The City Attorney
City of San Diego
MEMORANDUM

236-6220
DATE: May 13, 1986

TO: Police Department
FROM: City Attorney
SUBJECT: Beach Curfew in La Jolla

On May 2, 1986, this office received a request from Lieutenant N. E. Goodrich to review a memorandum attached to which is a cover letter and a curfew petition bearing the signatures of twenty-five (25) La Jolla property owners requesting a City of San Diego curfew on the Marine Street beach between the hours of 10:00 p.m. and 7:00 a.m. each day encompassing the area north from Dunnemere Drive to Marine Street. The petition notes "the beach is being used for parties where alcohol and drugs are consumed by adults and minors, resulting in vandalism and boisterous behavior."

A curfew is defined as a law (commonly an ordinance) which imposes on people (particularly children) the obligation to remove themselves from the streets on or before a certain time of night. (Black's Law Dictionary 344 (5th ed. 1979).)

The drafter of a curfew ordinance should first consider whether the subject has been preempted by state law.

> In exercising the judicial function of deciding whether a matter is a municipal affair or of statewide concern, the courts will of course give great weight to the purpose of the legislature in enacting general laws which disclose an intent to preempt the field to the exclusion of local regulation citation omitted, ...
> Bishop v. City of San Jose, 1 Cal.3d 56, 63 (1969).

The cover letter to the petition states that there are problems with drug use, disorderly conduct, vandalism and assaultive behavior. These illegal activities are prohibited by state law which has preempted the field. The proposed curfew ordinance would have to address a local rather than a statewide interest. Perhaps the local problems at Marine Street beach of boisterous behavior, enforcement of car removal from illegal parking zones and the control of bonfires outside fire-rings can only be

resolved with a curfew. On the other hand, a solution to these problems may lie in measures less restrictive than a curfew ordinance. The data presented in the memorandum, cover letter and petition does not provide an adequate factual basis for any conclusions on these issues. Courts look for a fairly close correlation between the degree of restriction to be tolerated and the degree of the existing emergency in passing on the validity of curfew laws. Alves v. Justice Court, 148 Cal.App.2d 419 (1957).

If a 'no loitering' provision is to be included in the desired curfew ordinance, the following should be considered. A loitering ordinance makes it a crime to "loiter" on a public street or in a public place. Although it has been said that loitering ordinances are necessary for the preservation of public peace and the protection of society, some loitering statutes have been held invalid on the grounds that they were too vague and broad to meet the constitutional requirements of what a suspect must do to satisfy the statute. Kolender v. Lawson, 461 U.S. 352, 361 (1983).

Where the ordinary meaning of a particular term raises an overbreadth and vagueness problem, "the judiciary bears an obligation to 'construe enactments to give specific content to terms that might otherwise be unconstitutionally vague'." Pryor v. Municipal Court, 25 Cal.3d 238, 253 (1979). The ordinary meaning of the verb "loiter" raises an overbreadth and vagueness problem in a criminal statute.

In the context of a criminal statute, whether characterized as a curfew or a loitering law, California 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 Creyler, 56 Cal.2d 308, 312 (1961); In re Huddleston, 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, supra.

A park closure ordinance prohibiting a person from entering, remaining, staying or loitering in a park between the hours of 10:30 p.m. and 5:00 a.m., was held not void for vagueness nor

overbroad for the reasons that the regulation placed a person on notice as to precisely what conduct was proscribed and the proscription itself left no room for the exercise of discretion by law enforcement officers as to the propriety of any particular person's presence in the park. People v. Trantham, 161 Cal.App.3d Supp. 1, 8-10 (1984).

By comparison, a California state penal statute that required persons who loitered or wandered on the street to provide "credible and reliable" identification when requested by a peace officer was held unconstitutional. It failed to give fair and adequate notice of the type of conduct prohibited and vested virtually complete discretion in the hands of the police to determine whether the suspect satisfied the statute. Kolender v. Lawson, supra at 358 (1983).

While California courts recognize that the City has inherent broad police powers to enact local ordinances not in conflict with general laws, the City must be able to show that such an ordinance is reasonably related to promoting the public health, safety, comfort and welfare, and that the means to accomplish that promotion are reasonably related to the purpose. This is the standard required. Higgins v. City of Santa Maria, 62 Cal.2d 24, 30 (1964). Additionally, since the public beach in question is adjacent to the ocean consideration should be given to article X, section 4 of the California Constitution which provides as follows:

> No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.

That the ocean is navigable water is clear from the following:

> There is no question that the ocean adjoining the city owned beaches is navigable water, nor that such beaches are "frontage
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> . . . of . . . navigable water in this state" within the meaning of Article X, section 4 of the Constitution. The right protected is one of access to and from navigable waters and not a right to use land fronting on navigable waters for recreational purposes.
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> 41 Cal. Ops. Att'y Gen. 39, 41-42 (1963).

There is also a statutory right of free access to the tidelands and navigable waters. Government Code section 39933. Strong

public policy favors public access to the coast. When a city council, in connection with a redevelopment plan, interfered with city residents' right of free access to tidelands and navigable waters, such action of the council was held to be an ultra vires or unauthorized act. Lane v. City of Redondo Beach, 49 Cal.App.3d 251 (1975). Given these restrictions to formulate a valid ordinance, we would have to be apprised of the following:

(1) Adequate facts showing that the ordinance is reasonably related to promoting the public health, safety, comfort or welfare and that the reasonable right of free access to tidelands and navigable waters has been considered.

(2) Adequate facts showing a rational basis for treating the Marine Street beach differently from other adjacent beach areas.

(3) A factual analysis showing that lesser restrictive measures are inadequate to solve the Marine Street beach problems.

Once we have this information, we will prepare the required ordinance.

JOHN W. WITT, City Attorney
By
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Deputy City Attorney

JMB:ls:520.1
MS-86-14