

Office of
The City Attorney
City of San Diego
MEMORANDUM
236-6220

DATE: November 9, 1994

TO: Councilmember Harry Mathis

FROM: City Attorney

SUBJECT: Proposed La Jolla Planned District Newsrack Ordinance

In a memorandum dated October 10, 1994, you asked our office to preliminarily review and comment upon a draft newsrack ordinance submitted to you by the La Jolla Community Planning Association ("LCPA").

The LCPA may not be aware that The City of San Diego ("City") regulates newsracks located in the public right of way. I have attached a copy of those regulations contained in San Diego Municipal Code section 62.1001 et seq. The existing ordinance establishes City-wide regulatory standards for newsracks by specifying permissible locations for newsracks and procedures for removal of newsracks installed in improper locations. You will note that it is similar in many respects to the proposed ordinance submitted by the LCPA.

However, one major distinction suggested by LCPA is for the regulations to be applicable solely to La Jolla. Special newsrack legislation for La Jolla may be inappropriate because the issue of newsracks, and their proliferation, truly is a matter of City-wide concern. Several other councilmembers have recently raised questions and concerns regarding the placement or condition of newsracks in their districts. As such, we believe that uniform City-wide regulation of newsracks is probably more appropriate.

The LCPA proposal also suggests the creation of a licensing scheme by requiring the issuance of a permit prior to placement of a newsrack. In contrast, the existing ordinance does not incorporate a permit requirement. This is because at the time the newsrack ordinance was first adopted, the legality of requiring permits was controlled by *Gannett Co. v. City of Rochester*, 330 N.Y.S. 2d 648 (1972). Based upon the holding of that case, the City Attorney's office concluded in an opinion that a permit requirement for newsracks would be an unconstitutional prior restraint on free speech. *Op. San Diego City*

Att'y 5 (1983).

However, since that time, the United States Supreme Court in *Lakewood v. Plain Dealer Publishing Company*, 486 U.S. 750 (1988), has disapproved of the reasoning and holding of the court in *Gannett*. California courts also now recognize the right of municipalities to impose permit requirements as part of a comprehensive scheme to regulate activities protected by the First Amendment. *Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 14 Cal. App. 4th 312, reh'g denied (1993). Therefore, the suggestion by LCPA to impose a permit requirement for newsracks in the public right of way, as a matter of policy, may be ripe for consideration by the Council.

The legislation proposed by the LCPA raises another issue with respect to delegation of authority. The LCPA proposal would delegate the power to reject or approve issuance of a newsrack permit to a subcommittee of the LCPA. This delegation of authority is highly unorthodox and could create legal problems. For instance, as a volunteer advisory body, distinguished from an advisory body established and appointed by the City Council, the LCPA would not qualify automatically for indemnification from the City or legal representation from the Office of the City Attorney.

Further, if members of the LCPA were delegated the power to issue permits for newsracks, it raises an issue with respect to the disclosure and disqualification requirements of the Political Reform Act of 1974, Gov't Code Section 81000 et seq. ("PRA"). The PRA requires public officials to file periodic financial disclosure statements. Cal. Gov't Code Sections 87200, 87302; Cal. Code Regs. tit. 2 Section 18700 (1994). As the association currently exists, members are not public officials under Cal. Code of Regs. tit. 2 Section 18700(a)(1), which exempts members of any board or commission which do not have decision making authority. A Board possesses decision making authority whenever it makes, compels, or prevents a governmental decision by exercising exclusive power to decide or by exercising a veto power which may not be overridden. Cal. Code Regs. tit. 2 Section 18700(a)(1)(A)(B). Even recommendations which are regularly adopted by a governmental agency may constitute decision making authority. *Id.*, Section 18700(a)(1)(C). If the power to approve or reject permit applications on behalf of the City is delegated to the LCPA, it would transform the LCPA into an official decision making body of the City. Consequently, members of the LCPA would become public officials under the PRA and thus be required to comply with the financial disclosure and disqualification provisions of the PRA.

As you requested, our comments and observations contained in this memorandum are cursory in nature and represent our preliminary review of the proposed ordinance submitted by the LCPA. Please do not hesitate to contact me if you have additional concerns or a desire for more specific legal advice on issues related to regulation of newsracks.

JOHN W. WITT, City Attorney

By

Richard A. Duvernay

Deputy City Attorney

RAD:lc:940.1

Attachment

MS-94-2