MEMORANDUM OF LAW

DATE: February 13, 1986
TO: Deputy Chief K.J. O'Brien, San Diego Police Department
FROM: City Attorney
SUBJECT: Policy for Cabaret Hours

Some months ago, this office was asked a number of questions concerning the closing hours of cabarets, an exemption for the Gaslamp District and a random selection of some establishments for a trial-basis program. Due to a number of vague parameters, a formal legal response was not made. At a series of meetings involving yourself, representatives from Vice and Jon Dunchack of the Manager's office, the situation was discussed and it was determined that the relevant Municipal Code sections should be rewritten. Rewriting of the entire Municipal Code division on police regulated businesses is nearing completion. The question has resurfaced as whether the City may allow cabarets in the Gaslamp District to operate after 2:00 a.m. while forcing cabarets in other areas such as La Jolla and Mission Valley to close between the hours of 2:00 a.m. and 6:00 a.m. We have researched this question and have concluded that the City may so regulate if the City is able to justify such regulations as being rationally related to a legitimate governmental objective.

A cabaret is any place where alcoholic beverages and/or soft drinks are dispensed and entertainment is provided by paid entertainers and/or entertainment is permitted to be furnished by volunteer or itinerant entertainers. San Diego Municipal Code section 31.0110(s). A cabaret may or may not be a public dance (San Diego Municipal Code section 33.1520.1) but a public dance is usually a cabaret. The possible exception would be a dance using recorded music from equipment operated by the management.

If the City allows cabarets in the Gaslamp District to operate while forcing those in La Jolla, Mission Valley and other areas to close between the hours of 2:00 a.m. and 6:00 a.m., the latter cabaret owners may claim a violation of the Equal Protection Clauses of the State and Federal Constitutions. They may argue that the State is treating similarly situated persons differently thus denying them equal protection of the laws.

When state action is not based on a suspect classification or a fundamental right, it is reviewed by the courts under the

rational basis test. The proposed disparate closing would appear to be a type of zoning ordinance and zoning legislation may be held unconstitutional only if it is shown to bear no rational relationship to the state's interest in securing the health, safety, morals or general welfare of the public. Trustees of Mortgage Trust of America v. Holland, 554 F.2d 237 (5th Cir. 1977); see also, Cotati Alliance for Better Housing v. City of Cotati, 148 Cal.App.3d 280, 291 (1983). In order to determine whether the above actions would be constitutional, it is necessary to first ascertain the City's interest in proposing such regulations.

One possible interest of the City could be to curtail criminal activity and enforce peace and quiet during late night and early morning hours. To show a rational relationship, the City will have the burden of showing that the closing of all cabarets between 2:00 a.m. and 6:00 a.m., while exempting the Gaslamp District, is a legitimate means to achieve these interests.

In two early cases dealing with "closing laws," city ordinances were held to violate the Equal Protection Clause. In Deese v. City of Lodi, 21 Cal.App.2d 631 (1937), the Court held that a city ordinance which provided for the closing of grocery stores and fruit stands on Sunday, but leaving open dance halls, theatres, baseball games and other places of amusement, was discriminatory and could not logically be held to promote cleanliness, orderliness and public health. In Justesen's F.S., Inc. v. City of Tulare, 12 Cal.2d 324 (1938), a city ordinance prohibiting the receiving and selling of uncured and uncooked meats in all establishments except boarding houses and restaurants was held to arbitrarily impose burdensome conditions upon a selected class of merchants.

In this respect, although the closing of cabarets during certain early morning hours may be logically related to the curtailment of crime and maintaining the peace, an issue will arise as to the exemption of the Gaslamp District as a legitimate means of achieving the goal. As in the above cases where there was no apparent reason for treating grocery stores differently from dance halls or for treating restaurants differently from other classes of merchants selling meats, there may be no apparent reason for allowing the Gaslamp District cabarets to remain open while closing cabarets located elsewhere in

San Diego.

If there have been a number of complaints regarding crime, loud noises and boisterous activities from residents of La Jolla,

Mission Valley or other areas of the City, then there may be a greater need to enforce early morning closing hours in these other areas and exempting the Gaslamp District may be rationally related to a legitimate governmental interest. With the development of the residential community in the downtown area, there may be an equal or greater number of complaints involving the Gaslamp area. If this were true the City would not be able to show a rational relationship between its goal of crime prevention and the proposed disparate closing hours of the cabarets. Conversely, if there are higher crime rates or loud noise complaints in the outlying areas, then the City would be able to show a rational relationship between its goal of crime prevention and the closing hours.

Another possible argument of the City is that the Gaslamp District is part of a different zoning area than other areas where cabarets are located. The United States Supreme Court has held that the Equal Protection Clause relates to equality between persons, rather than areas, thus territorial uniformity is not a constitutional prerequisite. McGowan v. Maryland, 366 U.S. 420 (1960). In McGowan, a state statute prohibited the Sunday sale of merchandise except the retail sale of tobacco products, milk, bread, fruits, gasoline, drugs and newspapers in certain Maryland counties. The appellants, employees of a discount department store, contended that the statute violated the Equal Protection Clause on the grounds that the exemption from the sale of merchandise discriminated against retailers in other Maryland counties. The McGowan court found that the legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the population or for the enhancement of the recreational atmosphere of the day. The court held that permitting only certain retailers to sell merchandise was not in violation of the Equal Protection Clause. There was no indication of unreasonableness in the differentiation which, according to the court, is generally a matter of legislative discretion.

The most often cited case in the equal protection area in relation to regulations of local economies under a state's police power is New Orleans v. Dukes, 427 U.S. 297 (1976). In this case, the United States Supreme Court upheld a New Orleans ordinance that allowed vendors who had conducted business within the French Quarter for the preceding eight years to escape a general prohibition against pushcart vending in the French

Quarter. The court recognized that legislatures may implement their programs on a step by step basis and that regulations may

constitutionally ameliorate a perceived evil in part and defer complete elimination of the evil to future regulations. Dukes, 472 U.S. at 304. According to the District Court in Mid-State Food Dealers v. City of Durand, 525 F.Supp. 387 (E.D. Mich. S.D. 1981), the Dukes decision "should be read to stand for the proposition that any rational relationship between a statute's purpose and means is sufficient to pass equal protection clause muster." (Id. at 389). In Mid-State Food Dealers, a city ordinance provided that all businesses subject to city licensing requirements had to be closed between the hours of 2:00 a.m. and 6:00 a.m., while no such requirement was imposed on nonlicensed businesses. Such disparate treatment was upheld by the District Court on the grounds that it was rationally related to the permissible governmental objective of eliminating early morning noise and litter.

The above cases stand for the proposition that legislatures are given a wide latitude of discretion regarding zoning laws. However, even in these cases, a rational relationship was found between the state or city's action and the interest which it sought to enforce. For example, in Dukes the court was enforcing a grandfather clause by exempting a pushcart vendor from an ordinance because he was already a vendor before the ordinance took effect. The court in Mid-State Food Dealers found closing licensed businesses while allowing unlicensed businesses to remain open was a rational means of eliminating early morning litter in a gradual manner.

One legitimate interest of the City in monitoring the cabarets is the regulation of the sale of liquor. Inherent in one federal case involving a cabaret was the sale of liquor. Felix v. Young, 536 F.2d 1126 (6th Cir. 1976). In Felix, the owner of a cabaret sought to enjoin various city officials from enforcing an ordinance regulating the location of certain businesses providing adult entertainment. The Court held regulations in the area of the Twenty-first Amendment are entitled to an enhanced presumption of validity and thus upheld the ordinance. Therefore, at least insofar as the cabarets which are regulated by the California Department of Alcoholic Beverage Control, the City has wide discretion to regulate the sale of liquor and need only present a minimal showing of rationality to withstand a constitutional attack.

It is important to understand that if any cabarets with liquor licenses are allowed to remain open between the hours of 2:00 a.m. and 6:00 a.m., they will not be able to sell liquor or

to permit any liquor to be consumed on the premises. California

Business and Professions Code section 25631 provides in pertinent part as follows:

> Any on or off sale licensee, or agent or employee of such licensee, who sells, gives, or delivers to any person any alcoholic beverage or any person who knowingly purchases any alcoholic beverage between the hours of 2 o'clock a.m. and 6 o'clock a.m. of the same day, is guilty of a misdemeanor.

Section 25632 of the same code provides:

> Any retail licensee, or agent or employee of such licensee, who permits any alcoholic beverage to be consumed by any person on the licensee's licensed premises during any hours in which it is unlawful to sell, give, or deliver any alcoholic beverage for consumption on the premises is guilty of a misdemeanor.

Since any ordinance permitting the cabarets to remain open during the early morning hours would be superseded by state law, the cabarets could not sell liquor between the hours of 2:00 a.m. and 6:00 a.m.

CONCLUSION

If the City is able to show that permitting Gaslamp area cabarets to remain open while closing cabarets in other areas between 2:00 and 6:00 a.m. is a rational means of exercising the police power, then it can legally differentiate between areas based on the wide latitude of discretion it is given by the courts in regards to zoning regulations and controlling the sale of alcoholic beverages.

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ML-86-16