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DATE: August 21, 1989
TO: Daro Quiring, Centre City Maintenance Coordinator
FROM: City Attorney
SUBJECT: Newsracks

In a memorandum dated July 24, 1989, you requested a legal opinion on two questions concerning newsracks. First, may a development company, such as Koll Company, design newsrack enclosures that are architecturally and aesthetically compatible with their developments, then make the racks available to newspaper vendors for a fee? Second, may "City Racks," a private newsrack company, place multi-unit newsracks on a public right of way and charge a fee to vendors for use of the racks?

The issue of whether, and to what extent, public entities may regulate newsracks has been litigated numerous times. The courts have repeatedly found that the first amendment extends constitutional protection to newspapers. They have also found that:

> The constitutional protection extends to means of distribution of the newspaper, as well as to its content and the ideas expressed therein. The Supreme Court has long held that the right to circulation is as essential to the freedom of the press as the right to publish; without circulation, freedom of publication is a mockery.

Philadelphia News, Inc. v. Borough C., Etc., Swarthmore, 381 F. Supp. 228, 241 (1974).

However, the right to distribute is not without limits. Newsracks are subject to reasonable time, place and manner restrictions. Kash Enterprises, Inc. v. City of Los Angeles, 19 Cal. 3d 294, 302 (1977). In San Diego these time, place and manner restrictions are found in San Diego Municipal Code section 62.1001 et seq. (See Attachment A). Each of the proposed newsrack units would be required to comply with the restrictions found in the ordinance.

Additionally, both Koll Company and City Racks would be required to obtain an encroachment removal agreement (ERA) pursuant to San Diego Municipal Code section 62.0302 (See Attachment B). The provisions of the ERA would hold the City harmless in the event any damages or expenses arise as a result of the racks being placed on the public right of way. Individual

newspaper vendors are not subject to the requirement of obtaining an ERA. The distinction arises because the primary business of traditional newspaper vendors is the distribution of information, a protected right. The primary business of Koll Company and City Racks under the proposal would be the renting of newsracks. This type of profit generating enterprise on a public right of way is not a protected right, thus stricter requirements may be imposed by the City.

After the prerequisites are met, there is no legal bar to Koll Company erecting and maintaining aesthetically pleasing uniform racks on the public right of way surrounding their development. Current law indicates that Koll Company owns the underlying fee to the center of the street.

In explaining the rights of property owners abutting a public street, the court in Abar v. Rogers, 23 Cal. App. 3d 506 (1972) said:

> Where land is dedicated as a public street, the owner of the abutting property is presumed to be the owner of the fee to the street's center.
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> As the owner of the fee to the street's center, the abutting owner may make any use of the street consistent with the public right. It is said that subject to the public easement, he may exercise all "rights of dominion over his land" Santa Barbara v. More, 175 Cal. 6, 10, (1917) and he is entitled to "all profit or advantage which may be derived therefrom." Gurnsey v. Northern Cal. Power Co., 160 Cal. 699, 705 (1911).

Additionally, charging a fee for use of the racks poses no problem for Koll Company, for while the Constitution guarantees the right to distribute newspapers, it does not guarantee a right to the least expensive means of expression. Gannett Satellite Inf. Net. v. Metro Transp. A., 745 F. 2d 767, 774 (1984).

The proposal by City Racks to install uniform racks at various locations presents a slightly different issue. City Racks is not the owner of the abutting property and therefore has no legal right to use the public right of way for personal profit. Nevertheless, for numerous reasons the City may prefer the use of City Racks multi-rack units in lieu of the unsightly hodge podge of racks that currently litter City streets. The proposed units are uniform in size and color and City Racks has guaranteed to maintain and/or replace worn units. Each unit

holds eight (8) papers, removing clutter and presenting a neater and more aesthetically pleasing image.

In view of the potential benefits, the City should encourage City Rack to seek permission from the abutting property owners to place the racks on the public right of way. One assumes property owners will not object to installation of the racks because the racks will upgrade the overall appearance of the property. After obtaining the owner's permission and fulfilling the previously enumerated prerequisite of obtaining an ERA from the City, no legal restrictions bar placement of the racks on the public right of way by City Racks.

JOHN W. WITT, City Attorney
By
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Attachments
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