COUNCIL AGENDA: 5-23-06
ITEM: 6.5

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: RICHARD DOYLE
City Attorney

SUBJECT: **Regulation of Parked Vehicles Displayed For Sale on City Roadways**

DATE: May 19, 2006

Approved Date

RECOMMENDATION

Accept report and discuss:

(a) Alternatives to San José Municipal Code Section 11.36.100(1) for the regulation of parked vehicles displayed for sale on public rights of way; and
(b) Information from the Department of Transportation on vehicle counts and streets affected by cars displayed for sale on public rights-of-way

BACKGROUND

Currently, subparagraph (1) of San José Municipal Code ("SJMC") Section 11.36.100 prohibits a person from parking a vehicle "upon any roadway for the principal purpose of displaying such vehicle for sale." As we have previously advised staff and Council, a prohibition on parked cars, which is based exclusively on the display of a "for sale" sign, was ruled unconstitutional in *Burkow v. City of Los Angeles,* an October 2000 federal district court case in which the City of Los Angeles ("L.A.") was enjoined from enforcing its own "For Sale" ordinance. In response to being notified of the court ruling in *Burkow*, the City stopped enforcing SJMC Section 11.36.100(1).

On March 29, 2006, Council approved a Rules Committee memo directing the City Attorney's Office to work with the Departments of Code Enforcement and Transportation (DOT) and return to the City Council to provide information regarding alternatives to Municipal Code Section 11.36.100(1) for the regulation of parked vehicles displayed for sale on City roadways. Council also requested information and analysis of on -street "Used Cars for Sale" vehicle counts, streets, affected by "de facto used car lots", as well as any studies, anecdotal evidence, or legislative findings regarding the impacts of cars displayed for sale on public rights of way.

ANALYSIS

A. The City Cannot Constitutionally Prohibit Parked Vehicles Solely Based on the Display of a "For Sale" Sign

Commercial speech is entitled to constitutional protection. City ordinances regulating such speech must directly advance a substantial governmental interest, and cannot be more extensive than necessary to serve that interest.

In *Burkow*, L.A. argued that its ordinance directly advanced a substantial governmental interest based on safety and aesthetics because:1) the ordinance preserved safety by reducing distractions that are likely to cause traffic accidents; 2) it promoted the flow of traffic and access to businesses by discouraging would-be automobile sellers from parking on the busiest streets; 3) it protected public streets from blight; and 4) it discouraged the trafficking in stolen vehicles and other unlicensed automobile dealers. While noting that Los Angeles had failed to submit any evidence supporting the argument that its ordinance directly advanced a substantial governmental interest, the *Burkow* court held that even assuming that such evidence could be submitted, Los Angeles could not show that the ordinance was reasonably tailored to serve that interest.

The court in *Burkow* disagreed with Los Angeles' claim that its ordinance was narrowly tailored to situations where the traveling motorist is distracted by a small sign in a parked motor vehicle. The court noted that the ordinance permitted other type signs in and on parked cars, which could be even more distracting to passing motorists than the for sale signs. The *Burkow* court also ruled that there were other more narrowly tailored measures available to address the distraction cause by signage in parked vehicles, such as limiting the parking spaces available for all vehicles ("no parking or stopping" zones) and limiting the period of time during which any vehicle could be parked.

B. How Other California Cities Currently Regulate Parked Vehicles Displayed for Sale

In response to *Burkow*, Los Angeles repealed its ordinance, and an informal survey done by the City Attorney's Office shows that many other cities, including San Diego, Chico, Riverside, Capitola, and Walnut Creek, throughout the state have followed suit. Some cities with similar ordinances are not enforcing their ordinances. These cities include Huntington Beach, Danville, Riverside, Chico and Tracy. Other cities have addressed the issue by creating time limited zones or no parking zones on problem streets where many vehicles with "For Sale" signs tend to accumulate. The City Attorney's Office in Huntington Beach indicated that their city may consider designating an open lot that the city owns to allow people to leave their vehicles parked and displayed with "For Sale" signs so as to concentrate these vehicles in one area that will be known as a for sale used car lot.

C. Information Provided by DOT and Code Enforcement on Vehicle Counts and Streets Affected by "Used Cars for Sale" from March 30th through April 9th, 2006

Attachment A is a list of the dates, vehicle counts, and streets affected by parked cars displayed for sale, as recently witnessed by DOT Parking and Traffic Control Officers. The list shows fewer than ten areas in the City which had five vehicles or more on a City block displaying "For Sale" signage. DOT staff has indicated to the City Attorney's Office that it does not consider most of these areas to be a serious parking or traffic concern. DOT staff also advised our Office of the recent implementation of "NO STOPPING" areas, around two of the most impacted areas, northbound of Capitol Avenue, south of Mervyn's Way adjacent to a church and on Mervyn's Way from Story Road to Capitol Avenue.

D. Alternative Methods to Regulate the Parking of Vehicles with "For Sale" Signs

1. Posted or Marked Site Specific Location and/or Time Limitations Are Permissible

The *Burkow* court indicated that cities could minimize the alleged harms of used vehicles parked with for sale displays with measures far short of outright prohibition. The most common method that California cities have implemented after the *Burkow* decision is to install parking meters or create "Time Limited" or "No Parking" zones in areas that staff determines are consistent problem areas, similar to the limitations that DOT staff have recently implemented for two problem areas in San Jose. Though this method may result in shifting the displayed used vehicles for sale to neighborhoods that do not have the posted parking regulations or parking meters, this method meets legal requirements because all vehicles are treated the same regardless of the commercial speech displayed on the vehicles; and it complies with posting requirements contained in the Vehicle Code and the City's Municipal Code.

2. The City's Ability to Adopt Parking Restrictions without the Posting of signs or Street Markings is Limited

SJMC Sections 11.36.250 and 11.36.260 both prohibit parking, standing or stopping any vehicle in violation of any posted signs or street markings. Under Vehicle Code Section 22507, the City is generally allowed to adopt and enforce local parking regulations only if signs or markings giving adequate notice are in place. In a 2004 case involving the City of Santa Barbara, posting signs in 33 locations citywide was held to provide insufficient notice of a citywide parking ban on overnight parking of recreational vehicles as well as large commercial vehicles. The court deemed the postings insufficient since a motorist, unaware of the local restrictions, could enter Santa Barbara on a non-posted street, park on a non-posted street and be cited for the parking violation.

Notwithstanding Vehicle Code Section 22507, Vehicle Code Section 22507.5 authorizes regulation of parking by a citation only with no posting or street marking in two situations. First, a city council ordinance or resolution may prohibit or restrict the parking of large commercial vehicles, with certain exceptions, on any street or street portion that is located in a residential district. In accordance with Vehicle Section 22507.5, Council has adopted SJMC Section 11.36.290 which prohibits the parking of large commercial vehicles, except for the mandated exceptions, on all streets within the City.

Vehicle Code Section 22507.5 also permits the Council to adopt an ordinance or resolution which prohibits or restricts the parking or standing of vehicles on certain streets or portions of streets within the hours of 2 am and 6 am. Posting or marking of the specific streets is not required under this Vehicle Code Section, but the ban must be imposed on all vehicles parked in the identified locations, with the exception that the City may adopt a permitting system to allow overnight parking for disabled persons, residents and guests of residents in residential areas. Also, such an ordinance or resolution shall not be effective to commercial vehicles in certain exempted situations, such as those making pickups or deliveries of goods, wares, and merchandise to a building or structure located on a restricted street.

Enforcement of a 2 am to 6 am parking restriction would be limited to issuance of a citation unless the cited car was left parked for more than 72 hours. Vehicle Code Section 22651.05(a)(1) only allows for vehicle removal where no signs are posted if the vehicle is parked or left standing upon the roadway for 72 or more consecutive hours. While a 2 am to 6am restriction would not impact “for sale” vehicles that are moved every day, it would address the “de facto for sale used car lot” situation. However, it would also impact other vehicles left overnight in the same area.

CONCLUSION

Accept this report, and provide direction to staff and the City Attorney’s Office consistent with the analysis contained in this report if Council concludes that further regulation of parked vehicles displayed for sale on public rights of way is desirable.

RICHARD DOYLE
City Attorney

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MOHAMMED HILL
Deputy City Attorney

cc:

ATTACHMENT A

Dates, Vehicle Counts, And Streets Affected By Parked Cars Displayed For Sale

3/30/06	Piedmont Rd @ Hostettler Rd. – 1 vehicle Julian @ 28th St. – 3 vehicles Monterey Rd @ Capitol – 5 vehicles Hillsdale @ Cherry – 2 vehicles Hillsdale @ Gardendale – 1 vehicle Senter Rd @ Lewis - 2 vehicles Senter @ Dadis – 2 vehicles
4/1/06	Capitol Expy @ Mervyn's Wy – 3 vehicles Mervyn's Wy @ Capitol Expy – 25 vehicles Story Rd from King to Capitol – 15 vehicles Jackson Av between Story & 680 – 5 vehicles
4/3/06	McKee Rd @ King Rd – 3 vehicles
4/4/06	Monterey Rd @ Cottage Grove – 2 vehicles Harliss @ Willow – 1 vehicle Via Del Coronado @ Junesung – 1 vehicle Piedmont @ Cropley – 1 vehicle Cherry Ave @ Cherry Ct – 2 vehicles Hillsdale @ Cherry – 3 vehicles Branham @ Pearl – 1 vehicle
4/5/06	Hostetter @ Morrill – 1 vehicle North King @ Mabury – 2 vehicles
4/6/06	Eden @ Cadillac – 1 vehicle Starbird @ Boynton – 1 vehicle Santee Rd @ Capitol – 4 vehicles Senter Rd @ Lewis – 3 vehicles Foss @ Alum Rock – 15 vehicles Hillsdale from Cherry to Cheshire – 9 vehicles San Antonio @ 24th – 1 vehicle 8th @ Reed – 1 vehicle Monterey @ Alma – 1 vehicle Lean @ Calero – 1 vehicle 463 N. 16th St. – 1 vehicle 381 N. 16th St. – 1 vehicle Julian @ 28th – 2 vehicles

ATTACHMENT A

4/7/06	Senter Rd @ Monterey – 1 vehicle San Antonio @ 24th – 1 vehicle Blairberry Wy @ Glenberry – 1 vehicle Dias Dr @ Portal – 1 vehicle
4/8/06	Doxey Dr @ Flickenger – 1 vehicle WB McKee Rd @ King Rd. – 4 vehicles EB McKee Rd @ King Rd. – 5 vehicles Capitol Expy @ Mervyn's Wy – 3 vehicles Mervyn's Wy @ Capitol Expy – 17 vehicles Story Rd from King to Capitol – 12 vehicles Jackson Av between Story & 680 – 5 vehicles
4/9/06	Hamilton Avenue from Saratoga Ave to San Tomas Aquino – 5 vehicles Hamilton Avenue from Bascom Avenue to San Tomas Expressway– 15 vehicles Commercial St. – 50 vehicles (many of them in red zones; when patrolled by staff with light bar flashing; some vehicles moved)