

COUNCIL COMMITTEE MINUTES

Concurrent Special Committee Meetings of the Sacramento City Council, Redevelopment Agency of the City of Sacramento, Housing Authority of the City of Sacramento and the Parking Authority of the City of Sacramento.

COMMITTEE NAME: LAW AND LEGISLATION

MEETING DATE: August 28, 1992

MEETING TIME: 1:00 p.m.

LOCATION: **915 I STREET, 2ND FLOOR, COUNCIL CHAMBER**

I HEREBY CALL Special Meetings of the Sacramento City Council, Redevelopment Agency of the City of Sacramento, Housing Authority of the City of Sacramento, and Parking Authority of the City of Sacramento to be conducted concurrently with the Council committee meetings listed below, which are incorporated herein by reference. The Special Meetings are called to permit Members who are not on the listed committees to attend the meetings and participate in the discussions. In the event five (5) or more members of the City Council are present at a Committee meeting, only those items listed on the agenda can be acted on or discussed.

The meeting was called to order at 1:00 p.m. by Chair Lynn Robie.

PRESENT: Committeemembers Robie, Chinn and Serna.

ABSENT: Committeemember Pane.

Chair Robie announced that Ken Emanuels, the City's Legislative Advocate, would be arriving late; therefore, Item 1 on the agenda would be postponed until his arrival. In addition, because of the long agenda and the fact that Item 6 has already been delayed about three or four months, she asked that Item 3 relating to cardrooms operated by fraternal organizations be postponed until a future Law and Legislation Committee meeting.

2. AB 42X (Wyman) relating to murder by participant in a criminal street gang.

Recommendation of Staff: Recommend support.

Committee Action: Supported.

Voting Record: Moved: Chinn
Seconded: Serna
Ayes: Chinn, Serna, Robie
Absent: Pane

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2. ITEM CONTINUED FROM PREVIOUS PAGE.

MINUTES:

Claudia Evans, Administrative Assistant for the Police Department, explained this bill and encouraged the Committee's support. Chinn moved, Serna seconded the motion, and the Committee unanimously voted to support AB 42X relating to murder by a participant in a criminal street gang.

4. An ordinance amending Section 37.22 of the Sacramento City Code, relating to the exemption procedures in the Clean Indoor Air and Health Protection Ordinance.

Recommendation of Staff: Recommend support and forward to Council.

Committee Action: No action taken.

MINUTES:

Deputy City Attorney Diane Balter explained that the Environmental Commission came to the City with their concern that someone who had appealed the decision of the Environmental Commission said they were going to produce new evidence at the appeal hearing. The Environmental Commission was concerned that they weren't making their decision based on all the available information, which was a waste of time. Attorney Balter said the proposed ordinance would require all evidence in a hearing before the Environmental Commission to be presented to staff in writing prior to the Commission hearing, and no additional evidence would not be allowed either at the Commission hearing or at a subsequent appeal hearing. In this way, staff would have all of the necessary information to make a proper recommendation. Attorney Balter did mention that the City does not treat any other appeals in this manner, and appellants in matters other than the smoking ordinance are allowed to bring in new witnesses, new evidence, etc. Although this ordinance would result in greater efficiency, it would treat these particular appellants differently from other appellants.

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Chair Robie said she has a problem treating some people different from others, even though she understands this ordinance would make it more effective to reach a fair decision. She said she feels the procedure should remain as is. There was some discussion, and it was agreed that in order to treat everyone the same, nothing should be done; rather, another process should be found. The Committee members agreed that no action would be taken, but that if necessary, the matter can be brought back at a later date.

5. An ordinance amending Division I of Article II of Chapter 15 of the Sacramento City Code relating to fire prevention and adopting the Uniform Fire Code, 1991 edition, save and except such portions as are deleted, added or amended.

Recommendation of Staff: Recommend support and forward to Council.

Committee Action: Supported and forwarded to Council.

Voting Record: Moved: Chinn
Seconded: Serna
Ayes: Chinn, Serna, Robie
Absent: Pane

MINUTES:

Jim Graham, the City's Fire Marshal, explained that the Fire Department is currently working off the 1988 Uniform Fire Code. He introduced Fire Prevention Officer Jim Krantz, who has devoted the majority of his time during the last eight months to working on this project, and has acted as the lead person for a Code Review Committee along with Deputy City Attorney Diane Balter. Mr. Graham said they have notified the Sacramento Builders Exchange, American Institution of Architects, the BIA and the Sacramento Construction Code's Advisory Appeals Board, with no complaints or negative comments about the 1991 Fire Code. Sacramento County has adopted the 1991 Fire Code with amendments, and it has been supported by the County Fire Marshal's group.

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Chinn moved, Serna seconded the motion, and the Committee unanimously voted to support the ordinance relating to the Uniform Fire Code and to present it to full Council with this recommendation. Chair Robie commented that this adoption was rather anticlimactic after the long period of hard work putting this all together. She also thanked everyone for their hard work on this ordinance; it was a tremendous job.

6. An ordinance adding Chapter ____ to the Sacramento City Code, relating to service station franchise fair dealing.

Recommendation of Staff: Review and take action.

Committee Action: No action taken. To be brought back at a later date.

MINUTES:

Committeemember Serna stated his opinion that this ordinance is "good work in progress." He said he would like to hear testimony regarding how to improve the ordinance, and he would also like to see the oil companies talking to the dealers in a continued effort to work on the ordinance. He went on to say that there is sympathy on both sides, but he would like to see the ideas come closer together.

Committeemember Chinn agreed with Serna that more work needs to be done on this ordinance. He then said that if he had to vote today, he would vote it down because right now the ordinance is too vague and all it would invite would be lawsuits, which would mean not money to small dealers, but money to lawyers.

Deputy City Attorney Diane Balter explained that the ordinance was presented by Committeemember Serna, and that the City Attorney's office looked into the issue of whether state or federal law preempted the adoption of this ordinance. She said her office did not do any policy review of this item. As proposed, the ordinance would make findings about the importance of service stations to the public interest; it would provide

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that no party in a service station franchise relationship shall act toward the other party other than fairly; it will provide that any party in a franchise relationship may sue the other party for injunctive relief and actual damages within two years after any alleged unfair act; it sets forth the rules that a judge or jury would consider when determining whether the duty to act fairly and reasonably; and it provides that you cannot waive or release the rights and obligations that are created by the ordinance. Staff does not think this ordinance is preempted by state or federal law.

It was then agreed that the proponents would speak first, then the opponents, and each speaker was encouraged to keep their talks to a minimum because of the short time period left for this meeting.

The first speaker was David Nagler, an attorney representing a statewide association of service station dealers and others called California Service Station and Automotive Repair Association. Following is Mr. Nagler's presentation:

"It is this association which has been the sponsor of most of the efforts referred to by Mr. Chinn and others before Congress and State government. The Association has been very involved in this matter. Of all the ordinances that would be presented to this Committee, this may be amongst the most unusual, because you are not generally asked to get involved in affairs of public policy which are usually addressed at a different level of government, and for that reason, we are slightly apologetic and certainly sympathetic to the fundamental questions asked of us in the various discussions we've had so far with Council members, which is why the City should even be doing such a thing. While the oil companies would claim that the reason the State Legislature has denied enactment of this similar type of test in the State law is based upon policy considerations, we would actually argue that when it was given a full policy hearing and the votes were based upon that type of consideration, it was passed out of the committee chaired by Assemblymembers Phil Isenberg and Lloyd Connelly. That was on policy grounds. As it moved through the process, the votes become more of a political nature than of a policy nature, that's where we got bogged down. The same thing is happening in Congress. In fact, when the Petroleum Practices Marketing Act, was enacted, I've been told, the oil

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companies in the end said "Okay, okay, okay, we can go along with a Federal law which stipulates those circumstances under which termination or non-renewal may occur, so long as it doesn't include a test of fair and reasonable.

"As time has shown, the dealers will point out, the oil companies are very smart players; they know precisely what they are doing in their own industry. What we would suggest is, the reason that we are ultimately before you today is because by only having PMPA, and in fact the mere existence of PMPA, necessitates additional public policy to protect the interests of both parties to that relationship. Let me be clear about this. In typical contractual relationships, the parties to that contract enter into the relationship freely and in the course of that contract have the ability to either go to court to enact the provisions of that contract fairly, or to simply walk away from the contract. Nothing in law forces two parties to remain in a contract. But what makes the petroleum franchise relationship unique is, in fact, ironically, the existence of PMPA. Congress has established as national public policy a special relationship. They have established that special relationship and in the context of that special relationship the following occurrence results: Public policy says that the oil companies and the dealers, or specifically in this case the oil companies, can only walk away from a dealer under certain conditions (that's PMPA). And as it has been implemented by the oil companies, it has resulted in a circumstance in which the dealers are faced with the most unpleasant of all circumstances -- every three years (which is not by law but by industry practice, standards and precedence) the relationship between the oil company and that individual franchisee comes up for renewal. There are no property rights owned by the dealer in perpetuity, there are no assumptions about the continuation of the relationship, other than what is stipulated in this federal act, PMPA. And the oil companies, as have been established, literally go through this conversation with their dealers at the end of that three-year period: 'Here's your new franchise agreement.' The dealer says, 'Can I read it?' And the oil company representative says, in some way or another, 'Sure, of course you can read it, but not one word is changeable within that franchise agreement.' When you begin to read the words of the franchise agreement,

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what you discover is that the oil companies are given enormous broad, unilateral powers to implement company policies during the term of that contract. So in the federal act you have the establishment of the special relationship. The intent of PMPA is that the dealer is to be protected, but when the contract renewal comes due and the dealers are given a contract on a take-it-or-leave-it basis, they are faced again with the most unpleasant choices: either he signs the contract which he knows will give the oil companies opportunities to make this station a very uneconomic activity for him, or if he decides not to sign the contract, that is one of the provisions in the PMPA which allows the oil companies to walk away. So that dealer is faced with the circumstance that they have invested 3, 6, 9, 27 years of their life in this business enterprise, and they've operated in good faith, and are faced with the circumstance that the changing economics of the marketplace and the world from the point of view of the oil companies is protected in the contract. From the point of view of the dealers, it's an open gate. So, the contract is signed by the dealer. PMPA at that point walks away. There is no opportunity for the dealer to take the oil company to court now in the context of how that contract is implemented on the standard of fairness and reasonableness.

"So let me speak directly to what this ordinance does and doesn't do. First of all, the ordinance does not ask government or the courts to make business decisions. It does not ask the courts to rewrite the terms of the contract. It does not say that an oil company may not close down a station or may not walk away from a dealer. What this ordinance does do, is it tends to do that which the oil companies claim they also want to have occur. So presumably on this point we are in total and unyielding agreement; that is, it attempts to maintain full competition and fair competition in the marketplace. It attempts to give the dealer an opportunity in the context of the contractual relationship, during the term of the contract agreement, the opportunity to say to the oil companies that this is not a fair and reasonable implementation of this contract. In standard contract law, also covering that between a dealer and an oil company, there is implied a reasonable expectation on the part of both parties to that contract that they will have an opportunity to make a profit. There's no guarantee, but there is a reasonable expectation that they will have the opportunity to make a profit. By virtue

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of some evidence you are about to receive from an ex-dealer you all know, John Hawthorne, the oil companies time and time again use the broad parameters of the contract to allow themselves to take away from the dealers that opportunity to make a profit. Why? So the oil companies protect their profits unilaterally, and so that if it is the case that the dealer does walk away from the station, that oil company is in a position to take it over themselves or to have another dealer step in. The oil companies may argue that the prices of gasoline have never been lower, and if you look at what's going on today, something must be working because there must be competition because of the price of gasoline. I would make these two final points: (1) This is a snapshot in time of not today, but even 3-4 months ago. Effectively, one of a handful of major oil companies unilaterally sets the retail price of gasoline within the City of Sacramento. (2) It ignores what has happened over the last 3-4 months. The price of gasoline has gone up on the average of 19¢ a gallon. The price of a barrel of crude has gone up just over \$2.00. This should translate into approximately 2.5¢ a gallon at the gasoline pump. What's happened to that 10¢-12¢? Where did it go? The dealers have not increased their profitability; they've been losing more money over the past 90 days than they were making before that."

Mr. Nagler then introduced John Hawthorne, an ex-Chevron dealer in downtown Sacramento.

Chinn commented: "This country is made out of jillions of franchises. Almost everything is franchised these days. I can't believe other franchises don't ask for the same type of contract, and that the only negotiable is the price of the franchise. I don't think that's totally unusual in areas other than the oil franchises." Mr. Nagler responded that the franchise relationship in the petroleum industry is specifically uniquely set aside from all other franchise relationships, and that others (McDonald's, Burger King, etc.) operate under another franchise act [he couldn't remember the name], which act stipulates certain disclosure and operation requirements. He said that none of those requirements fall under the petroleum franchise. The term of the relationship in most franchises is significantly longer, and they are not renewed only once every three years. A franchisee asks him or herself, "Should I enter into that relationship, do I have the ability to make a prediction based upon longevity?" In the petroleum industry, there is no ability to project over a

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period of time, so that once a dealer gets into the position that this is his or her business, literally every three years they have to ask themselves again, "Can it get any worse?" Serna asked about the special relationship in the petroleum industry that does not exist in other franchises. Mr. Nagler said he could only guess that the federal government a long time ago, during the days of Rockefeller, Sr., got itself involved in the operations of the petroleum industry. The business of other franchise relationships is much newer than that. Because there is existing public policy in the franchise area, and because the oil companies themselves, did not want to be covered by these other much more protected franchise laws, got themselves exempted and that exemption continues.

Chair Robie apologized to everyone for running behind schedule. She asked Mr. Hawthorne in what way he felt he could cooperate with the oil companies in working with them and coming up with something else. Mr. Hawthorne said he has worked in the oil industry for about 29 years, so as far as cooperating with the oil companies, he could do that. He said he doesn't know whether they could agree on the terms "fair and reasonable," as it's a long-standing policy of most major oil companies that they negotiate with the dealer on a one-on-one basis. Mr. Hawthorne said he represents the dealers in Sacramento that support this ordinance. He said he understands the sensitivity of this ordinance, and he understands the obligation that goes with talking for dealers. He said about 25 of the local dealers have met individually with Council members, and they have talked about some of the problems they have that cause them to support this ordinance. He said that many dealers, including himself, have been averse to government involving itself in the business of enterprise; however, most of the dealers have come to the realization that this particular situation has eroded to the point where something needs to be done and has been tried to be done on other levels unsuccessfully. He continued by saying that some of the areas causing the most concern for dealers are the contracts, given with little or no impact by the dealer, and with no changes allowed; rental terms that are flexible and changeable within the lease period; and most important, the ability of the oil company to unilaterally extract cash from a dealer's business. These are things not in the contract, and are classified as a policy change or a procedural change. These are not agreed to by the dealer; they are just granted and withdrawn at will. It makes the ability of the dealer to forecast his return on his investment virtually impossible during the three-year period. The 24-hour policy has been a problem; the introduction of a new 3% credit card fee which is very expensive; credit terms and payment procedures which drastically

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affect the cash flow of a dealer and are neither negotiable or contractual, but just arbitrarily placed by a credit department; the increase of dealer maintenance responsibilities, almost to the point where a dealer is now responsible for the maintenance of and the liability for items that he does not purchase or own. It gets to the point where a dealer is required to replace flood lights at a level where they can't reach the lights, so they have to hire a fire engine to put the light in, which costs a lot of money. Other concerns are automatic enrollment in oil company-sponsored programs, uniform expenses, etc. One company automatically signs you up unless you notify them in writing that you don't want to be included. Another problem is the operating hours. Dealers are being required to remain open during hours that are not profitable and/or hours which are not safe. As far as being unsafe, Mr. Hawthorne feels this is very objectionable. At a time when the "thrill killer" was up and down Watt Avenue and everyone wanted the service stations to be closed because of a safety factor, one particular dealer called and said he wanted to send his employees home because I'm worried, and they said, your lease says you are to be open 24 hours a day and you are to remain open. He said he thinks that this could be termed unfair and unreasonable. The last concern is the pricing and the setting of margins the dealers find objectionable. He stated that all of the above are items that are conducted as business outside the dealer agreements, and the dealer has never agreed to adhere to company policy. Mr. Hawthorne continued by saying that everyone can agree that there are no existing agreements which govern the relationship of a petroleum franchise, and obviously these dealers have a problem. He said he knows this Council has the authority to adopt an ordinance, and these dealers need the Council's help, so he hopes Council will hang in there.

Chair Robie turned the meeting over to the oil industry, saying she is well aware that there will have to be another meeting on this issue. She also noted that Ken Emanuels, the City's Legislative Advocate, had arrived regarding Item 1 on today's agenda.

1. Legislative update from Ken Emanuels, the City's Legislative Advocate.

Recommendation of Staff: Recommend file.

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MINUTES:

Mr. Emanuels explained what is happening with the State Budget. He said that the City's cut has been narrowed to 9-13% of all property taxes, and that things haven't changed much since the last time he was here. He also said that there will be a 10-15% cut in SHRA money. There was some discussion. He said that whether we come in on the high side or the low side depends on how the schools are funded. Serna said he heard that the City will probably lose 10% of its budget. Mr. Emanuels said he felt that was high. Chair Robie asked if Ken could come back next Tuesday at 2:00 for a report to the Council.

Chair Robie then moved back to Item No. 6, and turned the floor over to the service station franchise fair dealing ordinance opponents.

The first speaker was John Geoghegan, who represents the Western States Petroleum Association. A copy of his presentation is attached to these minutes. He said he is aware the Committee has asked everyone to meet again, but he urged that this Committee reject the concept that a city on an individual basis would legislate contract law which will lead to an unacceptable climate for businesses which depend upon contractual relationships.

Mike Tooley, a Sacramento service station dealer for 15 years, then spoke regarding his opposition to this ordinance. He said he wanted to correct some misconceptions stated earlier, in that his lease with his oil company is for five years, and the rent is fixed. A copy of his presentation is attached to these minutes.

Serna asked whether Mr. Tooley ever supported this ordinance, and Mr. Tooley said he never did.

Serna moved that this issue come back to the next Law and Legislation Committee meeting, and asked both the oil refiners and dealers to come up with a redraft of this ordinance. He said he would like to hear it in the next 30-60 days. Chair Robie said she felt that it should go before the full Council. She also said she feels strongly that this is bigger than the City, and she doesn't even know if its a County issue either, but rather should be a state issue. She said she is really bothered by the City dealing with this.

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Serna said he thinks this is an issue where reasonable people can differ, and that oil occupies a very specialized space in contract law. He said he does agree that people can differ on these issue, but that he would rather see a complete and full debate before the full Council. He said what drives him to support an ordinance like this is, in fact, small business; he would like to hear them come back to say that they met, they met together and with staff, and that they agree on some points and disagree on some points, or that they met and they still disagree. He said it ought to be an open debate before the public.

Chair Robie asked that the two groups meet with staff once more. She asked Deputy City Attorney Diane Balter to set this up.

The meeting was adjourned at 2:04 p.m.

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LYNN ROBIE, Chair

ATTEST:

Judy Sanders
JUDY SANDERS, Secretary