil, other petroleum products, paint, chemicals and other hazardous wastes," Municipal Code Section 44.0116J. Emphasis supplied.

Basis for Regulation

The basis for regulation of sidewalk maintenance is of peculiar nature because the proposed ordinance requires affirmative acts, as opposed to compliance with prohibitions. Thus the basis of the legislation can be viewed either as an exercise of police power, or as a tax, or an assessment:

> Such ordinances are difficult, if not impossible to classify. In some features they resemble special assessments, the burden being imposed in the form of labor rather than of money, but as special assessments they would be unconstitutional, because not levied in proportion to benefit. On the other hand, it seems hardly possible to require a man, as an exercise of the

> police power, to remedy a condition which he has not caused, merely because to do so would enhance the public convenience. Yet . . . the ground usually assigned for the exercise of this legislative authority is the police power, although in a few cases it is held that legislation of the kind under consideration is a valid exercise of the power of taxation.

58 A.L.R. 215.

This authority suggest that the police power is typically invoked to support ordinances imposing duties upon abutting owners, indicating that the main justification for such laws is the abatement of nuisances. This reason is distinct from the purpose of improvement or maintenance, which are the objects of taxation. Either of these bases of regulation appear to be open to the City. As a special assessment the ordinance would not necessarily render disproportionate burdens and benefits. The property owners are deemed to own an easement interest to the center of the road, including the parkway and sidewalk. Civil Code Section 831; Jones v. Deeter, 152 Cal.App.3d 798 (1984). Thus the owners would receive a benefit to this interest by virtue of the assessment; whether this benefit is proportional to the burden will depend upon the nature and extent of the burden. An examination of this burden will also be required if the City is to rely upon its police power to support the legislation, for the question of reasonableness is essentially the issue.

Reasonableness of a Daily Hosing Requirement

In reviewing a constitutional objection the proposed ordinance, a court will apply a rational relationship test to determine whether the law will reasonably effectuate the purpose for which it was enacted. "No valid objection to the constitutionality of a statute under the due process clause arises if it is reasonably related to promoting the public health, safety, comfort, and welfare, and if the means adopted to accomplish that promotion are reasonably appropriate to that purpose." People v. Greene, 264 Cal.App.2d 774 at 777 (1968), citing Higgins v. City of Santa Monica, 62 Cal.2d 24 at 30 (1964). Where a legislative action by a local government is attacked as unreasonable, the burden of proof is on the attacking party. United Clerical Employees v. Contra Coasta County, 76 Cal.App.3d 119 (1977). Generally a statute or ordinance will be presumed to be constitutional unless its unconstitutionality clearly, positively, and unmistakably appears. Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside, 157 Cal.App.3d 887 (1984).

These established rules must be viewed in light of the applicable facts; e.g. a municipality's desire to enact an ordinance

requiring the daily washing of streets by adjoining property owners. Apparently this specific point has not been considered in California, but the decisions of other jurisdictions which bear close relation to this issue will provide helpful guidance in determining the constitutional validity of such an ordinance. Ordinances have been enacted in other states which require abutting property owners to remove snow and ice from public sidewalks within specified periods of time. These ordinances are the most approximate pieces of legislation to the proposed ordinance as could be found. The weight of authority has sustained these laws as a proper exercise of the police powers. State v. Small, 137 A. 398, 126 Me. 235 (1927); Rich v. Rosenshine, 45 S.E.2d 499, 131 W.Va. 30 (1947); Clinton v. Welch, 43 N.E. 116, 166 Mass. 133 (1896).

The best analysis of the issue is given in Small. There the Supreme Court of Maine held that the ordinance could be viewed as a form of taxation, but as such "it must be of the nature of local assessments, which, by eminent authorities, are also held to be an exercise of the police powers." 137 A. at 398. The court then turned to the question of whether the ordinance was a reasonable exercise of these powers. The law required that the owner, tenant, or occupant of property bordering on a public sidewalk "shall after the ceasing to fall of snow, if in the daytime within three hours, and if in the nighttime before 10 o'clock of the forenoon succeeding, cause such snow to be

removed." Recognizing the rule that there is a presumption in favor of reasonableness, the court examined the face of the ordinance and assessed the burden it imposed. The respondent contended that the shortness of time allowed for the removal of the snow made the law unreasonable. The court concluded that the "time limit for removal in by-laws of this nature is a matter resting in the sound judgment of the legislative body of this municipality. The court will not interfere simply because in its judgment a longer time should be allowed, unless the time fixed is so short that, on its face, or upon facts shown in evidence, it appears to be clearly unreasonable." Id. at 399.

As the Small case clearly illustrates, the face of the legislation will be the focus of judicial attention. An ordinance which requires sidewalks to be washed by adjoining property owners on a daily basis is not equivalent to the legislation sustained in Small. The difference lies in the fact that the ordinance in Small did not impose a duty to remove snow if no snow had fallen.

The logic of this is quite simple, and it may be extended to the issue at hand. A daily requirement of washing would appear to be

unreasonable if prior to washing the sidewalks were already clean. Such a duty, imposed regardless of the condition of the sidewalks, would not be the least restrictive means of achieving the City's goal of keeping its sidewalks in a sanitary condition. Here it must be observed that legislation affecting specific rights guaranteed by the constitution, or those "implicit in the concept of ordered liberty" must be protected notwithstanding the governmental interest. Palko v. Connecticut, 302 U.S. 319 at 325 (1937); Roe v. Wade, 410 U.S. 113 at 129, 152-156 (1973). The concern regarding fundamental rights is one of due process, but it is questionable whether property owners have a fundamental interest in not washing the sidewalks in front of their buildings. The general rule applied by the Supreme Courts of the United States and California in the examination of police power enactments against the requirements of state and federal due process is stated as such: "In the exercise of its police power the legislative body does not violate due process so long as an enactment is procedurally fair and reasonably related to a proper legislative goal. The wisdom of the legislation is not at issue in analyzing its constitutionality, and neither the availability of less drastic remedial alternatives, nor the legislative failure to solve all related ills at once will invalidate a statute." Perez v. City of San Bruno, 27 Cal.3d 875 at 889 (1980) citing Nebbia v. New York, 291 U.S. 502 at 525 (1937). As

far as concerns the substance of the proposed washing law, these requirements will be met.

If the City Council determines that the sanitation problems on the downtown sidewalks are of such a continuous nature that daily washings are required, then the same reasoning employed in Small should hold here; that is, the sound judgment of the legislature will control.

Exclusive Application to the Downtown Area

Differing conditions in different geographic areas may provide a reasonable basis for different legislative treatment. "Territorial uniformity is not a constitutional prerequisite." United States v. Tulare Lake Canal Co., 677 F.2d 713 (1982). As this issue is interpreted under the California Constitution, Abel v. Cory, 71 Cal.App.3d 589 (1977) provides precedent. That case noted that "equal protection" is not explicit but rather implicit in Article I, Section 7, of the State Constitution, and that the implication is that persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. Article I, Section 7, is equivalent to the Fourteenth Amendment of the United States Constitution. Id., at 597.

However, "the equal protection clause does not require absolute

or perfect equality; likewise it does not direct that statutes necessarily apply equally to all persons and permits the creation of differences so long as those differences do not amount to invidious discrimination (citations). Moreover, states may constitutionally create legislation that varies in effect between regions within the state inasmuch as equal protection relates to equality between persons rather than areas." Id., citing Salzburg v. Maryland, 346 U.S. 545 at 551 (1954). This rule would be equally applicable to laws enacted by municipal corporations, as the police power of local governments to make and enforce ordinances for protection of public health and safety is as broad as the police power exercisable by the State legislature. Ventura v. City of San Jose, 151 Cal.App.3d 1076 (1984).

These authorities support the proposition that the City may enact an ordinance which applies only to downtown residents. The proposed ordinance certainly relates to a very localized problem, and therefore its scope may properly be limited to that locality.

Enforcement

One consideration beyond the issue of constitutional validity is the question of how the ordinance will be enforced. As noted at the top of this memorandum, the City has already enacted an ordinance requiring property owners to keep their sidewalks clean. Municipal Code Section 44.0119B. Presumably an ordinance requiring daily cleaning would be enforced with the same procedures as this existing ordinance. If this is the case, some attention should be given to the problems this will present, since the proposed ordinance will demand more of the property owners than is already required. Apparently there is difficulty enforcing the current requirements.

Section 44.0119B. of the Municipal Code is now enforced by the following method: Section 44.0122 of the Municipal Code permits the Litter Program Coordinator or his agents to notify the owner of a building, or his agent or tenants, that remedial action is required to conform to the ordinance. Delivery may be by mail. If compliance is not attained, Section 44.0124 of the Municipal Code allows the Litter Control Inspectors to "enforce" the provisions of the ordinance, which is contained in Chapter IV, Article 4, Division 1, of the Municipal Code.

"Enforcement" may be taken to mean lodging a complaint against the violator with the City Attorney pursuant to Section 11.12 of the Municipal Code. This section permits prosecution of the offense as a misdemeanor or infraction. Another available method of enforcement would be the summary abatement of a nuisance violation under Section 11.16 of the Municipal Code.

With the foregoing considered, it is respectfully suggested that what is needed is not necessarily a new ordinance, but more effective enforcement of the existing law. In any event, enforcement should be a primary concern if the downtown sanitation problems are to be remedied by any law.
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