MEMORANDUM OF LAW

DATE: March 28, 1988

TO: Councilmember Judy McCarty

FROM: City Attorney

SUBJECT: Off Site Sale of Entertainment Tickets

By memoranda dated September 4, 1987 and February 8, 1988 you asked if the City has the authority to limit the amount that can be charged for an entertainment ticket above its face value. You mentioned that you received a number of complaints from constituents regarding such "price gouging" and that "ticket scalping" was a major problem during the period of the Super Bowl.

First, please accept our apologies for our tardy response to your inquiries. As you are aware, we never received your first memorandum.

The reselling and brokering of tickets to theatrical and sporting events is generally recognized as an activity which may be regulated, as opposed to prohibited, pursuant to the police power of a state. 81 A.L.R.3d 655, 659 (1971). Many states, including New York, Illinois, Pennsylvania and Massachusetts, have enacted state legislation either regulating ticket brokers or authorizing local entities to do so. The United States Supreme Court, after initially declaring unconstitutional a statute placing a ceiling upon the profit allowable upon resale of a ticket in Tyson & Broker-United Theatre Ticket Office, Inc. v. Banton, 273 U.S. 418 (1927), affirmed a lower court finding that the case was no longer good law. Gold v. Di Carlo, 235 F.Supp. 817, affd. 380 U.S. 520, 85 S. Ct. 1332 (1964). In tacitly reversing itself, the Court allowed a state to constitutionally regulate the price at which tickets to public places of amusement could be resold.

In contrast, however, the California courts have declared most regulation of ticket brokers and ticket resales invalid as an unconstitutional intrusion into the innocent business affairs of man. In 1905, the California Legislature enacted Penal Code section 526 which prohibited and made it a misdemeanor to resell a ticket to a public place of amusement at a higher than original sale price. The California Supreme Court in In re Quarg, 149 Cal. 79 (1906), invalidated that statute on the grounds that it was an unwarranted interference with the inherent and constitutional rights of individuals to purchase, possess and

sell goods or merchandise at whatever profit the market will bear. The court held, at page 81, that the statute was unreasonable and not related to the safety, welfare or health of its citizens. Further, the court stated that ticket resales are "entirely innocent in character" and the right to attend an event is "not so sacred or important in character as to require or justify legislation regulating the price of admission." Id. at 82-83.

The legislature repealed Penal Code section 526 in 1907 and has not enacted any broad reaching prohibition or regulation of ticket resales since. Specific state legislation on the books includes Penal Code section 346 which makes reselling of tickets for a price greater than the original price illegal upon the premises of a stadium, arena, theater or other place where an event for which the ticket was sold is to be held. In addition, the Food and Agriculture Code and Business and Professions Code contain some regulation of ticket resales for agricultural and sporting events, but the regulations are very narrow and specific.

The legislature has not enacted any enabling legislation or statutes authorizing local regulation of ticket resales; and local ordinances regulating ticket resales have consistently been struck down by the courts. For instance, in In re Dees, 50 Cal.App. 11 (1920), the court invalidated a San Francisco ordinance requiring licensing of "ticket peddlers" other than on the original issuer's premises; and in In re Van Wong, 165 Cal.App.2d Supp. 821 (1958), a Los Angeles ordinance prohibiting resale of tickets, whether or not at an advanced price, within 250 feet of a coliseum, stadium, arena, etc., was struck down as unconstitutionally discriminatory.

In People v. Shepherd, 74 Cal.App.3d 334 (1977), a Los Angeles City ordinance requiring all sellers of goods or merchandise upon City parks to be licensed was challenged as to its application to a person reselling a ticket to an entertainment event. In these narrow circumstances, the court found the regulation to be nondiscriminatory and reasonably related to municipal regulation of parks as authorized in the Government Code. The court further held that Penal Code section 346 did not preempt the ordinance because the use of a City park is a municipal purpose. By inference, the court held that local regulation of ticket sellers and brokers which is specific to that activity is preempted by state legislation.

Similarly, in Loska v. Superior Court of Los Angeles County, 188 Cal.App.3d 569 (1986) review den., the Court of Appeal,

Second District, upheld as constitutional a Los Angeles municipal ordinance prohibiting the sale of, or offer to sell, tickets of admission to a public assemblage upon a public street, sidewalk, park or other public place. The court held that the regulation, as narrowly construed to apply only to commercial ticket sellers, as opposed to not-for-profit occasional or one-time-only sellers, is constitutional on its face and a valid exercise of the city's police power. However, the court distinguished the ordinance from a scalping regulation and Penal Code section 346, stating at page 576, footnote 6:

> We agree that the ordinance on its face does not prohibit scalping. The ordinance does not attempt to prohibit the sale or resale of tickets per se at any price but merely at certain locations. There is nothing in this ordinance regarding the price of the ticket; the law can be violated regardless of whether the ticket is sold at face value, below face value, or above face value.

In conclusion, in spite of minor state legislative inroads into the 1906 court imposed prohibition against regulation of ticket resales, the California courts have not permitted municipalities to specifically regulate such activity. Thus, in answer to your inquiry, the City does not have the authority at this time to limit the amount that can be charged for entertainment tickets above their face value.

JOHN W. WITT, City Attorney
By
Nina B. Deane
Deputy City Attorney

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