MEMORANDUM OF LAW

DATE: January 2, 2003

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Applicability of Local Regulatory Requirements to Clean Syringe Exchange Program

INTRODUCTION

This memorandum is in response to concerns raised by opponents of the Clean Syringe Exchange Program [CSEP], who have questioned whether all applicable regulatory requirements are being met by the program. In public testimony at City Council and in correspondence to the City, the opponents have identified specific regulatory schemes, permitting and noticing requirements, and have asked our office to comment on the applicability of those requirements to the CSEP. For reasons set forth in more detail below, and in large part because CSEP operates out of a mobile vehicle, none of the regulatory requirements raised by the CSEP opponents are applicable to the operation of the program.

QUESTIONS PRESENTED AND SHORT ANSWERS

1. Does the City's Land Development Code regulate the operation of the CSEP mobile facility?

   No. The City's Land Development Code is primarily concerned with "development," a defined term that does not include the activity associated with CSEP. Moreover, none of the enumerated permits that are required for activities regulated by the Land Development Code can reasonably be interpreted to apply to CSEP.

2. Do the City's Planned District laws regulate the operation of the CSEP mobile facility?

   No. The City's Planned District laws concern the construction and use of buildings, and do not apply to CSEP's vehicular use of the City's streets.

3. Is the vehicle used by the CSEP subject to the City's permitting requirements for "commercial coaches"?

   No. Because CSEP operates out of a vehicle of relatively small size, it is not considered a commercial coach and is not subject to any regulations applicable to commercial coaches.

4. Is CSEP's operation subject to the City's laws applicable to "second-hand dealing"?

   No. The laws relating to "second-hand dealers" apply to operations that potentially involve the dissemination of stolen property, and CSEP activities cannot reasonably be considered to involve stolen property. Because the legislature did not intend to include syringe exchange programs in the state's second-hand dealer regulations, CSEP is not subject to those regulations or the City laws applicable to second-hand dealers.

5. Does CSEP's handling of used syringes constitute a handling of biohazardous materials subject to a City permitting requirement?

   No. The City does not regulate the disposal of medical waste. The disposal of medical waste, including potentially infectious needles, is subject to San Diego County's medical waste laws, which provide that generators of medical waste must obtain a permit from the County's Department of Environmental Health.

6. Are there any public noticing requirements in the Land Development Code which are applicable to the operation of the CSEP mobile facility?

   No. Noticing requirements under the Land Development Code are applicable only to "developments," a defined term that does not include a program operating out of a mobile facility such as CSEP.

FACTUAL BACKGROUND

In October 1999, the California Legislature passed AB 136, which eliminated criminal liability for the exchange of hypodermic needles and syringes through an exchange program operating under a declaration of a local emergency by a public agency. On October 16, 2000, and periodically thereafter, the City of San Diego has declared a state of local emergency in connection with the spread of the hepatitis C virus, which is exacerbated by the shared use of needles and syringes by intravenous drug users. San Diego Resolution R-293966 (Oct. 16, 2000). In conjunction with this declaration, the City authorized a privately funded one-year pilot clean syringe exchange program. The CSEP program is currently operating, and is being funded by the Alliance Healthcare Foundation and operated through a private provider, Family Health Centers of San Diego, which contracts with the funding agency. The program operates out of a motor home customized to facilitate needle exchanges, drug treatment referrals, medical referrals, and the distribution of health related literature. The motor home makes weekly trips to selected locations in the City where it operates for approximately two hours.

Opponents of the CSEP have questioned whether all applicable permitting and regulatory requirements have been met by the program, and have raised questions about specific regulatory schemes in recent testimony and correspondence. The specific regulatory schemes cited by the opponents are: (1) the City's Land Development Code (which includes the City's zoning laws); (2) the City's Planned District laws; (3) permitting requirements for "commercial coaches"; (4) regulations applicable to "second-hand dealers"; (5) permitting requirements for hazardous waste disposal; and (6) public noticing requirements. As will be set forth in more detail below, none of these regulations applies to the CSEP's operation of a mobile unit.

ANALYSIS

I. Land Development Code

Opponents of the CSEP have argued that the program is subject to the City's zoning laws, and that the City's zoning laws regulate the siting of the CSEP mobile facility, and impose public noticing requirements that have not been met by CSEP**.** However, a review of the City's Land Development Code [LDC] (codified at Chapters 11 through 14 of the San Diego Municipal Code [SDMC]), which contain the City's zoning and land use permitting regulations, reveals no local zoning or land use permitting laws that apply to CSEP operations. The LDC does not require any type of permit or public noticing for syringe exchange programs, or for any category of activity that such a program would reasonably fit into. Therefore, there are no local zoning or land use laws that apply to CSEP.

The LDC provides for the following types of land use permits: Temporary Use Permits, Neighborhood Use Permits, Conditional Use Permits, Neighborhood Development Permits, Site Development Permits, Planned Development Permits, Coastal Development Permits, and

Construction Permits. In order to determine whether any of these types of permits is required for CSEP, an analysis of each type of permit is necessary.

A. **Temporary Use Permit**

The City issues Temporary Use Permits for a number of different land use activities. These permits allow "certain uses for a limited time period where the uses would not otherwise be allowed in the applicable zone." SDMC § 123.0401. According to SDMC section 123.0402, a Temporary Use Permit is required for the following uses:

1. Retail sales related to seasonal activities, such as holidays;

2. Temporary public assembly and entertainment uses; and

3. Temporary telecommunication facilities intended to provide service to citywide public events.

None of the above activities encompasses the CSEP operation.

B. Neighborhood Use Permit

SDMC section 126.0203 identifies the types of activities that may require a Neighborhood Use Permit. This list limits the activities to the following: bed and breakfast establishments; communication antennas; community gardens; community identification signs; eating and drinking establishments abutting residential zones; employee housing; guest quarters; home occupations; outpatient medical clinics[1]; parking facilities as a primary use; push carts; reallocation of sign area allowance; recycling facilities; revolving projecting signs; sidewalk cafes; signs with automatic changing copy; temporary construction storage yards located off-site; and theater marquees. The CSEP operation does not fall within any of these categories.

[1]The CSEP mobile facility is not an outpatient medical clinic. According to Fran Butler-Cohen, Chief Executive Officer for Family Heath Centers of San Diego, no medical services are being performed in the mobile facility.

C. Conditional Use Permit

SDMC section 126.0303 identifies the types of activities that may require a Conditional Use Permit. The activities that are regulated by this scheme are limited to the following: agricultural equipment repair shops; agriculture-related supplies and equipment sales; alcoholic beverage outlets; automobile service stations; bed and breakfast establishments; boarding kennels; child care facilities; churches and places of religious assembly; commercial stables; communication antennas; companion units; educational facilities; employee housing; energy generation and distribution stations; equestrian show and exhibition facilities; fraternities, sororities, and student dormitories; historical buildings; housing for senior citizens; impound storage yards; instructional studios; major transmission, relay, or communication switching station; museums; newspaper publishing plants; outdoor storage and display of new, unregistered motor vehicles as a primary use; parking facilities as a primary use; plant nurseries; private clubs, lodges, and fraternal organizations; processing and packaging of plant products and animal by-products grown off-premises; recycling facilities; residential care facilities for 7 to 12 persons; swap meets and other large outdoor retail facilities; transitional housing for 7 to 12 persons; veterinary clinics and hospitals; botanical gardens and arboretums; camping parks; cemeteries, mausoleums, and crematories; correctional placement centers; exhibit halls and convention centers; golf courses, driving ranges, and pitch and putt courses; hazardous waste research facilities; homeless facilities; hospitals, intermediate care facilities, and nursing facilities; interpretive centers; junk yards; marine-related uses in the Coastal Overlay Zone; mining and extractive industries; nightclubs and bars over 5,000 square feet in size; privately operated recreational facilities over 10,000 square feet in size; residential care facilities for 13 or more persons; social service institutions; theaters that are outdoor or over 5,000 square feet in size; transitional housing for 13 or more persons; wrecking and dismantling of motor vehicles; airports; amusements parks; fairgrounds; hazardous waste treatment facilities; helicopter landing facilities; sports arenas and stadiums; very heavy industrial uses; and zoological parks.

The CSEP operation does not fall within any of these categories.

D. Neighborhood Development Permit

SDMC section 126.0402 identifies the types of activities that may require a Neighborhood Development Permit. These activities all pertain to “development,” a term defined in SDMC section 113.0103 as follows:

> Development means the act, process, or result of dividing a parcel of land into two or more parcels; of erecting, placing, constructing, reconstructing, converting, establishing, altering, maintaining, relocating, demolishing, using, or enlarging any building, structure, improvement, lot, or premises; of clearing, grubbing, excavating, embanking, filling, managing brush, or agricultural clearing on

> public or private property including the construction of slopes and facilities incidental to such work; or of disturbing any existing vegetation.

Because the CSEP mobile facility is not an edifice or building, and because it is not being "developed" on the sites where it operates, there is no legal requirement for CSEP to obtain a Neighborhood Development Permit for its syringe exchange operation.

E. Site Development Permit

According to SDMC section 126.0502, a Site Development Permit is required for the following types of developments: City public works projects on a premises containing environmentally sensitive lands; single dwelling unit development that involves sensitive coastal bluffs or coastal beaches; development on lots greater than 15,000 square feet containing sensitive biological resources, steep hillsides, or Special Flood Hazard Areas; development on lots less than or equal to 15,000 square feet that are joined in ownership to a contiguous lot so that the total area of contiguous ownership exceeds 15,000 square feet where sensitive biological resources, steep hillsides, or flood plains are present; and commercial, industrial, and multiple unit residential development on a premises containing environmentally sensitive lands.

As indicated in section D above, the CSEP program is not a development, and even if it was, it would not qualify as one requiring a Site Development Permit. It is not contained in the list of activities requiring such a permit.

F. **Planned Development Permit**

SDMC sections 126.0601 through 126.0605 contain provisions applicable to the process of obtaining a Planned Development Permit, and address residential, commercial, and industrial development in instances where a community plan specifically recommends a Planned Development Permit in conjunction with another requested discretionary action, typically involving a deviation from a strict application of base zone development regulations. This portion of the Municipal Code uses the term "development" as that term is defined in SDMC section 113.0103 and set forth above in section D, concerning Neighborhood Development Permits. For the reasons identified above in section D, the CSEP mobile facility is not a building or improvement and is not a "development," and therefore does not fall into the category of activities requiring a Planned Development Permit.

G. **Coastal Development Permit**

A portion of the City's LDC regulates "temporary events" occurring specifically in the Coastal Overlay Zone. CSEP activities arguably qualify as a "temporary event" pursuant to the definition contained in SDMC section 113.0103:

> "Temporary event" means an activity or use of limited duration that involves the placement of non-permanent structures and/or involves exclusive use of sandy beach, parkland, filled tidelands, water, streets or parking area which is otherwise open and available for general public use. For purposes of this definition, limited duration means a period of time which does not exceed a two week period on a continual basis, or does not exceed a consecutive four month period on an intermittent basis.

While a literal reading of this definition would include the CSEP mobile facility, it would also include every other vehicle parked on a public street. Any vehicle legally parked at the edge of a roadway is arguably involving the "exclusive use" of a "parking area which is otherwise open and available for general public use." While the parking of the CSEP vehicle arguably may be a "temporary event," such a classification is meaningful only in the context of being exempt from an obligation to obtain a Coastal Development Permit. According to SDMC section 126.0704(d), only a temporary event that meets *all* of the following criteria needs to obtain a Coastal Development Permit:

1. The event is held between Memorial Day weekend and Labor Day;

2. The event will occupy all or a portion of a sandy beach or public parking area;

3. The event involves a charge for general public admission or seating where no fee is currently charged for use of the same area (not including booth or entry fees);

4. The event and its associated activities or access requirements will either directly or indirectly impact environmentally sensitive lands;

5. The event is scheduled between Memorial Day weekend and Labor Day and would restrict or close to the public use of roadways or parking areas or otherwise significantly impact public use or access to coastal waters;

6. The event has historically required a Coastal Development Permit to address and monitor associated impacts to coastal resources.

Because the CSEP program does not charge a fee for its activities, operate on environmentally sensitive lands, require the restriction or closure of roadways, or have a history of requiring a Coastal Development Permit, any classification of it as a "temporary event" under this portion of the SDMC means nothing more or less than the fact that the program would not need to obtain a Coastal Development Permit if it were to operate in the City's Coastal Overlay

Zone.[2] Present CSEP activities do not take place in this zone, but, for future reference, if such activities did take place in that zone, a Coastal Development Permit would not be required.

H. **Construction Permit**

Construction Permits are governed by the provisions of SDMC sections 129.0101 through 129.0814. The purpose of these provisions is to establish a review process for construction plans before construction, demolition, or installation and for the inspection of construction work before use or occupancy. Construction permits encompass the following categories of permits: Building Permits, Electrical Permits, Plumbing/Mechanical Permits, Demolition/Removal Permits, Grading Permits, Public Right-Of-Way Permits, and Sign Permits. SDMC § 129.0102. The CSEP program does not involve construction of any type, or any of the activities covered by these types of permits. Therefore, as is the case with all of the permits discussed in this section of the memorandum, this type of permit has no bearing on CSEP operations.

II. **Planned District Laws**

Another category of City zoning law that exists in addition to the LDC is Chapter 10 of the SDMC, which concerns zoning regulations applicable to the City's planned districts. Chapter 10 is divided into multiple divisions, with each division applying to a particular planned district. The City's planned districts include the Old Town San Diego Planned District, the Golden Hill Planned District, the Gaslamp Quarter Planned District, the La Jolla Planned District, and other districts covering numerous areas throughout the City. In most planned districts, a "special use permit" or "special permit" is required for an improvement to real property. For example, in the Gaslamp Quarter Planned District, "no person shall commence any work in the erection of any new building or structure, including those moved into the Planned District, the remodeling, alteration, addition or demolition of any existing building, grading or landscaping within the Planned District, or put any building or structure within the Planned District to any use, without first obtaining a special permit in accordance with this section." SDMC § 103.0403.

Chapter 15 of the SDMC concerns planned districts in the Central Urbanized Planned District (Kensington, Normal Heights, and City Heights) and the College area. This chapter

---

[2] A temporary event which does not meet all of the criteria in Sections 126.0704(d)(1)-(3) may still require a Coastal Development Permit if the City Manager determines the event has the potential to adversely affect public access to the shoreline and/or environmentally sensitive lands. SDMC § 126.0702(d). It is unlikely that this rule would be applied to CSEP because the CSEP program has no impact on coastal land.

incorporates the requirements of the LDC, but also adds further regulations for instructional studios, eating and drinking establishments abutting open space and residential zones, particular retail sales, personal services (barber shops, beauty parlors, and tattoo parlors), various types of development, manufacturing, processing and packaging of plants and animal by-products, warehouses, alcoholic beverage outlets, and massage establishments. SDMC § 151.0220.

Similar to the laws contained in the LDC, the City's planned district laws apply principally to the construction and use of buildings, and do not implicate vehicular use of the City's streets. SDMC language commonly applied to the City's planned districts reads as follows: "No building or improvement or portion thereof shall be erected, constructed, converted, established, altered or enlarged, nor shall any lot or premises be used except for one or more of the following purposes . . ." *See, e.g.*, SDMC §§ 103.0408 (Gaslamp), 103.1205 (La Jolla), 103.1705 (Southeastern). Because the CSEP mobile facility is not a "building" or an "improvement," it has no reasonable connection to the City's planned district laws.

III. Commercial Coach Permits

Opponents of the City's CSEP contend that the CSEP operation is subject to the City's permitting requirement for "commercial coaches." In making this argument, the opponents point to permitting requirements set forth in the City's Development Services Department's Information Bulletin 240, entitled "How to Obtain a Permit for Commercial Coaches" dated August 2001 (Attachment 1). The term "commercial coach" is not defined in the SDMC, but the Information Bulletin contains a definition taken from California Health and Safety Code section 18001.8: "'commercial coach' means a structure transportable in one or more sections, designed and equipped for human occupancy for industrial, professional, or commercial purposes, which is required to be moved under permit." Based upon this definition, commercial coaches are not "vehicles." They are transportable, but are not self-propelled. Thus, the motor home used by CSEP for its operations does not fit into this category.

Commercial coaches are subject to state regulation by the California Housing and Community Development [HCD], one of several departments within the state's Business, Transportation and Housing Agency. HCD regulates manufactured homes, recreational vehicles, and commercial coaches. The HCD website clearly differentiates "commercial coaches" from other types of homes/trailers/vehicles. The website explicitly states that commercial coaches are "not vehicles." HCD, *Codes and Standards* (visited Dec. 5, 2002) <www.hcd.ca.gov/*codes/mhp/proghist.html*>. *Additionally, the language regarding the requirement that it "be moved under permit" refers only to the fact that commercial coaches are so large (width greater than 8.5 feet or length greater than 40 feet) that they require a special permit to be transported on public roadways. HCD Information Bulletin MH 98-10 (Nov. 3, 1998) n.1. CSEP uses a 2001 Fleetwood Jamboree, a vehicle classified as a "mini motor home" by its manufacturer. These vehicles are less than 40 feet in length and do not exceed 8.5 feet in width. Fleetwood RV, Jamboree* (visited Dec. 5, 2002) <www.fleetwoodrv.com/brands/b.asp?brandID=ja>. The size of

the Jamboree, in and of itself, precludes it from being considered a "commercial coach."

Even if the CSEP mobile facility did qualify as a "commercial coach," it is clear that the Information Bulletin's permit requirements would not apply to the CSEP mobile facility. Information Bulletin 240 is concerned with permits for the "installation" of commercial coaches. The authority for the permit is contained in SDMC section 98.0202. This Municipal Code section pertains only with the use of mobile homes, recreational vehicles, and commercial coaches on "private property not licensed as a mobile home park or special occupancy park." The CSEP vehicle parks for a few hours on various public streets and is never "installed" at a particular location with any degree of permanence.

Furthermore, even if the CSEP mobile facility was considered a commercial coach and it did park on "private property" to perform its function, it would still not be subject to permitting requirements under the SDMC. Section 98.0202 exempts from the permitting requirement any commercial coach that parks on private property "for strictly temporary and transient, nonresidential use limited to not more than 16 hours at any one location." It is indisputable that the CSEP facility is a nonresidential facility and that it stops at its various locations for only a few hours at a time.

For all of the reasons set forth above, the CSEP mobile facility is not a commercial coach, and it is therefore not subject to commercial coach permitting requirements under the SDMC or Development Services' Information Bulletin 240.

IV. **Secondhand Dealer Regulations**

Another potential source of regulatory requirements for the CSEP program cited by the CSEP opponents is the regulatory scheme for "secondhand dealing," which is governed by state law as well as City ordinance. Under the California Business and Professions Code, a "'secondhand dealer' . . . means and includes any person, copartnership, firm, or corporation whose business includes buying, selling, trading, taking in pawn, accepting for sale on consignment, accepting for auctioning, or auctioning secondhand tangible personal property." Cal. Bus. & Prof. Code § 21626(a). Although non-commercial, the exchange of needles could arguably be construed as "trading." Persons considered "secondhand dealers" are also subject to certain regulations in the SDMC. According to SDMC section 33.1101, "dealers in secondhand

articles as defined in Business and Profession Code section 21626 shall keep a record in accordance with state law of any and all articles acquired by purchase, pledge or otherwise." SDMC section 33.1105(a) further requires that "such business shall be carried on, maintained or conducted entirely inside an enclosed building or buildings." CSEP opponents point to this last provision as a prohibition for CSEP to operate anywhere other than in an enclosed building.

Because the SDMC refers to the California Business and Professions Code for establishing the identity of a "dealer in secondhand articles," an analysis of state law is necessary to establish whether a syringe exchange program is subject to the SDMC's "secondhand dealer" requirements. When interpreting a statute, the court looks first to the language of the statute; if clear and unambiguous, the court will give effect to its plain meaning. *Kimmel v. Goland*, 51 Cal. 3d 202, 208-209 (1990). The "rules of statutory construction are applied only where there is ambiguity or conflict in the provisions of the charter or statute, or a literal interpretation would lead to absurd consequences." *Castaneda v. Holcomb*, 114 Cal. App. 3d 939, 942 (1981). Because CSEP is not consistent with the other activities identified in Business and Professions Code section 21626, an analysis of the legislative intent behind this code section is necessary.

The language of Business and Professions Code section 21626 evidences an intent to regulate commercial enterprises. Section 21626 appears in Chapter 9, Division 8 of the Business and Professions Code, which governs commercial enterprises involving secondhand goods, such as watches, tools, machinery, scrap metal, and trading cards. Additionally, section 21625 states that it is "the intent of the Legislature in enacting this article to curtail the dissemination of stolen property and to facilitate the recovery of stolen property by means of a uniform, statewide, state-administered program of regulation of persons whose principal business is the buying, selling, trading, auctioning, or taking in pawn of tangible personal property and to aid the State Board of Equalization to detect possible sales tax evasion." Because syringe exchange programs have no logical relationship to the state's interest in curtailing the dissemination of stolen property, it is clear that the state and local secondhand dealer regulations were not intended to apply to such operations.

V. **Medical Waste Disposal Regulations**

State law regulates the disposal of syringes. "Any hypodermic needle or syringe that is to be disposed of, shall be contained, treated, and disposed of, pursuant to Part 14 (commencing with Section 117600) of Division 104 of the Health and Safety Code." Cal. Business and Professions Code § 4147. Under the Medical Waste Management Act (Health and Safety Code sections 117600, et seq.) "'sharps waste' means any device having acute rigid corners, edges, or protuberances capable of cutting or piercing, including, but not limited to, all of the following:

(a) Hypodermic needles, hypodermic needles with syringes, blades, needles with attached tubing, syringes contaminated with biohazardous waste, acupuncture needles, and root canal files." Cal. Health & Safety Code §117755. Syringes contaminated with the blood of individuals using illicit drugs may also be considered biohazardous waste, which includes "waste containing discarded materials contaminated with excretion, exudate, or secretions from humans . . . that are required to be isolated by the infection control staff, the attending physician and surgeon . . . or the local health officer, to protect others from highly communicable diseases. Cal. Health & Safety Code § 117635(e).

State law permits local agencies to regulate infectious waste in a manner that is consistent with the above provisions of the Health and Safety Code. Cal. Health & Safety Code § 117605. A "local agency" includes the local health department of a county that has chosen to adopt a local ordinance to administer and enforce this portion of the Health and Safety Code. Cal. Health & Safety Code §117685. The County of San Diego has elected to administer and enforce the above sections of the Health and Safety Code. "It is the intent of the Board of Supervisors that the Director of the Department of Environmental Health shall implement the Medical Waste Management Act, Division 104, Part 14 of the California Health and Safety Code." San Diego County Code of Regulatory Ordinances § 68.1201. The City has not enacted its own laws pertaining to the disposal of medical waste, but instead has adopted the applicable County Code sections by reference into the San Diego Municipal Code. SDMC § 42.1201. The County's medical waste laws provide that generators of medical waste must obtain a permit from the County's Department of Environmental Health. San Diego County Code of Regulatory Ordinances §§ 68.1202, 68.1203.

According to Fran Butler-Cohen, Chief Executive Officer of Family Health Centers, which is the operator of the CSEP, the organization has a valid permit from the County of San Diego for disposing of syringes. Additionally, the program contracts with a federally certified waste handler to pick up and dispose of the waste generated by the program. Therefore, the regulatory requirements for disposing of medical waste have been met by the CSEP.

VI. **Public Noticing Requirements**

In the site selection process for the CSEP, the funding agency and operator have taken various steps to notify members of the affected communities about the process, including personal contacts with residents and businesses, and community meetings. However, opponents of the CSEP have charged that there are legal public noticing requirements that are not being met by the program when making site selection decisions. The opponents' position that legal noticing requirements apply to the program is probably based on the public noticing requirements in the LDC, and is related to the opponents' view that land use regulations apply to the CSEP.

Noticing requirements under the LDC are set forth in SDMC section 112.0302. This section requires that notice of certain applications for land use be mailed to the occupants and owners of real property located within 300 feet of the boundary of the property that is the subject of the application. According to the SDMC, a "Notice of Application is required for an application for a permit, map, or other matter acted upon in accordance with Process Three, Process Four, or Process Five." SDMC § 112.0301(a). "The subject matter of the development application determines the process that shall be followed for each application." SDMC § 112.0501. A simple development may be subject to Process One (staff decision to approve or deny), while a development with a significant impact on the community may be subject to Process Five (City Council decision to approve or deny). For example, "[a]n application for a

tentative map may be approved, conditionally approved, or denied in accordance with Process Three for Tentative Parcel Maps and Process Four for Tentative Final Maps except for those tentative maps that include proposals for the vacation of public rights-of-way or the abandonment of public service easements, which shall be made in accordance with Process Five." SDMC § 124.0430.

The key word in section 112.0501 is "development," as that term is defined in SDMC section 113.0103 (see section 1(D) above). Noticing requirements under the LDC are applicable only to "developments," a term that does not include the use of a motor home parked for a period of several hours on a public street. For the same reasons that the zoning and permitting requirements of the LDC do not apply to the CSEP, as stated in section 1 above, the noticing requirements of the LCD do not apply to the CSEP.

It should be noted, however, that even if public noticing was required by the LDC and was not made properly, the CSEP program cannot be invalidated for that reason. "The failure of any person to receive notice given in accordance with this division and the State of California Planning and Zoning Laws shall not constitute grounds for any court to invalidate any action taken by the City for which the notice was provided." SDMC § 112.0309.

Despite the absence of legal noticing requirements applicable to CSEP, members of the City Manager's facilitation committee have identified public noticing and community outreach as an important policy consideration for the program, in response to feedback from members of the community. A subcommittee of the facilitation committee has been formed to develop a proposed policy for how notice of the CSEP should be provided to members of the affected community.

VII. Statutory Interpretation Rules Applicable to the Omission of Syringe Exchange Programs from Regulatory Schemes

The various laws discussed in this memorandum, from those applying to commercial coaches to those involving land use issues, all have at least one thing in common: they do not explicitly apply to syringe exchange programs. The opponents of the CSEP program may take the position that these laws are broad enough to encompass mobile syringe exchange programs. However, as established in each section set forth above, syringe exchange programs simply do not fit into the categories of activities being regulated. Had the drafters of the SDMC meant to include activities of the type being performed by CSEP, there is a presumption that they would have done so. "If there is no ambiguity in the language of the statute, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs." *Lennane*

v. Franchise Tax Bd., 9 Cal. 4th 263, 268 (1994).

Assuming however, that the subject laws are ambiguous when applied to a syringe exchange program, well-established rules of statutory construction become applicable. According to these rules:

> Where the Legislature makes express statutory distinctions, we must presume it did so deliberately, giving effect to the distinctions, unless the whole scheme reveals the distinction is unintended. This concept merely restates another statutory construction canon: we presume the Legislature intended everything in a statutory scheme, and we should not read statutes to omit expressed language *or include omitted language*.

Jurcoane v. Superior Court, 93 Cal. App. 4th 886, 894 (2001) (emphasis added).

"It is a long-standing rule of statutory construction that the expression of certain things in a statute necessarily involves exclusion of other things not expressed." *People v. Brun*, 212 Cal. App. 3d 951, 954 (1989). The California Supreme Court has clearly established that if a legislative body chooses not to include a subject in a particular law, then that subject does not exist in that particular law. "We decline to insert into the statute what the Legislature omitted. That is not our function." *In re Christian S.,* 7 Cal. 4th 768, 775 (1994). The laws analyzed in this memorandum contain lists, often of a voluminous nature, of the types of activities being regulated. The absence of syringe exchange programs in these lists is a significant factor that can lead only to the conclusion that the CSEP program is not subject to these laws. The CSEP operation is based around a mobile facility that simply does not fit into the statutory schemes for commercial coaches, second-hand dealers, or land development. In the absence of any indication that the drafters of these laws intended to include CSEP type activities, there is no reasonable basis for applying these laws to CSEP.

CONCLUSION

Opponents of CSEP have argued that a number of regulatory requirements apply to CSEP, and that those requirements have not been satisfied. However, an analysis of each of these requirements reveals that they do not apply to CSEP, primarily because the program operates out of mobile facility. Each statutory scheme in question expressly identifies the activities that are regulated by that scheme, and none of them provide for the regulation of a mobile syringe exchange facility. Of the regulatory requirements cited by opponents, only the County permit requirement for disposal of medical waste applies to CSEP, and that requirement has been met by the program operator. Therefore, the program appears to be meeting all applicable regulatory requirements.

CASEY GWINN, City Attorney

By
Lisa A. Foster
Deputy City Attorney

LAF:km:jb
ML-2003-01