



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Nora Frimann
City Attorney

SUBJECT: Public Safety Protections for
Women Seeking Abortions,
Persons Assisting the Individual
Seeking an Abortion, and for
Providers of Abortion Services

DATE: June 2, 2022

BACKGROUND

At the May 18, 2022 Rules and Open Government Committee meeting, Item C.1., the Committee directed the City Attorney's Office to research and recommend the best legal public safety protections that the City can provide, beyond ceremonial sanctuary city status, for women seeking abortion procedures, for persons assisting an individual seeking abortion procedures, and for providers of abortion services in the City of San Jose. The direction also included looking at potential land use protections for providers of abortion services. The purpose of this memorandum is to explain existing provisions of the Municipal Code that provide public safety protections to women seeking abortions, persons assisting individuals seeking abortions, and providers of abortion services.

In 1992, representatives of various health care facilities in San Jose had reported that persons attempting to gain access to health care facilities were being subjected to unwelcomed verbal and physical interference from demonstrators acting within extremely close range. There were also reports that demonstrators had physically restrained persons from entering health care facilities or had approached persons in their parked cars or on the streets and shouted at, and followed, them from very close distances until they reached private property. Health care facility representatives also reported that this activity left some patients in a highly stressed condition, and that some frightened patients left the area, abandoning their appointment for health care and assuming the risk of delaying medical treatment.

During this same time period, there were several organized picketing activities that specifically targeted residents, including doctors and elected officials, at their homes. Demonstrations around health care facilities, and targeted picketing of the homes of certain San Jose residents, led the City Council to respond with the two ordinances discussed in the analysis below.

ANALYSIS

A. Existing Municipal Code protections for women seeking abortion services, persons assisting women seeking an abortion, and health care providers

1. San Jose Municipal Code (SJMC) Chapter 10.08 – Public Access

In September 1992, the City adopted provisions in Chapter 10.08 to provide protections for persons seeking access to or leaving health care facilities. (SJMC Sections 10.08.030 and 10.08.040)¹

a. SJMC Section 10.08.030 Impeding access prohibited.

Under Section 10.08.030, any person who is demonstrating on a public street or other public space within 100 feet of a health care facility is prohibited from impeding or hampering another person from entering or leaving the facility. The demonstrator must withdraw to a distance of 8 feet following a request to withdraw from a person seeking to enter or leave a health care facility. A request to withdraw may be requested by a person verbally, or by carrying or wearing a sign clearly indicating a withdrawal request. SJMC Section 10.08.030 defines the terms it uses in the following subsections: B – 100-foot access area, C - health care facility, D - demonstration activity, E – withdrawal request, and F – eight (8) foot distance.

Under the Municipal Code, violation of Section 10.08.030 is a misdemeanor, and a conviction is punishable by a fine of not more than one thousand dollars or imprisonment in the county jail for a period not to exceed six months, or both such fine and imprisonment. The City Attorney has the option of treating a violation as an infraction under Subsection B of SJMC Section 1.08.010.

In addition to the criminal penalties for violation of Section 10.08.030, SJMC Section 10.08.040 provides a private right of action for any person who is seeking or intends to seek access to a health care clinic and has been impeded in violation of Section 10.08.030. Individuals so impacted may bring a civil action for damages, costs, attorneys' fees and other relief including civil penalties up to \$1,000 for each violation.

b. A Colorado statute very similar to SJMC Section 10.08.030 was upheld against a First Amendment challenge by the U.S. Supreme Court.

The United States Supreme Court upheld the constitutionality of a 1993 Colorado statute very similar to SJMC Section 10.08.030.² The statute makes it unlawful within the 100-foot area around the entrance of a health care facility:

for any person to knowingly approach within eight feet of another person, without

¹ See Attachment 1 which contains copies of SJMC Sections 10.08.030 and 10.08.040.

² *Hill v. Colorado*, 530 U.S. 703 (2000)

that person's consent, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.
...³

Like San Jose's ordinance, the Colorado statute does not place restrictions on the content of the message that a person may wish to communicate, either inside or outside the 100-foot regulated area around a health care facility. Like the Colorado statute, SJMC Section 10.08.030 regulates the time, place and manner where some speech may occur by applying its restrictions to all demonstrators, regardless of viewpoint, and the ordinance makes no reference to the content of the speech.

The Supreme Court noted that the state's interest in protecting access and privacy, and providing the police with clear guidelines, are all unrelated to the content of the demonstrators' speech. The Court explained the substantial interest that states and municipalities have in controlling activity around certain public and private places, including health care facilities. The Court also noted as part of its analysis that the 8-foot restriction only occurs within 100 feet of a health care clinic, "the place where the restriction is most needed."⁴ The Court concluded that the restriction was reasonable and narrowly tailored.

c. First Amendment case law limits the size of buffer zones.

Supreme Court precedents on buffer zones have invalidated some buffer zones as overbroad. It is doubtful that courts will accept a buffer zone larger than the 8-foot buffer zone at issue in *Hill*. The Supreme Court struck down:

- a 15-foot buffer zone around people entering and leaving abortion clinics that prevented communicating a message from a normal conversational distance or handing out leaflets to people entering and leaving the clinics who are walking on public sidewalks;⁵ and
- a 35-foot buffer zone around the entrance or exit to a reproductive health care facility that stifled messaging through personal, caring, consensual conversations.⁶

A recent Federal District Court case invalidated a California urgency statute, SB 742, that became effective October 8, 2021 and is codified in Penal Code Section 594.39, which created a 30-foot buffer zone for persons within 100 feet of the entrance or exit of a vaccination site.⁷ The District Court concluded that the 30-foot floating buffer zone is clearly not a conversational distance, nor would it allow a passing pedestrian to accept a proffered leaflet in contrast to the 8-foot buffer zone in *Hill v. Colorado*. The District Court found that

³ 530 U.S. at 707

⁴ 530 U.S. at 730.

⁵ *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 377 (1997)

⁶ *McCullen v. Coakley*, 573 U.S. 464, 489 (2014).

⁷ *Right to Life of Central California v. Bonta*, 562 F. Supp. 947 (E.D. CA. 2021).

SB 742 is not narrowly tailored to serve the state's interest in ensuring access to vaccination sites.

2. Targeted Residential Picketing – SJMC Chapter 10.09

SJMC Section 10.09.010 prohibits a person from engaging in picketing activity that is targeted at, and is within 300 feet of, a residential dwelling.⁸

A violation of SJMC Section 10.09.010 is a misdemeanor, and a conviction is punishable by a fine of not more than one thousand dollars or imprisonment in the county jail for a period not to exceed six months, or both such fine and imprisonment. Alternatively, the City Attorney has the option of treating a violation as an infraction.

SJMC Section 10.09.020 creates a private right of action for any person aggrieved by an action prohibited by this Chapter that is identical to the private right of action for any person impacted by a violation of SJMC Section 10.08.040, impeding access to a health care facility.

- a. Courts have upheld Section 10.09.010 as a facially valid content neutral, reasonable time, place and manner regulation of speech.

The 6th District Court of Appeal⁹ upheld San Jose's targeted picketing ordinance finding that the 300-foot zone was reasonable on its face since it was consistent with standard notice requirements set forth in local and state laws for land use decisions. The minimum standard lot frontage required under the San Jose Municipal Code for subdivisions is 55 feet, therefore at most the buffer zone keeps picketers from coming within 5 and ½ homes on either side off the targeted residence. This distance does not prevent picketers from disseminating from a lawful distance their message to the general public or even to the residents of the targeted homes.

More recently, San Diego County's targeted residential picketing ordinance was upheld against a First Amendment challenge.¹⁰ The San Diego County ordinance is very similar to San Jose's targeted residential picketing ordinance.

3. Existing Land Use Protections for Providers of Abortion Services

In terms of land use and zoning regulation, the City is permissive toward abortion clinics that want to open and operate. An abortion clinic would fall under "Office, medical" as defined under Municipal Code Section 20.200.815, which means "offices of doctors, dentists, chiropractors, physical therapists, acupuncturists, optometrists and other similar health related occupations, where patients visit on a daily basis." "Office, medical" is a permitted use in Commercial Zoning (CO, CP, CN, CG), Industrial Zoning (CIC, TEC),

⁸ Attachment 2 contains a copy of SJMC Sections 10.09.010 and 10.09.020.

⁹ *City of San Jose v. Superior Court*, 32 Cal.App.4th 330 (6th Dist. 1995), cert. denied, *Thompson v. City of San Jose*, 516 U.S. 932 (1995)

¹⁰ *Klein v. San Diego County*, 463 F.3d 1029 (9th Cir. 2006).

Urban Village and Mixed Zoning (UVC, UV, MUC, MUN, UR, TR), Downtown Zoning (DC, DC-NT1), and Pedestrian Oriented (MS-G, MS-C) Districts.

In recent years, some jurisdictions have used zoning regulation, as well as other forms of industrial regulation, to mandate that abortion providers comply with strict requirements to operate. Referred to as “Targeted Restrictions on Abortion Providers,” or TRAP laws, these laws are intended to make it more difficult for abortion providers to operate in the jurisdiction. The City has not enacted TRAP laws. The requirements for abortion providers under the City’s zoning or building codes are the same as for any other medical office.

CONCLUSION

The current provisions of the Municipal Code provide protections for women seeking abortions at health care facilities, as well as for persons assisting women seeking abortions and for medical providers of abortions. These protections are provided in SJMC Section 10.08.030, which prohibits a person from impeding access to a health care facility and in the targeted residential picketing ordinance, SJMC Section 10.09.010, which prohibits a person from engaging in picketing activity that is targeted at and is within 300 feet of a residential dwelling.

In terms of land use and zoning regulation, the City is permissive toward abortion clinics that want to open and operate. The requirements for abortion providers under the City’s zoning or building codes are the same as for any other medical office.

The Municipal Code sections that are the subject of this memo provide the protections we understood the Council had directed our office to consider, and are the result of protests in the early 1990’s. We believe the sections continue to comply with existing case law and were actively defended by the City when adopted and challenged.

/s/ Nora Frimann

NORA FRIMANN

City Attorney

cc: Jennifer Maguire

Attachments: Attachment 1: SJMC Sections 10.08.030 and 10.08.040
Attachment 2: SJMC Sections 10.09.010 and 10.09.020

ATTACHMENT 1
SJMC Sections 10.08.030 and 10.08.040

10.08.030 - Impeding access prohibited.

A. No person, in the course of demonstration activity within the access area of a health care facility, acting alone or in concert with others, shall impede or hamper the free access to or departure from any health care facility by failing to withdraw immediately to a distance of at least eight feet away from any person who has requested such withdrawal.

B. For purposes of this section, "access area" means any portion of a public street or other public place or any place open to the public within one hundred feet of an exterior wall of a health care facility.

C. For purposes of this section, "health care facility" means any medical or health facility, hospital or clinic within the city which is licensed under state law or any building, office or other place within the city regularly used by any health care provider licensed under state law to provide medical, nursing or health care or advice to patients.

D. For purposes of this section, "demonstration activity" means all expressive and symbolic conduct, whether active or passive, which shall include, but not be limited to, protesting, picketing, distributing literature, and engaging in oral or silent protest, education or counseling activities.

E. For purposes of this section, withdrawal may be requested by a person verbally, or by carrying or wearing a visible sign clearly indicating such withdrawal request. Statements by a person, or signs carried or worn by a person displaying words or symbols such as or similar in effect to "stop," "stop it," "withdraw," "back off," "get away" or "leave me alone" shall be sufficient to constitute a request to withdraw under this section. Failure to comply immediately with any such request shall constitute a violation of this section. Mere statements of opinion or disagreement made in the absence of a request to withdraw shall not be construed to be a request to withdraw under this section.

F. Distance under this section shall be measured from that part of the closest demonstrator's body that is nearest to the closest part of the requesting person's body. For purposes of the preceding sentence, the term "body" shall include any natural or artificial extension thereof including, but not limited to, an outstretched arm or a hand-held sign.

10.08.040 - Private right of action.

A. Any person who is seeking or intends to seek access to a health care facility and is aggrieved by an act prohibited by [Section 10.08.030](#) may bring an action for damages, injunctive and/or declaratory relief, as appropriate, in a court of competent jurisdiction against any person who has violated, has conspired to violate or proposes to violate its provisions.

B. Any person who prevails in such an action shall be entitled to recover from the violator those damages, costs, attorneys' fees and such other relief as determined by the court. In addition to all other damages, the court may award to the aggrieved person a civil penalty of up to one thousand dollars for each violation.

C. The remedies provided by this section are in addition to any other legal or equitable remedies the aggrieved person may have and are not intended to be exclusive.

ATTACHMENT 2
SJMC Sections 10.09.010 and 10.09.020

10.09.010 - Targeted residential picketing prohibited.

- A. No person shall engage in picketing activity that is targeted at and is within three hundred feet of a residential dwelling.
- B. For purposes of this chapter, the term "residential dwelling" means any permanent building being used by its occupants solely for nontransient residential uses.
- C. For purposes of this chapter, the term "targeted" picketing means picketing activity that is targeted at a particular residential dwelling and proceeds on a definite course or route in front of or around that particular residential dwelling.
- D. This chapter does not and shall not be interpreted to preclude picketing in a residential area that is not targeted at a particular residential dwelling.

0.09.020 - Private right of action.

- A. Any person who is aggrieved by an act prohibited by this chapter may bring an action for damages, injunctive and/or declaratory relief, as appropriate, in a court of competent jurisdiction against any person who has violated, has conspired to violate, or proposes to violate the provisions of this chapter.
- B. Any aggrieved person who prevails in such an action shall be entitled to recover from the violator those damages, costs, attorneys' fees and such other relief as determined by the court. In addition to all other damages or relief, the court may award to the aggrieved person a civil penalty of up to one thousand dollars for each violation of this chapter.
- C. The remedies provided by this chapter are in addition to any other legal or equitable remedies the aggrieved person may have and are not intended to be exclusive.