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CITY OF OAKLAND



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February 8, 2011

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PUBLIC SAFETY COMMITTEE
Oakland, California

Dear Chairperson Kernighan and Members of the Committee:

Report and Ordinance Adding Chapter 9.56 to the Oakland Municipal Code, Declaring Vehicles a Public Nuisance and Authorizing Impoundment of such Vehicles When They are Used to Solicit an Act of Prostitution, for Pandering, Pimping, or Illegal Dumping

SUMMARY

This is a joint report from the City Attorney's Office and the Oakland Police Department. Councilmember Patricia Kernighan is sponsoring the proposed ordinance. The proposed ordinance would create a nuisance vehicle chapter in the Oakland Municipal Code authorizing the City to declare a motor vehicle to be a nuisance subject to impoundment for up to 30 days when the motor vehicle is involved in the commission of specified crimes related to prostitution or illegal dumping. The Ordinance will create a new tool to address the egregious public nuisance crimes of prostitution related offenses. Furthermore, the Ordinance will be a tool to combat illegal dumping, a crime that almost always includes the use of a vehicle in the commission of the offense.

Last year the California Legislature resolved the preemption issue in favor of a city's authority to impound vehicles used in certain defined public nuisance activities with the passage of an amended Vehicle Code 22659.5. Under the new provisions of Vehicle Code 22659.5, a city is authorized to adopt an ordinance declaring a motor vehicle to be a nuisance and to subject the vehicle to an impoundment period of up to 30 days. Impoundment is authorized only if two conditions are met: (1) when the motor vehicle is involved in the commission of any one or more of specified crimes related to prostitution or illegal dumping of commercial quantities of waste matter upon a public or private highway or road, and (2) if the owner or operator of the vehicle has had a prior conviction for the same offense within the past 3 years. The statute also requires that a city ordinance include specific provisions related to notice, the payment of towing, storage, and administrative fees, the provision of a post-storage hearing, and the release of the impounded vehicle.

The Vehicle Code also requires the ordinance to provide that a person operating or in charge of a storage facility is civilly liable to the owner of the vehicle or the person who tendered the towing.

Item: _____
Public Safety Committee
February 8, 2011

PUBLIC SAFETY COMMITTEE

Oakland, California

Re: Report and Proposed Ordinance Adding Chapter 9.56 to the Oakland Municipal Code

Page - 2 -

storage, and related fees for 4 times the amount, not to exceed \$500, if the person operating or in charge of the storage facility fails to comply with specified requirements to accept a valid bank credit card or cash for the payment of those fees.

FISCAL IMPACT

No new funding is being requested. The City will utilize existing resources to implement this Ordinance.

BACKGROUND

In 1997, the City Council passed Ordinance No. 11987 C.M.S., in response to community complaints of the negative effects on public streets and sidewalks caused by street prostitution occurring in automobiles and the nuisance caused by street level drug purchases by persons in automobiles. Over the years, various amendments were made to the Ordinance (Ordinances Nos. 12015, 12093, and 12684) which included a right to a jury trial, a post-seizure hearing, and adding violations for vehicles used by pimps and panderers.

In 1998, taxpayer Sam Horton filed suit against Oakland, alleging that the Ordinance was unconstitutional because it was preempted by California law. In July 2000, the California Court of Appeal, First District, issued a ruling in the lawsuit Sam Horton v. City of Oakland (2000) 82 Cal.App.4th 580, finding that the terms of Oakland's Nuisance Vehicle Forfeiture Ordinance did not conflict with California law and denied Horton's preemption challenge.

In early 2001, the City of Stockton passed Ordinance 015-01C.S. (effective July 12, 2001 and codified as Stockton Municipal Code, Chapter 5, Part XXV), which is substantially similar to Oakland's Nuisance Vehicle Forfeiture Ordinance in many respects. In late 2001, taxpayer Kendra O'Connell filed suit against the City of Stockton, alleging that Stockton's Nuisance Vehicle Ordinance was preempted by California law. The California Court of Appeal, Third District, found that Stockton is preempted from enacting such law. Because this Third District ruling directly contradicts the First District's ruling in Horton v. City of Oakland, Stockton appealed to the California Supreme Court.

Oakland was sued again in the fall of 2001 by a taxpayer (Aram Sohigian) who challenged Oakland's Ordinance on numerous grounds. Oakland successfully obtained a dismissal of the Sohigian case. The Court of Appeal agreed with the trial court on all counts except one (potential excessive fines), and also held that Sohigian had no standing to raise preemption because of the prior ruling in Horton v. City of Oakland. Sohigian appealed to the Supreme Court and review was granted. The Supreme Court postponed a ruling on Sohigian, so it could first decide the Stockton case.

Item: _____
Public Safety Committee
February 8, 2011

PUBLIC SAFETY COMMITTEE

Oakland, California

Re: Report and Proposed Ordinance Adding Chapter 9.56 to the Oakland Municipal Code

Page - 3 -

On July 26, 2007, the California Supreme Court ruled, in O'Connell v. City of Stockton (2007) 41 Cal.4th 1061, that Stockton's Nuisance Vehicle Ordinance was preempted by California law, and overruled the 2000 decision of the Court of Appeal, First District, in Horton v. City of Oakland.

Because Oakland's Nuisance Vehicle Forfeiture Ordinance provided for forfeiture of vehicles for the same types of activity that was prohibited in the Stockton Ordinance (illegal drug buying, and solicitation of prostitution), the Supreme Court's ruling in O'Connell v. City of Stockton effectively preempted Oakland's Nuisance Vehicle Forfeiture Ordinance. As a result, the Oakland Ordinance was repealed to avoid future liability from lawsuits challenging OMC Chapter 9.56 on the basis of preemption. Last year the California Legislature resolved the preemption issue in favor of a city's authority to impound vehicles used in certain defined public nuisance activities with the passage of an amended Vehicle Code section 22659.5.

KEY ISSUES AND IMPACTS

Passage of the proposed ordinance will provide the City of Oakland a tool to combat the public nuisance caused by vehicles used for prostitution, pimping, pandering and illegal dumping. It will also comply with the ruling of the California Supreme Court in Stockton and protect the City from liability from lawsuits challenging Oakland's Ordinance.

The requirement that the offender have a prior conviction for the same offense within the past three years before the vehicle can be impounded will limit the application of this provision to repeat offenders, but nevertheless will provide another tool to deal with the problems of street prostitution and illegal dumping in Oakland's neighborhoods.

PROJECT DESCRIPTION

The Ordinance will allow the City of Oakland to declare vehicles used for prostitution, pandering, pimping, or illegal dumping as public nuisances. Penal Code section 370 and Civil Code section 3479 both provide: "Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a public nuisance". Furthermore, Civil Code section 3480 provides: "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

PUBLIC SAFETY COMMITTEE

Oakland, California

Re: Report and Proposed Ordinance Adding Chapter 9.56 to the Oakland Municipal Code

Page - 4 -

The Ordinance will establish regulations which provide notice to the vehicle owners regarding their right to appeal the public nuisance finding before an Administrative Hearing Officer, and the payment of towing, storage, and administrative fees. The vehicle owner must also be provided a post-storage Administrative Hearing for contesting the matter and for the release of the impounded vehicle.

To implement the Ordinance, the Oakland Police Department will adopt administrative protocols for enforcing the Ordinance and will be responsible for training officers, conducting operations, identifying potential hotspots and issuing citations. The City Attorney's Office will work with the Police Department to provide training for officers, prosecution of Ordinance violations, and to file legal paperwork, negotiate fees with guidelines, and perform community outreach. On matters related to illegal dumping, the City Attorney's Office and the Oakland Police Department will work with the Public Works Agency and other city departments charged with the responsibility to stop illegal dumping in Oakland.

Penalties and fees for individuals cited under the Ordinance will include fines, towing fees, vehicle release fees, stay-away orders from the area of the offense, misdemeanor convictions, and up to six months in jail. Furthermore, the Ordinance permits the City of Oakland to seize and impound vehicles for up to thirty days when the defendant has a conviction of a similar offense within the previous three years.

SUSTAINABLE OPPORTUNITIES

Economic: Enforcement of this Ordinance should help improve economically depressed residential areas and lead to a better business environment for businesses in areas affected by prostitution, pimping, pandering, and illegal dumping.

Environmental: Enforcing this Ordinance should lead to a decrease in the amount of industrial and toxic waste that is illegally dumped in Oakland neighborhoods.

Social Equity: This Ordinance furthers social justice and equality by providing new enforcement tools and accountability measures against those who sexually exploit women and children. The implementation of this Ordinance should lead to a safer environment for the victims of sexual exploitation.

DISABILITY AND SENIOR CITIZEN ACCESS

There are no impacts on disability and senior access resulting from this Ordinance.

PUBLIC SAFETY COMMITTEE

Oakland, California

Re: Report and Proposed Ordinance Adding Chapter 9.56 to the Oakland Municipal Code

Page - 5 -

ACTION REQUESTED OF THE CITY COUNCIL

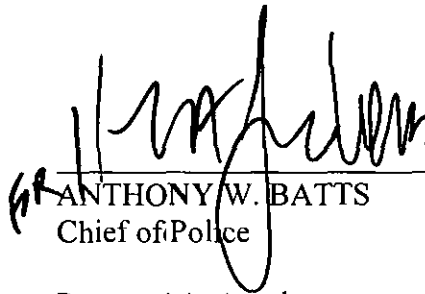
We recommend that the City Council accept this report and adopt the proposed ordinance. In addition, we recommend that the City consider sponsoring state legislation to remove the restriction that the impound procedure can be used only against repeat offenders.

Respectfully submitted,



JOHN A. RUSSO
City Attorney

Attorneys Assigned:
Rocio V. Fierro
Elias Ferran



ANTHONY W. BATTIS
Chief of Police

Personnel Assigned:
Lt. Kevin Wiley
Youth & Family Services

Reviewed by:
Ms. Cynthia Perkins
OPD Legislative Analyst

739019

Item:
Public Safety Committee
February 8, 2011

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Introduced by Councilmember Patricia Kernighan

Approved as to Form and Legality


Oakland City Attorney's Office

OAKLAND CITY COUNCIL

Ordinance No. _____ C.M.S.

ORDINANCE ADDING CHAPTER 9.56 TO THE OAKLAND MUNICIPAL CODE, DECLARING VEHICLES A PUBLIC NUISANCE AND AUTHORIZING IMPOUNDMENT OF SUCH VEHICLES WHEN THEY ARE USED TO SOLICIT AN ACT OF PROSTITUTION, FOR PANDERING, PIMPING, OR ILLEGAL DUMPING

WHEREAS, citizens of Oakland have been in frequent contact with the Oakland Police Department and have provided testimony before the Oakland City Council Public Safety Committee regarding the nuisance created by persons driving vehicles into their neighborhoods in order to solicit acts of prostitution, purchase drugs, and illegally dump waste and garbage; and

WHEREAS, persons who illegally dump waste and solicit acts of prostitution from their vehicles bring crime and decay to Oakland neighborhoods; and

WHEREAS, Prostitution and prostitution related crimes has become big business in Oakland rivaling only the illegal weapons trade and narcotics trade in sheer size and scope, according to the U.S. State Department; and

WHEREAS, in recent years, law enforcement officials have documented an alarming increase in the number of underage girls working as street prostitutes in the City of Oakland; and

WHEREAS, in recent years, the acts associated with the control and exploitation of prostitutes, otherwise known as "pimping," has drawn criminals to pursue this "trade" due to the perception that pimping is more lucrative and carries less risk of criminal prosecution than the illegal drug trade; and

WHEREAS, according to the National Center for Missing and Exploited Children, girls first become victims of prostitution on average between the ages of twelve and fourteen years old; and

WHEREAS, according to the US Department of Justice, approximately 55 percent of runaway or missing girls engage in formal prostitution, and of the girls engaged in formal prostitution, about 75 percent work for a pimp; and

FEB 08 2011

WHEREAS, according to the US Department of Justice, it is not only the girls on the streets that are affected—for boys and transgender youth, the average age of entry into prostitution is eleven to thirteen years old; and

WHEREAS, the areas most plagued with street prostitution and prostitution related crimes is known on the streets of Oakland as “The Track” and runs from San Pablo Boulevard in North Oakland to International Boulevard in East Oakland; and

WHEREAS, street prostitution is a pervasive problem especially in the area known as “The Track” in large part because of the easy vehicular access to the sidewalks and streets where the prostitutes gather to meet their customers; and

WHEREAS, illegal dumping is a long standing problem in certain areas of the City of Oakland, involving in many instances individuals from out of town who drive to Oakland looking for places to dump waste, debris, garbage and often toxic materials; and

WHEREAS, in 1997, the Oakland City Council enacted Ordinance No. 11987 C.M.S., which was subsequently amended by Ordinances No. 12015, 12093 and 12684 C.M.S., and this Ordinance declared vehicles that were used to solicit an act of prostitution or to illegally acquire a controlled substance to be public nuisances, and authorized the seizure and forfeiture of said vehicles; and

WHEREAS, Ordinance No. 11987 C.M.S. and its amendments were codified as Chapter 9.56 of the Oakland Municipal Code (named the Nuisance Vehicle Forfeiture Ordinance), subsequently challenged in court, and upheld by the California Court of Appeal in the 2000 decision in Horton v. City of Oakland; and

WHEREAS, the Oakland City Council repealed its Nuisance Vehicle Forfeiture Ordinances following the California Supreme Court decision in O’Connell v. City of Stockton (2007) 41 Cal.4th 1061, holding that Stockton’s Nuisance Vehicle Ordinance, which was similar to Oakland’s Ordinance, was preempted by California law, which decision overruled the 2000 Horton decision; and

WHEREAS, on January 1, 2010, the State Legislature enacted Vehicle Code Section 22659.9 which permits a city or a county to adopt ordinances which declare a motor vehicle to be a public nuisance and authorize under limited conditions the seizure and temporary impoundment of said motor vehicle when they are used in the commission or attempted commission of prostitution related offenses in violation of Penal Code Sections 266h, 266i or 647(b), or if the motor vehicle is used for illegal dumping in violation of Penal Code Section 374.3; and

WHEREAS, seizure and impoundment of the vehicles of persons who solicit acts of prostitution and/or illegally dump waste will prevent future use of the impounded vehicles for similarly unlawful purposes and will further serve as a deterrent to such unlawful behavior thereafter.

NOW THEREFORE,

THE CITY COUNCIL OF OAKLAND DOES ORDAIN AS FOLLOWS:

THE FOLLOWING CHAPTER 9.56 IS ADDED TO TITLE 9—PUBLIC PEACE, MORALS AND WELFARE, OF THE OAKLAND MUNICIPAL CODE.

“Chapter 9.56 Nuisance Vehicles

9.56.010 Definitions

For the purpose of this chapter the following words and phrases shall mean and include:

“Nuisance vehicle” means any vehicle used to agree to or engage in an act of prostitution, pandering, or pimping or to illegally dump; such vehicle is a nuisance.

“Pandering” means procuring another person for the purpose of prostitution, a crime pursuant to California Penal Code Section 266i.

“Pimping” means deriving support or maintenance from the earning or proceeds of a prostitute, a crime pursuant to California Penal Code Section 266h.

“Prosecuting Agency” means the District Attorney or the City Attorney.

“Prostitution” means the solicitation of, agreement to engage in, or engaging in any act of prostitution, as defined in California Penal Code Section 647(b).

“Illegal Dumping” means to dump or to cause to be dumped waste matter in or upon a public or private highway or road, as defined in California Penal Code Section 374.3.

9.56.020 Nuisance vehicles.

Any vehicle used to agree to or engage in an act of prostitution, or procure another person for the purpose of prostitution (pandering), or derive financial support or maintenance from the earnings or proceeds of prostitution (pimping), or illegally dumps, is declared a public nuisance, subject to seizure and an impoundment period of up to 30 days if the owner or operator of the vehicle has had a prior conviction for the same offense within the past three years.

9.56.030 Responsibility of towing and storage cost.

The registered owner or his or her agent shall be responsible for all towing and storage charges related to the impoundment. However, notwithstanding any provision of law, if a motor vehicle is released prior to the conclusion of the impoundment period because the driver was arrested without probable cause, neither the arrested person nor the registered owner of the motor vehicle shall be responsible for the towing and storage charges.

9.56.040 Security Interest Holder

A. A vehicle removed and seized under Section 9.56.020 shall be released to the legal owner of the vehicle or the legal owner's agent prior to the end of the impoundment period if both of the following conditions are met:

(1) The legal owner is a motor vehicle dealer, bank, credit union, acceptance corporation, or other licensed financial institution legally operating in this state, or is another person who is not the registered owner and holds a security interest in the vehicle.

(2) The legal owner or the legal owner's agent pays all towing and storage fees related to the seizure and impoundment of the vehicle.

B. No lien sale processing fees shall be charged to the legal owner who redeems the vehicle prior to the 15th day of the impoundment period. Neither the impounding authority nor any person having possession of the vehicle shall collect from the legal owner as described in Section 9.56.040, or the legal owner's agent, any administrative charges imposed pursuant to Vehicle Code Section 22850.5, unless the legal owner voluntarily requested a post-storage hearing.

9.56.050 State Law Requirements

During the enforcement of any section or subsection of this chapter, the City of Oakland will follow the relevant Vehicle Code's requirements for Notice, Post-Storage Hearings, Vehicle Release, Storage Facilities, and Rental Cars.

9.56.060 Promulgation of Administrative Instructions and Protocols

The City Administrator or his designee shall promulgate vehicle impoundment administrative procedures to ensure the implementation of this Ordinance complies with state law and with the City Council's policy directives

9.56.070 Severability clause

In any section, subsection, clause, phrase or word in this chapter is declared unconstitutional or invalid by any court, said ruling shall not invalidate any other portion of this chapter. The City Council finds and determines that it would have adopted this chapter without said section, subsection, sentence, clause, phrase, or word."

9.56.080 Effective Date

This ordinance shall become effective immediately on final adoption if it receives six or more affirmative votes; otherwise it shall become effective upon the seventh day after final adoption.

IN COUNCIL, OAKLAND, CALIFORNIA, _____

PASSED BY THE FOLLOWING VOTE:

AYES – BROOKS, BRUNNER, DE LA FUENTE, KERNIGHAN, KAPLAN, NADEL,
SCHAAF, and PRESIDENT REID

NOES –

ABSENT –

ABSTENTION –

ATTEST: _____

LaTonda Simmons
City Clerk and Clerk of the Council
of the City of Oakland, California

DATE OF ATTESTATION: _____

NOTICE AND DIGEST

AN ORDINANCE ADOPTING THE OAKLAND MUNICIPAL CODE TO AUTHORIZE THE CITY OF OAKLAND TO DECLARE VEHICLES A PUBLIC NUISANCE SUBJECT TO IMPOUNDMENT WHEN USED FOR SOLICITING QAN ACT OF PROSTITUTION, PANDERING PIMPING, OR ILLEGAL DUMPING

This Ordinance adds section 9.56 to the Oakland Municipal Code which permits any vehicle used to agree to or engage in an act of prostitution, or procure another person for the purpose of prostitution (pandering), or derive financial support or maintenance from the earnings or proceeds of prostitution (pimping), or illegally dumps, is declared a public nuisance, subject to seizure and an impoundment period of up to 30 days if the owner or operator of the vehicle has had a prior conviction for the same offense within the past three years.