

OFFICE OF THE COUNTY COUNSEL
COUNTY OF SANTA CLARA

70 West Hedding Street, 9th Floor
San Jose, California 95110-1770
(408) 299-5900
(408) 292-7240 (FAX)



Ann Miller Ravel
COUNTY COUNSEL

Winifred Botha
Miguel Márquez
Lori E. Pegg
ASSISTANT COUNTY COUNSEL

MEMORANDUM

TO: Supervisor Don Gage, Chairperson
Supervisor Pete McHugh, Vice Chair
Housing, Land Use, Environment & Transportation Committee

FROM: *Ann Miller Ravel*
Ann Miller Ravel, County Counsel
Miguel Márquez, Assistant County Counsel *Miguel Márquez*
Susan Swain, Lead Deputy County Counsel *Susan Swain*
Kathy Kretchmer, Deputy County Counsel *Kathy Kretchmer*
Eric Hing, Deputy County Counsel

RE: Report Back on Cruelty to Animals
Response to Board Referral from February 12, 2008, Item #15

DATE: August 21, 2008

OPINION REQUESTED

On February 12, 2008, the Board directed the Administration to provide the Board information regarding the feasibility of enacting a local ordinance duplicating provisions of state law relating to cruelty to animals, including: (1) prohibiting tripping or felling of equine animals or intentionally tripping; (2) prohibiting dragging or felling bovine animals by the tail; and (3) imposing the requirement for a veterinarian to be present throughout the duration of an event using animals. Additionally, the Board requested information regarding possible remedies for violation of a local ordinance. On April 22, 2008, the Board further requested that information be added about regulating rodeos and circuses on County-owned property.

CONCLUSION

The County could enact an ordinance that bans rodeos and circuses on County-owned property such as the Fairgrounds. The purpose of such a ban would be to promote the humane treatment of wild, exotic, and rodeo animals; therefore, such a ban would not violate the free speech rights of participants and spectators.

The County could also supplement state law provisions that regulate rodeos and circuses, imposing additional requirements on rodeos and circuses that are consistent with the purpose of state law; a local ordinance which reiterates, or duplicates, a state law would likely be found preempted by the state law and unenforceable. However, a complete ban on rodeos and circuses that extends beyond County-owned property would likely be preempted by state law. Should the Board adopt additional local regulations, any violations may be prosecuted as an infraction or misdemeanor, or may be the subject of a civil action.

BACKGROUND

The Fairgrounds Management Corporation (“FMC”) manages the Santa Clara County Fairgrounds pursuant to a Management Agreement with the County. FMC rents the Fairgrounds for a variety of events, including traveling rodeos and circuses.

Rodeos at the Fairgrounds — generally consisting only of bull-riding — were held in 1998 and 1999. They were suspended from 2000 through 2007 during the renovation and construction of an open-air bleacher arena. Six rodeos are scheduled to be held in 2008. They are expected to bring in \$332,000 in total revenue.

In addition to rodeos, two circus promoters perform at the Fairgrounds — Circo Hermanos Vazquez and Circus Vargas. Those promoters rotate annually so that each year since 1998, there has been one circus event at the Fairgrounds. The Vazquez circus includes tigers, elephants, camels, horses, zebras and dogs. The Vargas circus uses a Belgian horse and some trick dogs in their annual performances. The circuses bring in approximately \$38,000 in total revenue to FMC each year.

DISCUSSION

1. Regulation at the Fairgrounds — A Complete Ban is Possible.

A ban on rodeos and circuses at the Fairgrounds implicates – but does not violate – the free speech rights of those participating in the rodeos and circuses. Both the California and United States Constitutions shield more than political speech and verbal expression; their protections extend to “expressive speech,” including entertainment, film, theater, and music. The performance of rodeo or circus events would likely be construed as expressive communication and would, therefore, be protected by the First Amendment. The fact that certain activity is protected by the First Amendment, however, does not mean that it cannot be regulated.

The United States Supreme Court has made clear that the government, “no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”¹ The Fairgrounds is a type of property that the County has opened up to certain groups for certain types of expression. But it is not open for indiscriminate use and the County may reserve the Fairgrounds for certain groups or for the discussion of certain topics. Such restrictions may not discriminate against speech on the basis of viewpoint, and they must be reasonable in light of the purposes served by the forum.

Here, the goal of a ban on rodeos and circuses at the Fairgrounds would not be to suppress protected expression. Rather, the purpose would be to promote the humane treatment of wild, exotic, and rodeo animals. This legitimate state interest is sufficient to justify a ban on rodeos and circuses on County-owned property. Accordingly, adopting an ordinance prohibiting rodeo or circus promotions that use wild, exotic, or rodeo animals should survive First Amendment scrutiny, as long as the ban is limited to County-owned property, is consistently applied, and is viewpoint neutral.²

Finally, there is no state law expressly requiring or prohibiting circuses and rodeos on County-owned property; therefore, a ban of such activities that is limited to County-owned property would not be preempted by state law.

2. County-Wide Regulation — County Cannot Enact a Complete Ban, but Can Adopt Supplementary Regulations.

The question of whether the County may regulate rodeos and circuses County-wide turns on whether such regulations would be preempted by existing state laws. Counties can pass ordinances so long as they are not in conflict with general state statutes. Courts have explained that a conflict exists if local legislation duplicates, contradicts, or enters an area “fully occupied” by general state law, either expressly or by legislative implication. To determine the County’s ability to regulate rodeos and circuses, it is necessary to first consider whether the entire field of legislation has been fully occupied by the state, either expressly or by implication. If the field has been fully occupied, the County may not enact any related legislation. If, however, the field is not fully occupied, the County may enact legislation in furtherance of the purposes of state law.

¹ *Greer v. Spock* (1976) 424 U.S. 828, 836.

² Where a ban on activity is within a county’s police power and is not otherwise preempted by state law, banning the activity on county-owned property may be properly accomplished by ordinance. *Nordyke v. Santa Clara County* (1997) 110 F.3d 707.

This office has reviewed existing state laws relating to rodeos and circuses and has concluded that the Legislature has not fully occupied the field in this area. The provisions relating to rodeos and circus events are narrowly drawn and very specific.³ Thus, the County may further its own interests in promoting the humane treatment of animals by imposing supplemental regulations on rodeos and circuses,⁴ so long as it confines the local legislation to “supplementary” regulation.⁵ Courts explain that “a city or county may make additional regulations, different from those established by the state, if not inconsistent with the purpose of the general law.”⁶ Other cities and counties in California have enacted supplemental regulations relating to rodeos and circuses. These regulations can be grouped into the following categories:⁷

- *Broadened definition of “rodeo.”* The state Penal Code defines a rodeo as a competition involving three or more events. Alameda, Contra Costa, and Glenn Counties define a “rodeo” as having one or more events. This is likely valid as a supplementary requirement that is consistent with the purpose of the general law.
- *Horse tripping and steer tailing.* Alameda, Contra Costa, San Joaquin, Los Angeles, and Glenn Counties ban horse tripping and steer tailing. There is already a state Penal Code

³ See, e.g., Penal Code section 596.7 [requiring that a veterinarian be present or on-call and available to arrive at the rodeo within one hour]; Penal Code section 597m [prohibiting bullfights]; Penal Code section 597g [prohibiting tripping or poling horses]; Health & Safety Code section 25989.1 [requiring circuses to notify the local animal control services at least 14 days before the first performance]; Penal Code section 596.5 [prohibiting elephant abuse]; Penal Code section 597.6 [prohibiting declawing procedures performed on exotic cats].

⁴ The County already has a detailed ordinance relating to the licensing of circuses. In Chapter VI, section B3-111 of the Ordinance Code, a circus is defined as “any exhibition or entertainment at which acrobatic feats and trained or wild animals are exhibited and displayed or at which clowns, jugglers, or similar persons perform, and which may include sideshows, after-shows and carnivals, and a circus parade or procession.” Section B3-113 requires that an application for a license be received 90 days prior to the commencement of the event — longer than the 14 days notice required by state law. These provisions do not apply to circus performances at the Fairgrounds or those with an appropriate zoning permit.

⁵ *Chavez v. Sargent* (1959) 52 Cal.2d 162, 176–177.

⁶ *Fiscal v. City and County of San Francisco* (2008) 158 Cal.App.4th 895, 915.

⁷ Other unique ordinances passed by local governments are listed in the Attachment to this memorandum.

provision banning horse tripping. The steer tailing prohibitions are likely valid ordinances consistent with state law; though the ban on horse tripping may be unenforceable as a local law which duplicates, or reiterates, state law.

- *On-site veterinarians and animal control officers.* State law only requires that an on-call veterinarian be within an hour of the event. Alameda, Contra Costa, and San Francisco Counties require a veterinarian or animal control officer onsite at rodeos. Such a local requirement is likely consistent with the purpose of the general law and, therefore, not preempted.⁸

A complete ban on rodeos and circuses County-wide would probably be invalid as contradictory to state law. Total bans are viewed differently from supplemental regulations, and Courts apply greater scrutiny to such enactments. While the state rodeo and circus laws are not comprehensive, a complete County-wide ban would impermissibly contradict those laws that express the Legislature's recognition that these activities occur.⁹

3. Any Supplemental Local Laws Enacted by Ordinance May be Treated as either an Infraction or Misdemeanor.

A violation of a county ordinance that is treated as a criminal violation is considered a misdemeanor unless the ordinance specifies the violation to be an infraction.¹⁰ If the violation is classified as an infraction, "it is punishable by (1) a fine not exceeding one hundred dollars (\$100) for a first violation; (2) a fine not exceeding two hundred dollars (\$200) for a second violation of the same ordinance within one year; (3) a fine not exceeding five hundred dollars (\$500) for each additional violation of the same ordinance within one year."¹¹ If the violation is

⁸ The supplemental regulations discussed above might also implicate free speech rights insofar as they are considered limitations on the "free expression" of rodeos and circuses. Those regulations, however, would be valid restrictions on the conduct of rodeos, not their expressive speech aspects. Time, place, and manner restrictions of speech are upheld if necessary to further significant governmental interests. Promoting the health and welfare of exotic, wild, and rodeo animals would be a governmental interest that would support such regulations.

⁹ For instance, section 597m of the Penal Code states that while bullfights are illegal, "nothing herein shall be construed to prohibit rodeos or to prohibit measures necessary to the safety of participants at rodeos."

¹⁰ Gov. Code, § 25132, subd. (a); County of Santa Clara Ordinance Code, § A1-28.

¹¹ Gov. Code, § 25132, subd. (b).

Memo to Housing, Land Use, Environment & Transportation Committee
Re: Report Back on Cruelty to Animals
August 21, 2008
Page 6 of 6

classified as a misdemeanor, it is “punishable by a fine of not more than \$1,000.00, imprisonment in the county jail for a period not exceeding six months, or both.”¹² A violation may also be pursued through a civil action.¹³ If the County chooses to enact an ordinance regulating rodeos and circuses and provides for a remedy by way of a civil action, the County is not subject to the monetary penalties noted above with respect to criminal prosecutions for misdemeanors and infractions.

Attachment: Summary of Additional Rodeo and Circus Ordinances Passed by California Municipalities

¹² County of Santa Clara Ordinance Code, § A1-28.

¹³ Gov. Code, § 25132, subd. (a).

Additional Rodeo and Circus Ordinances Passed by California Municipalities

Alameda County

Requires notification of the Alameda County sheriff's department and the Oakland SPCA to be notified at least fourteen days in advance of the rodeo. Alameda County Ordinance No. 5.32.040

Santa Cruz County

Prohibits use of electric prods on livestock in rodeos to torture, torment or practice cruelty on any animal. Santa Cruz County Ordinance No. 6.12.134. This is broader than state law, which merely permits the use of prods when an animal is in a holding chute. Pen. Code, § 596.7(e).

Glenn County

Prohibits organizing, sponsoring, or conducting an event at which prohibited activities are planned. Glenn County Ordinance No. 1047.

Remedies available for violation include impounding animal at violator's expense. Glenn County Ordinance No. 1060, 1047.

City and County of San Francisco

Rules of the Professional Rodeo Cowboys Association apply to all rodeo events.

City of San Juan Capistrano — Municipal Code sections 6-1.10 — 6-1.24

Prohibits use of locked rowels and undulled spurs.

Prohibits sharp or cutting objects in cinch, saddle girth, or flank straps.

Prohibits unlined flank straps.

Prohibits caustic ointments.

Prohibits use of prods, except for chute stalling animal.

Chutes must be constructed to prevent injury to an animal.

Timed-event stock must be run through event chutes and through the arena prior to the start of contests. Horns of steers that are not able to pass through the timed event chute must be trimmed.

Arenas must be free as possible of unnecessary obstacles.

In calf roping, neck ropes must be tied with string. No metal snaps, elastics or hardware should be used on neck ropes.

Additional specific regulations for calf roping and team roping, including time limits and prohibition of “jerk downs.”

Prohibits stimulants or hypnotic drugs.

Requires bareback pads to completely cover the underside of rigging.

In bull riding events, no bull tails are allowed under flank straps. Prohibits use of sharp spurs.

City of Poway

Requires humane treatment of rodeo animals. City of Poway Municipal Code section 6.24.010.

Prohibits use of stimulants or hypnotics on any rodeo animal. City of Poway Municipal Code section 6.24.010.

Prohibits certain flank or bucking straps. City of Poway Municipal Code section 6.24.010(A).

Prohibits electric prods or shocking devices, except if required for the safety of humans. City of Poway Municipal Code section 6.24.010(B).

Requires notice to Humane Society of San Diego County and San Diego County Department of Animal Control fourteen days in advance of rodeo. City of Poway Municipal Code section 6.24.030.

135619