CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: RULES COMMITTEE

FROM: RICHARD DOYLE
City Attorney

SUBJECT: **Urgency Ordinance Prohibiting The Use Of Automobile / Bus / Truck Horns In Residential Neighborhoods For Any Reason Other Than An Emergency Warning Of Traffic Hazard**

DATE: October 13, 2006

INTRODUCTION

On October 4, 2006, the Rules Committee requested the City Attorney's Office to prepare a memorandum for their October 18, 2006 meeting to address concerns regarding vehicles using their horns in residential neighborhoods. The following memorandum analyzes whether the City can adopt an ordinance limiting the use of vehicle horns in residential neighborhoods to emergency situations and whether there are alternatives to addressing the specific concerns of the Woodmansee family who claim that their neighbor's employees engage in excessive horn honking at the exit to the neighbor's property.

BACKGROUND

In 1978, Royal Coach Tours (RCT), a private tour bus company, purchased and began operating its business from the properties located at 644 and 630 Stockton Avenue, in San Jose. At the time, there were no residentially zoned properties within 150 feet of its business and 644 and 630 were zoned Heavy Industrial (HI). Prior to RCT's purchase of the properties, a "Smith's Bus Chartering Line" operated from this location.

In 2005, the Woodmansees purchased the property located at 641 Stockton Avenue, directly across the street from RCT. Prior to the Woodmansees' purchase of the property, and up until 2001, the "641" neighborhood bar operated from 641 Stockton Avenue.

In 2004, prior to the Woodmansees' purchase of 641 Stockton Avenue, the City discovered that although the property was zoned for commercial uses, the commercial building on the site had been expanded and converted to a residence without prior approval from the City. The City notified the Woodmansees, then tenants at the property, that they were illegally using the property as a residence and advised them to have the property rezoned from commercial to residential if they wished to continue residing there.

In January 2005, the owner of 641 Stockton Avenue applied for and obtained from the City a rezoning of 641 Stockton Avenue from commercial to residential. In April 2005, the Woodmansees purchased the property and subsequently obtained a Site Development Permit (SDP) from the City to allow the conversion of the commercial building to a residence. RCT objected to the above rezoning and issuance of an SDP, but the City concluded that the rezoning and the SDP were appropriate because both were consistent with the City's General Plan Map.

Although the General Plan Map designates most of the area west of Stockton Avenue for residential uses and the area east of Stockton for industrial uses, the Woodmansees' property and a couple of buildings zoned for commercial use, but operating as single-family residences, are the only residences on the west side of Stockton Avenue.

Neighbor Complaints And RCT's Response:

In March 2005, while the Woodmansees were still tenants at 641 Stockton Avenue, Code Enforcement received a complaint from the Woodmansees that RCT's buses were idling their engines excessively on the public street and at night. Code Enforcement conducted an investigation and closed its file after RCT agreed that their buses would no longer idle their engines in this manner. In May 2005, Code Enforcement received a complaint from another neighbor that RCT installed an alarm at their entrance gate which created too much noise. Code Enforcement conducted an investigation and closed its file after RCT agreed to disconnect the alarm. The Woodmansees then began complaining to the City about noise created by RCT's buses and other vehicles that were honking their horns as they exited RCT's property.[1] Code Enforcement conducted an investigation and learned that vehicles leaving RCT's property, specifically tour buses, were sounding their horns at the gate to the exit of the property for two reasons: (1) to warn pedestrians of their approach and (2) the bus drivers are required, by California law, to confirm that the bus horn is in working condition before operating the bus on the public roadway.

ISSUES PRESENTED

Issue #1: Can the City adopt an ordinance prohibiting the use of horns by motor vehicle drivers in residential neighborhoods for any reason other than emergency warning of a traffic hazard?

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[1] According to the Woodmansees, other residents have also complained about the noise created by the horns; however, neither Code Enforcement nor the San Jose Police Department has received complaints from any other parties regarding the same. Though Code Enforcement has not surveyed the neighboring residents or businesses, Code Enforcement did observe the frequency of the horn usage as follows. On June 27 and 28, 2006, between 8:30 a.m. and 11:00 a.m., an inspector observed 4 vehicles honk their horns at the gate. On July 12, 2006, between 8:00 a.m. and 8:30 a.m., no vehicles sounded their horns at the exit. On July 14, 2006, between 11:30 a.m. and 12:30 p.m., a total of 4 out of 24 vehicles sounded their horns as they exited. On July 20, 2006, between 3:30 p.m. and 4:00 p.m., 2 vehicles honked their horn at the gate. Overall, the honking from the vehicles was deemed by Code Enforcement to be reasonable.

Issue #2: Are there alternatives to adopting an ordinance that the City can pursue to address the alleged disturbance caused by the sounding of horns by vehicles as they exit RCT's property?

SHORT ANSWERS

Issue #1: No.

Issue #2: Yes, if the City determines that RCT's use of their property has resulted in an adverse public impact.

ANALYSIS – ISSUE # 1

The Limits of the California Vehicle Code:

It is well settled law that the control of street traffic is not exclusively a municipal affair, but rather, a statewide concern. Accordingly, unless given expressly delegated authorization by statute, charter cities remain subject to the traffic regulations set forth in the California Vehicle Code. In this instance, there is no California Vehicle Code Section authorizing the City to establish regulations restricting the use of vehicle horns in residential neighborhoods. As such, the City is not permitted to implement and / or enforce the same.

Although an argument can be made that Vehicle Code Section 21100 authorizes the City to regulate "passenger vehicles for hire" (i.e., private tour bus operations such as RCT), Vehicle Code Section 27001 clearly limits the extent to which the City can regulate the use of horns by RCT's bus drivers by providing as follows:

(a) The driver of a motor vehicle when reasonably necessary to insure safe operation ***shall*** give audible warning with his horn.
(b) The horn shall not otherwise be used, except as a theft alarm system which operates as specified in Article 13 (commencing with Section 28085) of this chapter.

Section 27001 not only places an *affirmative duty* on all drivers, including tour bus operators, to use their horn if reasonably necessary for safety purposes; in cases involving traffic accidents, failure to do so has repeatedly been found to be a dereliction of a statutory duty.[2]

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[2] *See* Menchaca v. Helms Bakeries, Inc. 68 Cal.2d 535 (1968) [In an action for wrongful death by the parents of a child accidentally killed when standing in front of the left front wheel of a bakery truck as it moved off after making a home delivery, the court held the driver liable for not using his horn where, although the driver of the truck testified that he saw only five children nearby and all returned to a position of safety before he started, substantial evidence indicated it was still "reasonably necessary" to sound his horn because of the dangerously blind spots in front of the truck due to its unusual shape, design, and equipment.]

While Section 27001 does go on to prohibit the use of horns in an abusive manner or for non-safety purposes, what will ultimately constitute "reasonably necessary to insure safe operation" appears to be in the sole discretion of the law enforcement agency charged with the duty of issuing citations for violations of Section 27001(b).

The Role of California Code of Regulations:

Further restricting the City's ability to regulate passenger vehicles for hire are provisions set forth in Section 1215 of Title 13 of the California Code of Regulations. That Section states, in relevant part, the following:

> (b) ...all drivers shall perform vehicle inspections and submit written reports in accordance with the requirements of Title 49, Code of Federal Regulations, Sections 396.11 and 396.13, as follows:
> (1) Before driving a motor vehicle, the driver shall:
> (A) Inspect each vehicle daily to ascertain that it is in safe operating condition and equipped as required by all provisions of law, and all equipment is in good working order.

Subsection (c)(6) of Section 1215 goes on to list vehicle horns as one of the parts that "shall" be covered in the driver's report.

Therefore, to the extent the City can regulate the use of vehicle horns in residential neighborhoods, it is only authorized to regulate the use of horns by passenger vehicles for hire. In turn, to the extent the City can regulate the use of horns by passenger vehicles for hire, it cannot adopt regulations that would limit the driver's use of the horn in a manner that is contrary to the provisions of either Vehicle Code Section 27001 or Title 13 of the California Code of Regulations. In sum, the City cannot make it unlawful for operators like RCT to sound their horns when reasonably necessary to insure safe operation or from sounding their horns to confirm the same are in good working condition.

ANALYSIS – ISSUE # 2

Zoning Code Requirements:

Pursuant to the City's current Zoning Ordinance, adopted in 2001, a common carrier[3] like RCT may operate in a HI District without obtaining a Conditional Use Permit (CUP) from the City. A common carrier must, however, obtain a CUP if it is located within 150 feet of a residentially zoned property and it intends on conducting any of its operations outdoors between the hours of 12:00 midnight and 6:00 a.m.[4] The Zoning Ordinance also imposes performance standards on common carriers and prohibits any operation that (1) constitutes a menace, (2) is performed in a manner that is dangerous, obnoxious, or

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[3] San Jose Municipal Code (SJMC) § 20.200.210 defines a "common carrier" as a company in the business of transporting passengers or goods for hire.

[4] SJMC § 20.50.220(B).

offensive ...by reason of air pollution, odor, smoke, noise, dust vibration, radiation, or fumes, or (3) creates a public or private nuisance.[5]

Legal Nonconforming Use:

As discussed, RCT operates from an area that is zoned Heavy Industrial (HI). Since RCT's use of the property at 644 and 630 Stockton Avenue began in 1978 and, at the time, there were no residentially zoned properties within 150 feet of its business, RCT would not be subject to the above referenced sections of the Zoning Ordinance, adopted 23 years after RCT began its operations. That is, RCT can be said to enjoy "legal nonconforming" status.[6] "Legal nonconforming use" is any lawful use of land that ceases to conform to the provisions of the Zoning Ordinance upon changes in the regulations of the Zoning Ordinance.

Loss of Legal Nonconforming Status / Adverse Public Impact:

Although RCT may enjoy legal nonconforming status and therefore is not operating in violation of the aforementioned sections of the Zoning Ordinance, RCT can lose that status if the City determines that RCT's use of their property results in an adverse public impact and has therefore become incompatible with the surrounding neighborhood. An adverse public impact can be supported by evidence that the neighborhood has substantially changed or the use substantially impairs the public peace, health, safety, morals or welfare. Once the City makes the determination that the use is resulting in an adverse public impact, it can issue an Order to Show Cause to RCT directing RCT to appear before the City's Planning Commission and show cause why their legal nonconforming status should not be revoked or why RCT should not be made to secure a CUP containing conditions aimed at abating the adverse public impact. If the Planning Commission agrees that RCT's horn use creates an adverse public impact, it could either terminate RCT's legal nonconforming status so that RCT would be subject to the current Zoning Ordinance; or, it could require RCT to obtain a CUP with conditions that would prevent or mitigate the adverse impact of the horn use.

It is important to note that whatever the Planning Commission ultimately decides, in light of the state statutes outlined above, any use restrictions the Planning Commission may seek to impose on RCT's operations would be limited by the affirmative duties set forth in the Vehicle Code and the Code of Regulations.

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[5] SJMC § 20.50.300.

[6] Although RCT has not requested the City make a determination regarding their actual legal nonconforming status, based on the information City staff has gathered to date, RCT's use of the property was considered lawful prior to the adoption of the standards set forth in the current Zoning Ordinance and therefore, remains lawful despite the enactment of the same.

CONCLUSION

The City cannot adopt an ordinance prohibiting the use of all vehicle horns in residential neighborhoods for any reason other than emergency warning of a traffic hazard. To the extent the City can regulate the use of any vehicle horns, they are limited to the regulation of passenger vehicles for hire and their use of horns. And, to the extent the City seeks to regulate these types of vehicles, they are bound by the limitations of the Vehicle Code and the Code of Regulations. If the City wishes to pursue other alternatives for resolving the specific complaints by the Woodmansees, vis a vis Royal Coach Tours, the City can consider the option of the Adverse Public Impact process outlined above, should the City deem that the sounding of horns is, in fact, adversely impacting the public.

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