



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: FIREWORKS ORDINANCE
WORKPLAN STATUS REPORT

DATE: September 27, 2019

REASON FOR SUPPLEMENTAL

The purpose of this supplemental memorandum is to:

1. Analyze and compare fireworks provisions in the Pacifica Municipal Code and San José Municipal Code; and
2. Discuss the legal implications of allowing supervised firework use at a specific date, time, and location.

BACKGROUND

Staff reported to the Public Safety, Finance, and Strategic Support Committee (PSFSS) on August 15, 2019 on the status of fireworks enforcement following the Fourth of July. The Committee expressed interest in: (1) investigating the regulation of fireworks discharge in the City of Pacifica, which provides for strict liability; and (2) investigating the legal implications of allowing supervised fireworks use at a designated time and place.

ANALYSIS

I. Background on Strict Liability Offenses

A strict liability offense is one in which the violator's mental state or intent is not an element of the crime. Most criminal statutes require that the violator intend to commit the act that constitutes the crime. For example, criminal battery typically requires that a defendant willfully touched another person in a harmful and offensive manner that was not in self-defense or defense of others. This requires that the defendant intended to touch another person but does not require that the defendant intended to cause harm or break the law. Therefore, a person who stumbles and falls into someone else is not guilty of criminal battery because he did not intend to cause physical contact with the victim. In other words, he did not have the mental state required to commit criminal battery.

In a strict liability offense, even that level of basic intent is not necessary for a violation. For example, some states have laws that make the sale of alcohol to minors a strict liability offense. The intent or mental state of the seller is irrelevant to establishing the violation. It is not a defense that the minor looked of age or presented fake identification. It is not even a defense if the seller believed that what he was selling was not alcohol. If alcohol was sold to a minor, the seller is guilty of a violation. Unlike crimes that require intent, strict liability crimes impose liability despite any good-faith errors in judgment.

Strict liability is most commonly applied to public welfare offenses such as illegal sales of intoxicating liquor; violations of traffic regulations; and violations of general police regulations, passed for the safety, health or well-being of the community.¹ In these examples, it is the violator (i.e., seller, driver) who commits the wrongful act the ordinance seeks to prevent and is held strictly liable. An ordinance imposing strict liability against property owners, tenants, and social hosts for fireworks violations must define the wrongful act committed by the cited party with sufficient clarity for the public to understand what act is prohibited.

II. Pacifica's Municipal Code Compared to San José's Municipal Code

Pacifica's Municipal Code imposes strict liability on property owners, tenants and social hosts for fireworks violations at his or her property.² However, Pacifica's Municipal Code provides an affirmative defense for property owners but not for tenants or other hosts of the event. San José's Municipal Code does not impose strict liability for fireworks violations. Instead, the San José Municipal Code imposes liability on property owners or tenants who know or should have known of the fireworks violations.³ In practice, in order to cite a tenant or property owner for discharge of fireworks at his or her property, both codes require enforcement officers (or members of the public using the online reporting tool) to see the fireworks and identify the property from which the fireworks are discharged.

a. Summary of Fireworks Provisions in Pacifica's Municipal Code

Pacifica's Municipal Code allows the use of safe and sane fireworks within certain time, place, and manner restrictions. In addition to imposing liability on actual violators (those who in fact use, sell, or discharge fireworks in violation of the Municipal Code), Pacifica's Municipal Code also imposes strict liability on tenants and social hosts for their guests' illegal use of fireworks. A "social host" is defined as:

- (1) Any owner of private property as listed on the most recent assessment roll;

¹ § 18 Public Welfare Offenses., 1 Witkin, Cal. Crim. Law 4th Elements (2019).

² Pacifica Municipal Code § 4-3.209(b).

³ San Jose Municipal Code § 10.17.100.

- (2) Any person who has the right to use, possess, or occupy a public or private property under a lease, permit, license, rental agreement, or contract;
- (3) Any person who hosts, organizes, supervises, officiates, conducts, or accepts responsibility for a gathering on public or private property.⁴

Pacifica's Municipal Code provides an affirmative defense to the social host liability for property owners. Specifically, property owners can avoid liability if they can prove that at the time of the violation: (1) the property was rented or leased to another; (2) the property owner was not present; and (3) the property owner had no prior knowledge of the violation.⁵ Ordinarily, strict liability offenses do not allow any affirmative defense. Tenants and other hosts cannot assert this affirmative defense and are strictly liable for illegal fireworks use on their property or at their event, including if the violations are committed by trespassers. If property owners, tenants, and social hosts are strictly liable for the fireworks violations committed by trespassers, they are effectively being punished for failure to have sufficient gatekeeping at their properties or at their parties. If there were an exception for violations committed by trespassers, that would create the need to prove who is a guest and who is not.

b. Summary of San José's Fireworks Code

San José's Municipal Code does not allow the use of safe and sane fireworks. Any use of fireworks without a permit is a violation. In addition to imposing liability on a violator, San José's Municipal Code imposes liability on "any property owner or tenant [who] allow[s] or permit[s] the sale, use and discharge of fireworks on their property when the property owner or tenant knows or should know of the sale, use or discharge of fireworks at the property."⁶ Similar to Pacifica's Municipal Code, San José's Municipal Code imposes liability on property owners and tenants for the violations on the property even if they are not the violators. However, San José's Code provides that property owners and tenants who did not know and should not have known of the fireworks violation are not liable. Unlike Pacifica's Municipal Code, San José's Municipal Code does not impose liability on social hosts. Social host liability is only relevant when the violation cannot be attributed to a property owner or tenant. Social host liability would arise when a person arranges to have an event on a street, sidewalk, or other public property and a participant in the event, including a gate-crasher, discharges fireworks.

c. The Evidence Required to Issue a Citation is the Same if the Violation Imposes Strict Liability.

Both Pacifica's and San José's Municipal Codes have the same evidentiary requirement for issuing citations. Enforcement officers (or members of the public using the online reporting tool) must identify the property or the individuals responsible for the

⁴ Pacifica Municipal Code § 4-3.201(h).

⁵ Pacifica Municipal Code § 4-3.209.

⁶ San Jose Municipal Code § 10.17.100C.

fireworks in order to cite tenants, guests, property owners, or social hosts. The chart below compares enforcement under both Municipal Codes and the requirements necessary to prove the violation.

Fireworks violations are difficult to enforce because the evidence is difficult to gather, and violators almost have to be caught in the act or immediately thereafter for there to be sufficient evidence to issue a citation. This requirement does not change by making the violation a strict liability one, even without any affirmative defenses.

Citable Party	Liability		Evidence Requirement	
	San Jose	Pacifica	San Jose	Pacifica
Tenant	Liabile if he/she knew or should have known of the discharge of fireworks	Liabile for any fireworks on the property	Must see the fireworks and identify which property the fireworks came from	Same
Guest	Liabile if he/she discharged the fireworks.	Liabile if he/she discharged the fireworks	Must identify who discharged the fireworks.	Same
Property Owner	Liabile if he/she knew or should have known of the discharge of fireworks	Liabile unless he/she can prove the affirmative defense.	Must see the fireworks and identify which property the fireworks came from	Same
Social Host	Not liable	Liabile for any fireworks discharged at his/her event	None, Host is not liable	Must identify who discharged the fireworks and confirm he/she was part of the Host's event or must identify the event responsible for the fireworks

II. Allowing Supervised Fireworks Use Would Conflict with the Code.

The PSFSS Committee discussed having a location in the City where residents could go to discharge fireworks. The intent would be to discourage people from setting off fireworks in the streets, parks, and backyards and to contain the activity at a safer location. Currently, the Municipal Code does not allow any use or discharge of fireworks without a permit. A state-licensed pyrotechnician must pull the permit, bring the fireworks to the site, discharge the fireworks, and remove any debris. Under these permit requirements, citizens cannot bring their own fireworks to a site and discharge them themselves. There are also operational and logistical concerns with trying to regulate fireworks on a particular property.

Some cities, such as Dublin and Pacifica, allow the discharge of safe and sane fireworks under certain time, place, and manner restrictions including on private property. Dublin also allows the discharge of safe and sane fireworks at designated public parks. Since Dublin does not require permits for residents to discharge safe and sane fireworks, opening public parks to the activity does not conflict with Dublin's Municipal Code. However, San José does not allow the discharge of any fireworks

without a permit, so allowing the activity anywhere without a permit would conflict with San José's Municipal Code.

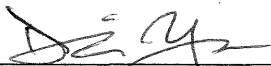
III. Conclusion

Thus, the fireworks provisions in San José's Municipal Code are similar to those in Pacifica's Municipal Code. Under both Municipal Codes, a private property owner may be cited for a violation if fireworks are discharged at his or her property regardless of whether he/she is the person who discharged them. Also, under both Municipal Codes, the property owner may avoid liability if he can show that he did not know and should not have known that fireworks were being discharged at the property. Pacifica's Municipal Code treats property owners and tenants differently, allowing the affirmative defense for property owners but not for tenants. San José's Municipal Code treats property owners and tenants the same, allowing both to be cited for fireworks discharged on the property but also allowing the same defense for both.

Imposing strict liability does not alter the evidence required for issuing citations. Inspectors (or members of the public using the reporting tool) must still prove "who, what, when, and where" to establish the violation. The difficulty in enforcing fireworks violations is in gathering the evidence to prove those elements. Imposing strict liability will not lessen that evidentiary requirement.

Lastly, allowing supervised fireworks use in designated locations for Fourth of July (or other celebrations), would conflict with the San José Municipal Code, which requires all fireworks use to have a permit. The permit must be pulled by a state-licensed pyrotechnician who must bring the fireworks to the location, discharge the fireworks, and remove any debris.

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