

RESOLUTION 4-9-03

DIGEST

Public Nuisance: Local Ordinances and Constitutionally Protected Activity

Adds Penal Code sections 373b and 373c to provide that no criminal statute shall prevent cities and counties from enacting local nuisance ordinances with harsher penalties than the state, excepting constitutionally protected activities.

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

History:

None known.

Reasons:

This resolution adds Penal Code sections 373b and 373c to provide that no other criminal statute shall prevent cities and counties from enacting local nuisance ordinances with harsher penalties than the state, excepting constitutionally protected activities. This resolution should be disapproved because it is, in part, unnecessary, and because allowing local authorities to set harsher penalties than the state may result in unequal justice in differing political divisions of the state.

To the extent this resolution seeks to grant cities and counties the right to make local nuisance ordinances, it is unnecessary. Government Code section 38771 already gives cities and counties that right; and it has been confirmed by case law. (*People v. Johnson* (1954) 129 Cal.App.2d 1, 6.) To the extent this resolution seeks to limit local infringements on activity “protected by the U.S. Constitution or California Constitution” it is also unnecessary. There is a large body of law defining and enforcing such constitutional protections. Whether or not cities and counties define and enforce those constitutional protections via local ordinances is a political decision that would not be affected by additional statutory authority.

To the extent this resolution seeks to grant cities and counties the right to make local nuisance ordinances which carry harsher penalties for some public nuisances than found elsewhere in the state, this resolution is ill-advised. First, multiple definitions of “nuisance” in different jurisdictions will lead to increased litigation on the constitutionality of local ordinances. Second, local jurisdictions could impose different penalties from those set forth in Penal Code section 373a, resulting in unequal justice in various political divisions of the state.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to add Penal Code sections 373b and 373c to read as follows:

1 §373b
2 Nothing in this chapter shall be construed to prevent any city or county from adopting or
3 enforcing its own laws or ordinances for the abatement of public nuisances that impose greater
4 restrictions or harsher penalties on persons who maintain, permit, or allow a public nuisance to exist
5 upon their property or premises or who occupy or lease the property or premises of another who
6 maintains, permits or allows a public nuisance to exist thereon. Such laws or ordinances adopted or
7 enforced by cities and counties may include separate definitions of “public nuisance,” but such
8 definitions shall be deemed inclusive of every thing that constitutes a public nuisance under this
9 chapter along with every other thing that constitutes a “public nuisance” under the city or county law
10 or ordinance.

11

12 §373c

13 Nothing in this chapter shall be construed to prohibit or punish activity protected by the U.S.

14 Constitution or California Constitution.

(Proposed new language underlined; language to be deleted stricken.)

PROPOSER: Beverly Hills Bar Association

STATEMENT OF REASONS

Existing Law: Defines a “public nuisance,” in part, as anything that is “indecent, or offensive to the senses . . . 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” (Penal Code § 370) and further provides that, after a person has been served with reasonable notice to abate such nuisance, if the nuisance remains unabated, he or she would be guilty of a misdemeanor. (Penal Code § 373a.)

This Resolution: Provides that (1) cities and counties are free to enact and enforce their own ordinances and regulations to define and abate public nuisances, and (2) public nuisance laws shall not be used to chill free speech and other constitutionally protected activity.

The Problem: There are two fundamental problems with the current law: (1) it fails to clarify that cities and counties are free to enact and enforce their own ordinances and regulations that are more stringent than California law and, as a consequence, some cities and counties are reluctant to enforce their own existing ordinances because they fear that such enforcement could violate conflict of law principles; and (2) it opens the door for the government to use the public nuisance laws to chill free speech and other constitutionally protected activity.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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COUNTERARGUMENTS

SAN DIEGO COUNTY BAR ASSOCIATION

City and county ordinance should not have the power to create their own definition of public nuisance when the Penal code already gives the definition. Not only will various multiple different definitions come under legal attack but also it would be confusing to both law enforcement and the public as to what is a public nuisance. We should leave the situation as it is with everyone knowing the definition as defined in Penal code section 370

BAR ASSOCIATION OF SAN FRANCISCO

This resolution, which allows municipalities to impose harsher penalties for public nuisances than permitted under state law, encourages a multiplicity of regulation that results in uncertainty, confusion and unfairness. State laws criminalizing conduct take supremacy over laws covering the same conduct enacted by individual localities, a necessary result for consistency of laws and equal protection. Although communities may have their own ideas about what constitutes a public nuisance, their enforcement should

not lead to a Balkanization of the criminal laws. Should a person who fails to abate a nuisance in Beverly Hills be subject to harsher penalties than someone in Burbank?

Although the proponent complains that municipalities are “reluctant to enforce their own existing ordinances” out of fear that they violate conflict of law principles, such evaluation is necessary and appropriate in the enforcement of criminal laws. While the proponent’s second goal, of restricting the ability of municipalities to use the law of public nuisance to chill free speech and other constitutionally protected activity, is a laudable one, it is more likely that a proposed statute that allows municipalities to impose harsher sanctions on public nuisances of their choosing would have the unintended consequence of chilling free speech, regardless of assertions to the contrary.

SANTA CLARA COUNTY BAR ASSOCIATION

This resolution would allow local cities and counties to adopt and/or enforce their own laws or ordinances regarding public nuisances even though a public nuisance law already exists (Penal Law § 370). Moreover, this resolution would allow the cities or counties to impose greater or harsher penalties on violators than are already set forth (Penal Law § 373a).

This resolution is ill-advised and should not be approved. If cities or counties were expressly permitted to create their own public nuisance laws, it would lead to a hodgepodge of laws that would lack consistency across city and county borders, both in what is prohibited and how violators are punished. California already defines “public nuisance”; allowing additional definitions would make it difficult for a homeowner to know exactly what is and is not permitted, particularly since this resolution would maintain the already existing definition. Such difficulty would also extend to local police officers in attempting to enforce what could become an ever increasing group of regulations.

Permitting local cities to enact their own regulations could also encourage individuals to press for ordinances banning things that annoy them personally, rather than acting in the best interest of the city or county as a whole.

There is no need to allow local governments to create more regulations by which their citizens must abide and which local police must then enforce, taking time and money away from more pressing police needs. The state has provided a sufficient definition and punishment scheme. There is no need to make additions to this section of the Penal Code, and the resolution should be rejected.