

MEMORANDUM OF LAW

DATE: May 16, 1988

TO: City Manager
FROM: City Attorney
SUBJECT: Antiloitering Laws

By memorandum dated January 25, 1988, copy attached, Councilmember Wes Pratt requested information on the present status of the application and enforcement of San Diego's antiloitering ordinances. Specifically requested was information on ordinance wording, history of ordinance development, legal challenges, recent attempts to strengthen the ordinances, whether penalties for violations can be increased and whether business and liquor licenses could be revoked for ordinance violations. The following is intended as a response to those matters.

Wording

The word "loitering" as used in a criminal statute has a sinister or wrongful as well as an innocent meaning. The verb to "loiter" in its general, innocent manifestation has been defined as "to interrupt or delay an activity or an errand or a journey with or as if with aimless idle stops and pauses and purposeless distractions. . . ." (Webster's New Internat. Dict. (3d ed. (1971) p. 1331.)

In the context of a criminal statute, whether characterized as a curfew or an antiloitering law, courts have held that the words "loiter" or "loitering" may be construed to connote lingering "for the purpose of committing a crime as opportunity may be discovered." (In re Cregler, 56 Cal.2d 308, 312 (1961); In re Huddleson, 229 Cal.App.2d 618, 622 (1964).) The rationale behind such a restrictive and sinister connotation is to avoid declaring such a statute void for uncertainty by giving a reasonable and practical construction to its language. (Pryor v. Municipal Court, 25 Cal.3d 238, 253 (1979).)

"Manifestly one who goes to a bus station or railroad depot and waits for the purpose of buying a ticket, boarding the

the conveyance, meeting a relative or friend actually expected to arrive, or with any other legitimate objective, is not loitering within the sense of the statute. Loitering as forbidden includes waiting, but mere waiting for any lawful purpose does not constitute such

loitering." (In re Cregler, supra, 56 Cal.2d 308, 312.)

Likewise, "persons who merely sit on park benches, loll on public beaches, pause in the vicinity of schools or linger in the many public areas frequented by children cannot be reasonably considered as loitering within the compass of the statute." (In re Huddleson, 229 Cal.App.2d 618, 625 (1964).)

The above examples are illustrative of those situations where the absence of such a sinister connotation would provide the police with unbridled discretion to determine arbitrarily and upon whim who was loitering and who was not and to arrest upon mere suspicion of criminal activity rather than the constitutionally mandated standard of probable cause. (People v. Bruno, 211 Cal.App.2d Supp. 855, 859 (1962); accord People v. Caylor, 6 Cal.App.3d 51 (1970).)

Antiloitering statutes pose inherent drafting difficulties because they must reconcile conflicting interests which the courts have expressed as follows:

Antiloitering statutes "represent an arena for conflict between healthy antipathy to the 'roust' or arrest on suspicion, on the one hand, and legitimate interests in crime prevention, on the other. Security against arbitrary police intrusion is basic to a free society. Citation omitted. Thus, arrests on mere suspicion offend our constitutional notions. Frequently they amount to arrest for status or condition instead of unlawful conduct. Most of the provisions of the now repealed vagrancy statute (former Pen. Code, . 647) were concerned with status rather than conduct.

At the opposite side of the scale is the view that law enforcement officers need not wring their hands in constitutional frustration while nighttime prowlers and potential thieves and rapists skulk through

our neighborhoods. The usual accommodation between these warring notions is the concept of 'reasonable cause,' that is, an officer may properly inquire, search and sometimes arrest if he has reasonable cause to believe that a crime has been committed. Citation omitted. People v. Caylor, supra, 6 Cal.App.3d 51, 56.

The discussion of drafting and wording difficulties provide

background for the texts of antiloitering provisions of the San Diego Municipal Code which are as follows:

Sec. 33.1610.3 Proprietor Permitting Minor
Loitering in Billiard or Pool
Hall - Prohibited

It shall be unlawful for any proprietor, manager, or responsible person in charge of any billiard room or poolroom in The City of San Diego to allow any person under the age of sixteen (16) years to visit, enter or loiter in such place unless said person is accompanied by his or her parent or legal guardian who is over the age of eighteen (18) years.

Sec. 33.1610.2 Minor Loitering in Billiard or
Pool Hall -- Prohibited

It shall be unlawful for any person under the age of sixteen (16) years, to visit, enter, or loiter in any billiard room or poolroom in The City of San Diego, unless said person is accompanied by his or her parent or legal guardian who is at least eighteen (18) years of age.

Sec. 66.0124 Refuse Disposal Facilities --
Regulations

The following rules and regulations for the use of refuse disposal facilities operated or maintained by The City of San Diego are hereby established, and any person violating any of said rules and regulations shall be guilty of a misdemeanor:

.....

(g) loitering is prohibited in disposal areas.

Sec. 52.25 Pedestrian Tunnel -- Loitering is
Prohibited

It shall be unlawful for any person to loiter in or about any public pedestrian tunnel or underground passageway.

Sec. 58.01.1 Parent or Guardian Prohibited
from Permitting Minor to Violate
Curfew

It shall be unlawful for the parent, guardian or other adult person having the care and custody of a minor under the age of eighteen (18) years, to permit or allow such

minor to loiter, idle, wander, stroll or play in or upon the public streets, highways, roads, alleys, parks, playgrounds, wharves, docks, or other public grounds, public places and public buildings, places of amusement and entertainment, vacant lots, or other unsupervised places, between the hours of ten o'clock p.m. and daylight immediately following, contrary to the provisions of section 58.01.

Each violation of the provisions of this section shall constitute a separate offense.
Sec. 58.01 Curfew for Minors -- Exceptions

It shall be unlawful for any minor under the age of eighteen (18) years, to loiter, idle, wander, stroll or play in or upon the public streets, highways, roads, alleys, parks, playgrounds, wharves, docks, or other public grounds, public places and public buildings, places of amusement and entertainment, vacant lots, or other unsupervised places, between the hours of ten o'clock p.m. and daylight immediately following; provided, however, that the provisions of this section do not apply when the minor is accompanied by his or her parents, guardian, or other adult person having the care and custody of the minor, or when the minor is upon an emergency errand

directed by his or her parent or guardian or other adult person having the care and custody of the minor, or when the minor is returning directly home from a meeting, entertainment or recreational activity directed, supervised or sponsored by the local educational authorities, or when the presence of such minor in said place or places is connected with and required by some legitimate business, trade, profession or occupation in which said minor is lawfully engaged.

Each violation of the provisions of this section shall constitute a separate offense.
Sec. 52.30 No Trespassing Signs -- Posting

Authorized

Any person, firm or corporation,

governmental agency, department or instrumentality having possession or control, of any of the facilities, plants or utility properties enumerated in section 52.30.1 hereof, may post . . . signs. . . . displaying prominently . . . the words "Trespassing -- Loitering -- Forbidden by Law. . . ."

Sec. 52.30.1 SAME-- POSTING--WHERE PERMITTED

The places which may be so posted are the following:

- (a) Every airport, and every plant, field and structure used for the manufacture, assembling or testing of aircraft;
- (b) Every tank-farm, refinery, compressor-plant or absorption (sic) plant, marine terminal, pipe line, pumping station and reservoir, used for the bulk treatment, bulk handling or bulk storage of petroleum or petroleum products;
- (c) Every reservoir, dam, pumping station, aqueduct, main canal or pipe line, or a public water system;
- (d) Every reservoir, dam, generating plant, receiving station, distributing station and transmission line of a company or agency furnishing electrical energy;
- (e) Every gas generating plant, compressor plant, gas holder, gas tank, and gas main used for the production, storage and distribution of gas;
- (f) Every plant or vital part thereof or other principal property essential to rendering telephone or telegraph service;
- (g) Every radio broadcasting central plant or station;
- (h) Every railroad bridge or tunnel;
- (i) Every plant for the bulk storage of dynamite, giant power, gun power, or other explosive.

Sec. 52.30.2 Loitering-- a Misdemeanor

It shall be unlawful for any person to loiter in the immediate vicinity or any premises posted as provided in this section and these Subsections.

History of Ordinance Development

Early vagrancy or antiloitering ordinances were broader in scope than the present day statutes. They prohibited activity which modern courts would construe as innocent, non-criminal loitering. An illustrative example of an early vagrancy or antiloitering ordinance is San Diego Ordinance No. 5954, approved December 29, 1914 but not incorporated in the San Diego Municipal Code which is quoted as following:

An Ordinance Defining Certain Acts of Vagrancy in The City of San Diego, and Fixing Penalties Therefor.

Be it ordained, by the Common Council of the City of San Diego, as follows:

Section 1. That every person who, having no certain dwelling within the City of San

Diego, roams about from place to place therein, without any lawful business or employment; or

Every person who loiters, loafes, or wanders about, upon any public street, alley, or place, within said City, at late or unusual hours of the night, without any visible or lawful purpose; or

Every person, (except a California Indian), in said City, who, having the physical ability to engage in useful work, and being without visible means of living, does not seek employment, or when employment is offered him, does not engage in such employment; or

Every person who lodges in any house, barn, shed, shop, store, outhouse, railroad car, vessel, boat, or place in said City, other than such as is kept for lodging purposes, without permission of the owner or person entitled to the possession thereof,

Is a vagrant, and guilty of a misdemeanor punishable by a fine not exceeding Five Hundred Dollars, or by imprisonment in the City Jail for a period not exceeding six months, or by both fine and imprisonment.

Section 2. This is an ordinance for the immediate preservation of the public peace, health and safety, and shall take effect and be in force from and after its passage and

approval.

Ordinances of The City of San Diego,
California, published by authority of the
Council of The City of San Diego, July 1937.

Antiloitering ordinances have also focused on other specific social issues. The operation of pool halls has been regulated for the protection of the youth of the City since September 23, 1904 when ordinance 1729 O.S. was adopted to prohibit minors from loitering in pool halls. See San Diego Municipal Code section 58.05. That same ordinance prohibited pool hall proprietors from permitting minors to loiter in pool halls. See San Diego Municipal Code section 58.06. Both regulations have survived to

date, remain virtually unchanged and were renumbered in the recent 1987 revision of section 33 of the San Diego Municipal Code. See San Diego Municipal Code sections 33.1610.2 and 33.1610.3.

Curfew provisions were also enacted for the protection of the city youth and have been in effect since adoption on June 24, 1947. Minors under eighteen (18) years of age are prohibited from loitering between the hours of ten o'clock p.m. and daylight. San Diego Municipal Code section 58.01. A parent or guardian is prohibited from permitting a minor to violate curfew. San Diego Municipal Code section 58.01.1.

National defense and security considerations were evident in ordinance 1948 N.S. adopted on October 1, 1940 to protect reservoirs, dams, plants, radio stations, bridges and tunnels. The timing of those municipal enactments just prior to World War II indicates concern for possible espionage activities by enemy agents. Those provisions remain in effect to this date. See San Diego Municipal Code sections 52.30, 52.30.1 and 52.30.2.

Legal challenges

In *Kolender v. Lawson*, 461 U.S. 352 (1983), California's vagrancy or antiloitering statute, Penal Code section 647(e), requiring persons who loiter or wander on the streets to provide a credible and reliable identification and to account for their presence when requested by a peace officer under circumstances that would justify a valid stop was held unconstitutionally vague on its face. The statute was defective because it encouraged arbitrary enforcement by failing to clarify what was contemplated by the requirement that a suspect provide a credible and reliable identification.

Although *Kolender v. Lawson* involved a state penal statute rather than a local ordinance, it provides insight into the inherent limitations of all antiloitering legislation. The earlier case of *Jennings v. Superior Court*, 104 Cal.App.3d 50

(1980), restricted the use of antiloitering statutes by holding that a San Francisco municipal ordinance prohibiting persons from obstructing, hindering or delaying the free passage or use of a street, sidewalk, passageway or other public place, was invalid for failure to include maliciousness as an element of the offense. Thus, a woman arrested under the ordinance was entitled to a writ of mandate directing the superior court to suppress a plastic bag containing 20 balloons of heroin found under the back seat of a police car used to transport her to jail and to enter an order suppressing the evidence derived from the unlawful arrest.

Antiloitering ordinances have also been successfully challenged on preemption grounds. *Gates v. Municipal Court*, 135 Cal.App.3d 309 (1982), held that a San Jose ordinance prohibiting loitering for the purpose of soliciting an act of prostitution was preempted by state law which fully occupies the field of criminal sexual conduct and was unconstitutionally vague and overbroad.

While the preemption challenge was upheld in *Gates v. Municipal Court*, 135 Cal.App.3d at 309, local vagrancy and loitering ordinances have generally been upheld as not preempted by state law. A San Francisco ordinance which prohibited loitering with a concealed weapon was upheld against a preemption challenge. *Yuen v. Municipal Court*, 52 Cal.App.3d 351 (1975). A Los Angeles ordinance generally prohibiting loitering in tunnels, subways and freeway areas was upheld. The court concluded as follows: "It is evident that the legislature did not intend to occupy the entire field of loitering and preclude local legislation thereon." *Gleason v. Municipal Court*, 226 Cal.App.2d 584, 586 (1964).

Recent Attempts to Strengthen Ordinances

We are not aware of any recent attempts to strengthen the antiloitering ordinances.

Increasing Penalties for Violations

Penalties for antiloitering ordinance violations can be increased by the city council. Maximum penalties for infractions and misdemeanors are set out in the San Diego municipal Code and apply ". . . unless provision is otherwise herein made. . . ." San Diego Municipal Code section 11.12. (Emphasis supplied.)

Revocation of a Business License

The next question posed is whether the failure to post required signs or the existence of persistent crime related activity directly adjacent to a licensee's facility constitutes just cause for the revocation of a business license for failure to adhere to the provisions of an antiloitering ordinance. Since

no additional factual information is furnished the response will be in general terms.

The contemplated action for the violation is the revocation of a business license. The suspension or revocation of a license or permit classified as police regulated is provided for in the San Diego Municipal Code as follows:

Sec. 33.0401 SUSPENSION OR REVOCATION OF
LICENSE OR PERMIT

In the event that any person holding a license or permit classified as police regulated as herein designated, shall violate or cause or permit to be violated any of the provisions of this Article, or any provision of any other Article, ordinance or law relating to or regulating said business or occupation, or shall conduct or carry on the business in a manner which manifests a disability to perform properly the duties of the business or occupation as evidenced by the commission of an act or a series of acts, the Chief of Police, may, in addition to other penalties provided by ordinance, take action to suspend or revoke the license or permit issued for conducting or carrying on of the business or occupation. The action of the Chief of Police shall be subject to the appeal provisions of this code except that the Chief of Police may take immediate action with respect to a license or permit, if a subsequent hearing is provided, where there is an urgency of immediate action to protect the public from injury or harm, or where a license or permit has been issued based on material misrepresentations in the application and but for the material misrepresentations the license or permit would not have been issued.

Detailed regulations on specific police regulated businesses are contained in San Diego Municipal Code section 33.0101 et seq.

Businesses that are not police regulated in nature are subject to different regulations. A business that is not police regulated is issued a certificate upon payment of a business tax. The purpose of the business tax is "to raise revenue for municipal purposes and is not intended for the purpose of regulation." San Diego Municipal Code section 31.0101. The business tax "does not authorize operation of a business without

any permit or license required under other sections of the San Diego Municipal Code, or in violation of other provisions of the law, and it shall not be a defense to any such violation that a certificate was issued. . . ." San Diego Municipal Code section 31.0110(a). Failure to post the certificate in a conspicuous place upon the premises where business is conducted or to show it to a police officer or other city official when requested is a

misdemeanor. San Diego Municipal Code section 31.0127. The issuance of a certificate does not allow the conduct of any business for which a license is required by any other provisions of the San Diego Municipal Code, including police or health permits, zoning permits, planning permits, building or emergency permits, and the like. San Diego Municipal Code section 31.0120.

In summary, if a police regulated business is required to post certain signs, failure to do so could result in suspension or revocation of the police license or permit to do business. Persistent crime related activity directly adjacent to the police regulated business might result in revocation or suspension of a business permit or license depending on such facts and circumstances as the nature of the activity, the licensee's participation in or control of that activity and whether the activity violates any provision of law.

Revocation of a Liquor License

The final inquiry is whether failure to post required signs or whether the existence of persistent crime related activity directly adjacent to a licensee's facility constitutes just cause for the revocation of a liquor license for failure to adhere to the provisions of an antiloitering ordinance.

The contemplated action for the violation of the ordinance is revocation of the liquor license. The administration and enforcement of liquor laws throughout the state is the responsibility of the California Department of Alcoholic Beverage Control. Business and Profession Code sections 23049, 23050.

Pursuant to provisions of the California Constitution ". . . The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude. . . ." Cal. Const., art. XX, . 22. The constitutionally conferred power of the Alcoholic Beverage Control Department to revoke liquor licenses are supplemented by the following California Business and Professions Code statutory provisions:

Sec. 24200. Grounds

The following are the grounds which constitute a basis for the suspension or revocation of licenses:

(a) when the continuance of a license would be contrary to public welfare or morals;

...

Sec. 24200.5 Mandatory revocation

Notwithstanding the provisions of section 24200, the department shall revoke a license upon any of the following grounds:

(a) If a retail licensee has knowingly permitted the illegal sale, or negotiations for such sales, of controlled substances or dangerous drugs upon his licensed premises. Successive sales, or negotiations for such sales, over any continuous period of time shall be deemed evidence of such permission. . . .

Sec. 25657. Employment of persons to procure or encourage purchase or sale of drinks; persons begging or soliciting drinks

It is unlawful:

(a) For any person to employ, upon any licensed on sale premises, any person for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, or to pay any such person a percentage or commission on the sale of alcoholic beverages for procuring or encouraging the purchase or sale of alcoholic beverages on such premises.

(b) In any place of business where alcoholic beverages are sold to be consumed upon the premises, to employ or knowingly permit anyone to loiter in or about said premises for the purpose of begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting.

Every person who violates the provisions of this section is guilty of a misdemeanor.

Sec. 25601. Disorderly houses; places of disturbance, etc.

Every licensee, or agent or employee of a licensee, who keeps, permits to be used, or suffers to be used, in conjunction with a licensed premises, any disorderly house or place in which people abide or to which people resort, to the disturbance of the neighborhood, or in which people abide or to which people resort for purposes which are injurious to the public morals, health, convenience, or safety, is guilty of a misdemeanor.

In summary, the California Alcoholic Beverage Control Department has broad and exclusive powers under the California State Constitution and supplementary state statutory provisions to regulate the sale of intoxicating liquors within the state and to revoke any specific alcoholic beverage license. Cal. Const., art. XX, . 22. However, the matter of consumption of alcoholic beverages was omitted from the constitutional grant of exclusive powers thereby allowing municipalities to prohibit drinking of alcoholic beverages on streets or playgrounds as the regulation of a municipal affair, not exclusively a matter of state-wide concern. *People v. Butler*, 252 Cal.App.2d Supp. 1053 (1967).

The San Diego Municipal Code prohibits the consumption and possession of alcoholic beverages in certain areas as the regulation of a municipal affair not exclusively a matter of state-wide concern. San Diego Municipal Code section 56.54. It also prohibits open alcoholic beverage containers on posted premises. San Diego Municipal Code section 56.56.

It is assumed that the issue of alcoholic beverage license revocation relates to San Diego Municipal Code section 56.56 rather than the so-called antiloitering statutes discussed above. Section 56.56 provides that retail package off-sale alcoholic beverage licensees must post premises including parking lots and public sidewalks immediately adjacent to the licensed premises. A licensee who does not post the licensed premises is guilty of an infraction. Failure to post signs required by section 56.56 could result in the assessment of penalties for an infraction but would not warrant license revocation.

Persistent crime related activity directly adjacent to a licensee's facility that is well documented by police reports could lead to a "disorderly house" investigation pursuant to California Business and Professions Code section 25601. Steven

Ernst, Supervising Special Investigator of the California Department of Alcoholic Beverage Control in San Diego, advised me that such "disorderly house" investigations have been conducted

in the past and some are presently ongoing.

It is hoped the foregoing adequately answers the questions posed. If you have specific questions on any of the items discussed I will be pleased to respond.

JOHN W. WITT, City Attorney

By

Joseph M. Battaglino

Deputy City Attorney

JMB:ifs:520.1(x043.2)

ML-88-49