

**SAN DIEGO POLICE DEPARTMENT  
PROCEDURE**

**DATE:** MARCH 7, 2017

**NUMBER:** 4.16 - LEGAL

**SUBJECT:** PROCEDURES FOR HANDLING INCIDENTS  
INVOLVING EXPRESSIVE ACTIVITY AND FIRST  
AMENDMENT RIGHTS

**RELATED POLICY:** N/A

**ORIGINATING DIVISION:** OPERATIONAL SUPPORT

**NEW PROCEDURE:**

**PROCEDURAL CHANGE:**

**SUPERSEDES:** DP 4.16 - 10/09/2012

---

**I. PURPOSE**

This Department procedure establishes guidelines for officers responding to calls for service related to the exercise of First Amendment rights. Collectively, the many forms of expression are referred to as “expressive activity.”

**II. SCOPE**

This procedure applies to all sworn members of the Department.

**III. BACKGROUND**

A. The First Amendment of the United States Constitution guarantees the freedom of speech and the freedom of assembly. While the United States Constitution provides minimum protections that no state can infringe upon, a state may offer more protections than the United States Constitution.

California is one of the states whose constitution expands traditional First Amendment rights. As a result of this expansion of rights, the California Supreme Court (and later the United States Supreme Court) has ruled that the modern day shopping mall has assumed the function of the town square where people used to meet and discuss the issues of the day. These gatherings

sometimes disturb the orderly conduct of business at malls and other commercial properties. Property owners and managers often call for police assistance.

- B. The majority of these calls involve disputes that are civil in nature. Therefore, officers should keep in mind the following points when responding to calls for service involving expressive activity:
1. While private business owners may create reasonable time, place, and manner restrictions for the use of their property, these rules are not law. Therefore, police officers have no lawful authority to enforce them.
  2. Non-compliance with these restrictions, by itself, is not a crime. A person who is merely on the privately owned property of a business for the purpose of engaging in expressive activity, in violation of the business owner's rules, is therefore not committing a crime.
  3. A person who is merely on the privately owned property of a business for the purpose of engaging in expressive activity, in violation of the business owner's rules, does not become a trespasser by virtue of his continued presence, unless he engages in activity that genuinely obstructs the business or interferes with or intimidates the business' employees or customers.
  4. A business owner seeking to remove or restrict persons engaged in expressive activity must obtain a restraining order, or injunction, from a civil court. A person engaged in expressive activity who remains on the property in violation of such a court order would then be subject to arrest and removal.
  5. Labor activity is a form of expressive activity that is lawfully authorized by both Federal and State law. People engaged in lawful labor actions are specifically excluded from the trespassing statutes that pertain to certain types of property.
  6. Disputes between property owners and persons wishing to use the property for expressive activity are civil disputes. The sole purpose of police officers at these disputes is to preserve the peace.

#### IV. **DEFINITION**

Expressive Activity - any protest, proselytization, propagandizement, or other communication or conveyance of an idea or ideas, or message or messages, to a general audience, the effect, propensity, or intent of which is to express an idea or belief, or draw or attract a crowd or onlookers. These activities may be commercial, political, personal, or labor-related in nature.

## V. EXPLANATION OF PROPERTY RIGHTS AND ISSUES

The courts recognize the right of property owners to control and use their own property. They also recognize the rights of citizens to exercise their constitutional rights. In their attempt to balance these sometimes-competing rights, the courts have ruled that “private property rights are not absolute and may be subordinated to the rights of society.”

The issue is not whether the property is privately owned, but whether, and to what extent, the owner has opened it up for public use. If the property is open for public use and that public use resembles the town hall function of a public meeting place, then the public’s right to engage in activities similar to a town hall outweighs the property owner’s right to the absolute control of the property.

### A. Nature of the Property

1. One factor in determining the right of the public to enter property for purposes of expressive activity is the nature, purpose, and primary use of the property itself. As case law evolves in this area, it appears that a continuum has developed in terms of the types of property and the owner’s rights to control the property, versus the right of the public to engage in expressive activity there.
2. Shopping malls contain theaters, plazas, walkways, courtyards, food courts and, in some cases, even stages for public use. The extent and nature of the public’s invitation to use the property goes beyond merely making a purchase and leaving. Malls invite and encourage patrons to congregate and spend time together. These factors make them a modern “town center” and “town hall.” These are the properties where expressive activity has been upheld. Examples might include University Town Center and Fashion Valley malls.
3. Individual retail businesses, such as stand-alone businesses with their own parking facilities, separate from other businesses, do not possess the attributes of a “town hall” public forum. They do not offer the same inducements to congregate as the “town square.” Examples of these types of businesses might include convenience stores, grocery stores, gas stations, car dealers and even “big box” stores, if they are separated from surrounding businesses, where the invitation to the public is to come in and conduct business or purchase merchandise (as opposed to congregating for other purposes). It should be noted that these type of properties MAY be able to pursue a case for civil trespass followed up by a restraining order, however, rarely will these actions rise to the level of criminal trespass.

## B. Reasonable Time, Place, and Manner Restrictions

While the courts have opened up some properties for expressive activity, they have also allowed property owners to adopt “reasonable” regulations to ensure that expressive activities do not interfere with normal business operations. Allowable regulations or restrictions fall into the following categories:

1. Time restrictions - property owners can restrict people wishing to use their property for expressive activity by limiting their activities to hours when the property is open for business.
2. Place restrictions - expressive activities can be limited to places generally open to the public. Those wishing to use the property for expressive activity may be excluded from areas used for deliveries (if they are not open to the public), office areas, or areas only open to employees of the mall or the stores in the malls.
3. Additionally, in stand-alone businesses, such as a “big box” store, further restrictions may be placed as to where expressive activity may take place on the property. To balance the rights of all, the business must still provide an area where those engaging in expressive activity are close enough to those using the store to have their message heard.
4. Manner restrictions - private ownership of property, and the sidewalks leading to it, does not operate to strip members of the public of their rights to exercise First Amendment privileges on the sidewalk at, or near, the place of entry to the establishment. In utilizing the sidewalk for such purposes, those seeking to exercise such rights may not do so in a manner that obstructs or unreasonably interferes with free ingress and egress to or from the business. Therefore, property owners may enact and enforce reasonable restrictions on the manner of the expressive activity to prevent obstructions or unreasonable interference with ingress or egress of the business.
5. Conduct that disrupts the business, such as excessively loud noise, particularly where it is not meant to communicate an idea or where it incites disruptive, intimidating or criminal activity, can be restricted.

## C. Content Restrictions

While property owners may be able to impose reasonable time, place, and manner restrictions, they cannot restrict the content of the message being communicated, even if that message may harm the property or store owner’s business interests. For instance, they cannot prohibit the use of pickets or the passing out of leaflets, even when the pickets or leaflets urge a boycott of the shopping center or stores within the center.

D. Businesses Not Open to the Public

Most of the cases discussing expressive activity involve retail establishments. There are many other types of businesses, such as office buildings, and manufacturing and research facilities, which are not open to the public. They are not the equivalent of a public forum and expressive activity, with the exception of labor activity, could be prohibited on those properties. Incidents of trespassing that occur on these properties is generally described in Penal Code section 602(o).

VI. **PROCEDURES**

A. Initial Response

1. When responding to calls for service regarding expressive activity, officers should keep in mind that, depending on the nature of the expressive activity, emotions can be very inflamed. Upon arrival, it may be useful to stand back and observe the parties involved, taking note of whether those engaged in expressive activity are peaceful or not. If they are peaceful, they are not trespassing, even if they are in violation of the property owner's regulations.
2. Note any activity that might be considered obstructive or interfering with the business. If this occurs, those engaged in expressive activity lose the protection of their exemptions from the trespassing statutes and may be subject to arrest and removal.
3. When contacting the parties, officers shall remain fair and impartial.

B. Review of Documents

1. Property owners and those wishing to use the property for expressive activities are often sophisticated enough to arm themselves with legal advice about why their interests should prevail. Both parties may request that responding officers review their documents.
2. Business owners may ask officers to read and/or enforce their policies for expressive activity or legal opinions supplied by their counsel. While it would be appropriate for a police officer on the scene to attempt to mediate a resolution acceptable to both parties, it is **NOT** the place of the police officer to attempt to determine if the time, place, and manner restrictions are reasonable. Only a court can make those determinations. Therefore it is appropriate to decline to review these documents. The officer's sole determination for taking action is whether or not a crime has been committed; not whether the property owner's rules have been violated.

3. Likewise, those engaged in expressive activity may ask officers to read cases or opinions provided by their counsel purporting to authorize their presence. Again, declining to do so is appropriate.

C. Citizen's Arrest

1. In some instances, the property owner or their agent will insist that they have the authority to make a citizen's arrest based on a violation of their time, place, and manner restrictions. As discussed above, their restrictions are not law and therefore a violation of them cannot result in an arrest.
2. Making an arrest or accepting a citizen's arrest should be considered as a last resort. Absent extenuating circumstances, it is best to advise the parties to consult their legal counsel and to pursue civil remedies through the courts.
3. For a citizen's arrest to be appropriate the following elements should exist:
  - a. The activity of those engaged in expressive activity must have obstructed or interfered with the operation of the business, or interfered with or intimidated the employees or patrons of the property or the businesses on the property. It is not enough that an employee or patron was annoyed by having to pass those engaged in the expressive activity or that the patron did not agree with their message. There must have been some conduct that made them afraid to or discouraged their use of the property. This information must be obtained from the patron, not the property manager.
  - b. The crime must have occurred in the presence of the person making the arrest. It is not enough that the property owner or agent is aware of and has cause to believe that a crime has occurred. The statutory requirement is that the crime occurred in their presence. If it did not, they cannot make an arrest.
  - c. There must have been an actual criminal violation of any statute. If a crime has been committed, and the person(s) committing the crime refuses to leave after being requested to do so and the property owner or agent makes a citizen's arrest, an officer may accept the arrestee from the citizen making the arrest. After accepting the arrest, the officer can issue a misdemeanor citation to the person(s) arrested. If one or more of the exceptions to the misdemeanor citation release requirement is present, the officer can book the arrestee into county jail. As an alternative, the officer may complete a request for a notify warrant.

D. Court Orders

1. Disputes between property owners and those engaging in expressive activity are civil in nature. Therefore, relief sought by any party against the other must come from a civil court in the form of a restraining order or injunction.
2. When presented with a court order by either party, officers should handle them as they would any other court order. The officer should verify the validity of the order and whether or not it has been properly served. Officers can verify the order by calling the Sheriff's warrant division. Refer to Department Procedure 4.05, Protective Orders, for details.
3. In the event that a party named in the court order is present, in violation of the order, the officer should review the requirements of the order with the person and offer an opportunity to comply with the order.
4. If the person refuses to comply with the order, he/she is in violation of Penal Code section 166(4) which is a misdemeanor. Officers may then proceed in accordance with the procedures for making a misdemeanor arrest.