MEMORANDUM OF LAW

DATE: May 1, 1996

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Amendments to Newsrack Ordinance

ISSUE

On February 7, 1996, the Land Use and Housing Committee voted to adopt the recommendations of the Committee Consultant for revisions to San Diego's current newsrack regulations (San Diego Municipal Code sections 62.1001 et seq.) and directed the City Manager to do the following:

1. Work with the City Attorney to review any public safety issues that need to be addressed;

2. Draft defensible language for restricting newsracks in zones identified by painted curbs; and

3. Make further recommendations if necessary to ensure public safety.

In addition, the City Attorney was asked to provide further information regarding banning newsracks in residential zones.

This memorandum serves as an accompaniment to the proposed ordinance submitted to the City Council for introduction. The memorandum provides the legal background for the placement provisions included in the proposed ordinance and provides the information requested on banning newsracks in residential zones.

SUMMARY

Proposed Ordinance. The proposed ordinance includes the recommendations adopted by the Land Use and Housing Committee. The following additional provisions were added to address public safety and welfare: (1) restrictions on placement of newsracks near red or yellow painted curbs and (2) a requirement that all newsracks placed near the street side of a sidewalk be placed so that they do not open toward the street. A potential issue raised by the elimination of the Section 62.1005 exception is also addressed.

Residential Ban. Research and analysis on banning newsracks is provided. Because public sidewalks are considered a traditional public forum and because newsracks have been given First Amendment protection, we believe the narrowly tailored ordinance proposed meets the constitutional standard as currently stated.

ANALYSIS

Legal Standard

The placement of newsracks has been held to be entitled to full First Amendment protection. In Chicago Newspaper Publishers v. City of Wheaton, (N.D. Ill 1988) 697 F.Supp. 1464, 1466, the court stated:

> It is beyond dispute that the First Amendment protects the right to distribute newspapers in newsracks. ╒Citations.σ The degree of protection provided by the constitution depends 'on the character of the property at issue.' ╒Citation.σ In this case, the 'property at issue' is city streets in Wheaton, Illinois. The Supreme Court has repeatedly recognized public streets 'as the archetype of a traditional public forum.' ╒Citation.σ
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> In these traditional public fora, government's authority to restrict speech is at its minimum.

Given these constitutional protections, cities may "enforce regulations of the time, place, and manner of expression which are (1) content-neutral, (2) narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels of communication for the protected speech regulated." See Ward v. Rock Against Racism, 491 U.S. 781, 798, 105 L.Ed.2d 661 (1989).

A reasonable time, place and manner restriction, however, need not be the "least restrictive or least intrusive" alternative. Id. Ordinances have been upheld which address issues such as number, size, construction, placement and appearance of newsracks. In Kash Enterprises, Inc. v. City of Los Angeles, 19 Cal.3d 294 (1977), the California Supreme Court upheld an ordinance with provisions virtually identical to San Diego's current locational restrictions.F

> The only difference between the Los Angeles ordinance and San Diego's current locational restrictions contained in Section 62.1005 is that Section 62.1005 has an escape clause for newsracks which the Los Angel ordinance did not contain. The potential impact of eliminating this e clause is addressed later in this memorandum.

Similar provisions have also been upheld more recently in other courts. See, e.g., Jacobsen v. Crivaro, 851 F.2d 1067 (8th Cir. 1988) (upholding similar provisions in Des Moines, Iowa); and see Globe Newspaper Co. v. Beacon Hill Architectural Comm., 847 F. Supp. 178 (D. Mass. 1994) (holding that newsracks could be subject to historic district design

review process).

Courts have recognized a number of legitimate government interests to be furthered by regulation of newsracks including (1) reducing

clutter on public streets (see City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805); (2) avoiding unreasonable interference with the flow of pedestrian or vehicular traffic (Kash Enterprises, supra, 19 Cal.3d at 303); and (3) traffic safety, proper functioning of a city's safety and sanitation forces, maintaining a clear right of way on sidewalks for pedestrians and aesthetics (see Plain Dealer Pub. Co. v. City of Lakewood, 794 F.2d 1139).

Proposed Ordinance Provisions

Two changes are proposed to the draft ordinance previously submitted which we believe are valid provisions under the above constitutional analysis: (1) limitations on placement near red and yellow-painted curbs and (2) requiring that newsracks placed on the street side of a sidewalk not open toward the street.

There is no question that San Diego's ordinance, as currently written, and as proposed for revision, is content neutral. In addition we believe the proposed provisions on placement of newsracks in certain painted curb zones satisfy the constitutional test of being narrowly tailored to further the stated interests. The City has substantial interests in ensuring the safety of persons loading and unloading in designated zones and in ensuring that the curb areas can, in fact, be used for the designated activities. The presence of newsracks is a safety hazard to pedestrians trying to get to and from the sidewalk area for loading and unloading and directly interferes with the loading and unloading of freight in designated areas. Concern has also been raised as to the safety hazards presented by the presence of newsracks on red painted curbs, including interference with access of safety vehicles and potential hazards created by illegal stopping to purchase papers. The requirement that newsracks locate no closer than three (3) feet to such areas is narrowly tailored to serve these interests.

Likewise, the additional requirement that newsracks on the street

side of a sidewalk be positioned to open away from the street serves the purposes of (1) ensuring the safety of the person attempting to purchase a newspaper from the hazards of moving traffic on the street and (2) ensuring free flow of vehicular traffic by not encouraging drivers to attempt to stop and purchase from their car.

A potential question raised by the ordinance revisions is the effect of eliminating the current Section 62.1005(e) escape clause. San Diego's existing ordinance contains locational restrictions identical to those of a Los Angeles ordinance found constitutional by the California Supreme Court in Kash v. City of Los Angeles, 19 Cal.3d 294 (1977). However, there is one significant difference between the two ordinances: the current San Diego ordinance contains an exception to the locational restrictions which allows a newsrack to nonetheless locate if the restrictions would preclude newsracks for a distance of 150 feet on the same side of the street on the same block. The Los Angeles ordinance at issue in Kash contained no such exception.

The Kash court stated in its analysis of Los Angeles' restriction on placement within three (3) feet of lawn, shrubs, trees, etc. that

> ╒Iσn the absence of any showing that the provision unduly restricts the use of newsracks in the city . . . we think the regulation on its face represents a reasonable accommodation of the city's interest in maintaining greenery in an urban environment and the First Amendment interests served by the newsracks.

Kash Enterprises, Inc. v. City of Los Angeles, 19 Cal.3d at 305.

Because the Kash court made the constitutionality finding in the absence of any evidence that the provision unduly restricted the use of newsracks in the city, the decision leaves room for the potential argument that the effect of eliminating San Diego's exception creates such an undue restriction. We are aware of no evidence at the present time to suggest this would be the case. If the City is presented with any such evidence, we would be happy to research potential alternative constitutional regulations consistent with the City's goals.

Residential Ban

The constitutionality of bans of newsracks in residential areas has not been directly addressed by the United States Supreme Court. The Supreme Court in 1994 refused to hear a Seventh Circuit case in which the lower court, in upholding a permit requirement for newsstands (these were staffed booths where multiple periodicals were sold), stated that "no person has a First Amendment right to erect or maintain a structure on the public way" and applied that reasoning to newsstands. Graff v. City of Chicago, 9 F.3d 1309, 1314 (7th Cir. 1993). While this may provide some indication as to future inclinations of the Court, the question remains open at the present.F

In the event of future litigation on this issue, it would seem appropr to have the court review the fact that, in most cases, the dedicated s in which newsracks are placed is actually owned in fee to the center o street by the owners of the adjacent lots. To our knowledge, no court reviewed the legitimacy of placing the newsrack structures on the priv property within the public right-of-way without obtaining the consent owner of the fee interest in the property.

In the most recent U.S. Supreme Court decision on the issue of newsrack bans, the court rejected a city's ban on so-called commercial publications through newsracks as not sufficiently related to a legitimate end since the regulation only addressed commercial and not

all newsracks. This was, in effect, an illegitimate form of content-based regulation. City of Cincinnati v. Discovery Network, Inc., 507 U.S. , 123 L.Ed. 2d 99, 113 S.Ct. 1505 (1993).

The lower federal courts which have directly addressed the residential ban issue disagree. In Plain Dealer v. Lakewood, 794 F.2d 1139, aff'd on other grounds, 486 U.S. 750, the Sixth Circuit upheld a ban in residential areas where the evidence showed that there was an available newsrack within 1/4 mile of every residence in the city. The court recognized the city's substantial government interest in "traffic safety, proper functioning of a city's safety and sanitation forces, maintaining a clear right-of-way on sidewalks for pedestrians, and aesthetics . . ." However, in Chicago Newspaper Pubs. v. City of

Wheaton, (N.D. Ill. 1988) 697 F.Supp. 1464, 1466, the U.S. District Court for the Northern District of Illinois rejected a residential ban. The court distinguished Plain Dealer on the basis that for some homes in Wheaton, the nearest newsrack was more than three miles away. The court also disagreed with Plain Dealer's assumption that alternative locations on private property, such as a convenience market, was a sufficient alternative channel of communication to satisfy the constitutional test.

The California Supreme Court last spoke on the issue of outright bans in Kash, stating:

> ╒Nσumerous courts -- both in California and out-of-state -- have in recent years uniformly held that First Amendment protections are applicable to the public distribution of newspapers and periodicals through newsracks and that, as a consequence, municipalities lack constitutional authority to foreclose all use of such newsracks on their streets and sidewalks. ╒Citationsσ" (Kash v. City of Los Angeles, 19 Cal.3d at p. 302.) (Emphasis added.)

In addition, the California Attorney General, interpreting current court cases on point, recently concluded that a city ordinance may not prohibit placement of all vending machines on public property located within the city to the extent that such prohibition would include newsracks. 96 Ops. Cal. Atty. Gen. 206 (June 6, 1994).

There has been no court ruling in the state of California or at the federal level other than Plain Dealer that explicitly authorizes an outright ban on newsracks in the public right-of-way in residential areas. Notwithstanding court cases indicating an inclination to support wider bans on newsracks, the law currently, as most recently interpreted by the California Supreme Court would prohibit an outright residential

ban.F

We note, however, that permit requirements for locating newsracks have been upheld. San Diego does not currently require a permit for locati newsracks. We would be happy to conduct legal review of any proposed

so providing.

CONCLUSION

We believe the proposed revisions to the City's newsrack regulations are legitimate time, place and manner regulations which meet tests of constitutionality.

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