Citizens' Oversight Projects (COPs)
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El Cajon, CA 92019
CitizensOversight.org
619-447-3246

November 28, 2011

Owner, Civic Center Plaza Office Building
c/o Cyndi Poes
Asst. Real Estate Manager
CB Richard Ellis
1200 3rd Ave.
Suite 405
San Diego, CA 92101
cyndi.poes@cbre.com

Dear Cyndi:

Thank you for talking to me the other day about the reports from the police that tenants in your building have complained about noise from the Civic Center public square that exists directly to the south of your building. Please provide this letter to the owner(s) or whomever is responsible for operations of your building and surrounding area.

I am National Coordinator for Citizens Oversight Projects (COPS), a 501c3 nonprofit organization that specifically focuses on improving the involvement of the public in public meetings, and we are particularly concerned about the ability of the public to engage in public protest, demonstrations, and other elements of free speech which are guaranteed under the First Amendment of the U.S. Constitution, as well as affirmatively by the California Constitution. In this case, we are concerned about these rights in the Civic Center Plaza area primarily to the south of your building. The right to free speech is something that we hold particularly dear because we feel it is central to our identity as a democracy. I hope you feel the same way.

Although we support the right of the Occupy San Diego protestors to use this public square, I am not attempting to represent them in any official way. Instead, this letter is prompted by a general interest in furthering the opportunity for the public to engage in speech.

I was in the Civic Center Plaza at about 10am on Wednesday, November 23rd. I noticed SDPD officer Tony Lessa talking with occupier Michael B. The officer was asking the occupiers to stop singing because it was disturbing the tenants of the nearby Civic Center Plaza office building. I asked him what complaints he was talking about, and he said they had received many complaints. He said he had no complaints in writing, but that they receive them all the time.

We talked to Michelle Rouselle, manager of Civic Center Plaza office building. I asked her if they had any complaints, and she said they had many complaints – the sound comes right in the open doors. I asked if it would be possible to close the front doors which were propped open with little wedges. "Most businesses don't leave their doors wide open." I said. She said she didn't think it was right to require that the building

stop propping the doors wide open.

We wound up going to the office of Cyndi Poes, Assistant Real Estate Manager, who I understand reports to the owner. I understand that the building is owned by a private party and leased mainly to the City for City Attorney and Mayor's offices. I asked Ms. Poes if they had had any complaints for noise. She said, "Not lately, no."

I'm not sure why there is a unfounded notion that there are many complaints from the building when there are none. But even if such complaints exist, as a first step, you should swing the propped-open doors closed. Most businesses operate with doors that are unlocked but in the closed position. Since your building does not have any reason to try to attract people into the lobby (such as to display items for sale that might be appropriate if you were running a store at that location) closing the doors will not impact your business operation. The police should not be asking the public to stop or limit their speech, singing, or any other verbal communication BEFORE you first swing your doors closed.

Please swing your doors closed if there is any concern with noise before requesting that the police restrict speech in the public square. I hope you will help us with this small request.

A second concern is regarding the use of the area which is designated as private property around your building by the public for peaceful political activity. It is obvious that in this case, you have little if any right to restrict such activity.

To support this assertion, I point to ***Pruneyard Shopping Center v. Robins***, 447 U.S. 74 (1980), a U.S. Supreme Court decision (attached) that requires privately owned malls and shopping centers to allow peaceful political activity inside the mall. In essence, the decision embraced the notion that today, these privately owned malls have replaced the public square, and therefore, it is appropriate to require the malls to allow peaceful political activity, subject to time, place, and manner restrictions. Those restrictions were added to account for the fact that the property owners had other interests, namely to encourage shoppers to spend money in the mall and not be hassled by political activists. Thus, malls are allowed to restrict the time, for example, by not allowing any such activity during the holiday season.

First, it is clear that the area in front and on the sides of the Civic Center Plaza building, at 1200 3rd Ave. in San Diego, qualifies at least as much as would the area inside a public shopping center, such as the Pruneyard shopping center. The question here is whether your building has any right to restrict activities to time, place and manner, as would be the case in a private mall. I assert that those restrictions are largely not applicable to this case. Here is why:

The plaza area is specifically known to be the central square of the city of San Diego. The purpose of this square is to allow access by the public and particularly to support the right for free speech. In fact, the square is directly adjacent to San Diego City Hall to the south, Civic Center Auditorium, operated by the City of San Diego, also to the south, and the Civic Center Plaza building is primarily leased to the City for public functions, to the north. There is no doubt that this is the official public square of the City of San Diego. Indeed, there is no other similar square in San Diego.

This is in contrast with a private mall, such as the Pruneyard shopping center, where the intention of the spaces in the mall is not to provide a public square, but to allow shoppers conveniently spend money and make a profit for the mall owner.

“The emerging trend from these cases is that the crucial element in balancing private property rights against free speech rights is the nature of the premises and the extent to which they have been opened up to the public for congregation and other public purposes, as opposed to strictly directed commercial purposes.”

Therefore, time, place and manner restrictions have little or no meaning in this case. Considering each dimension of restriction:

- Time: The public square is an outside facility, and there are no inherent reasons to limit the time that the public can use that area. There is no seasonal peak period that would be found in a mall.
- Place: It is reasonable to expect unfettered access to the front doors of the Civic Center Plaza building and movement of patrons into and out of the building. Other than that, there does not seem to be any reason to limit the place that the public can operate in this square.
- Manner: The Prune Yard case is restricted because the malls were a “quasi-town square.” Since the Civic Center Plaza is indeed the one and only “public square” of the city, limiting the manner that the public can interact makes no sense. The rationale in the Pruneyard case is that since they needed to share limited space with their customers, it was necessary to limit the manner in which the the public can speak in the square.

It is therefore clear that the use of the square, regardless of private ownership, is allowed under both the First Amendment of the Constitution and the California Constitution.

In the text of the Wikipedia entry for the Pruneyard case the following paragraph exists:

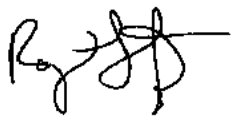
> California's constitution contains an affirmative right of free speech which has been liberally construed by the Supreme Court of California, while the federal constitution's First Amendment contains only a negative command to Congress to not abridge the freedom of speech. This distinction was significant because the U.S. Supreme Court had already held that under the federal First Amendment, there was no implied right of free speech within a private shopping center. The Pruneyard case, therefore, raised the question of whether an implied right of free speech could arise under a state constitution without conflicting with the federal Constitution. In answering yes to that question, the Court rejected the shopping center's argument that California's broader free speech right amounted to a "taking" of the shopping center under federal constitutional law.

However, in this case, we assert that under the federal constitution, there is an implied right of free speech in the public square of the city.

In conclusion, we would appreciate your support of the right to free speech in the public square adjacent to your building. Please do not resist the use of this space by the public unless it conflicts with the actual purpose of your building. I am sure the Occupy San Diego participants will be glad to accommodate your needs for unfettered access to the building. Other than that, any attempt to restrict peaceful political activities in that area, which is part of the public square, is unlawful.

For your convenience, I have attached a copy of the Supreme Court decision on the Pruneyard case.

Sincerely,



Ray Lutz
National Coordinator,
Citizens Oversight Projects

TEXT OF THE PRUNEYARD DECISION:

PRUNEYARD SHOPPING CENTER ET AL. v. ROBINS ET AL.

No. 79-289

SUPREME COURT OF THE UNITED STATES

447 U.S. 74; 100 S. Ct. 2035; 1980 U.S. LEXIS 129; 64 L. Ed.2d 741

March 18, 1980, Argued June 9, 1980, Decided

OPINION: MR. JUSTICE REHNQUIST delivered the opinion of the Court:

Appellant Prune Yard is a privately owned shopping center in the city of Campbell, Cal. It covers approximately 21 acres -- 5 devoted to parking and 16 occupied by walkways, plazas, sidewalks, and buildings that contain more than 65 specialty shops, 10 restaurants, and a movie theater. The Prune Yard is open to the public for the purpose of encouraging the patronizing of its commercial establishments. It has a policy not to permit any visitor or tenant to engage in any publicly expressive activity, including the circulation of petitions, that is not directly related to its commercial purposes. This policy has been strictly enforced in a nondiscriminatory fashion. The Prune Yard is owned by appellant Fred Sahadi. Appellees are high school students who sought to solicit support for their opposition to a United Nations resolution against "Zionism." On a Saturday afternoon they set up a card table in a corner of Prune Yard's central courtyard. They distributed pamphlets and asked passersby to sign petitions, which were to be sent to the President and Members of Congress. Their activity was peaceful and orderly and so far as the record indicates was not objected to by Prune Yard's patrons. Soon after appellees had begun soliciting signatures, a security guard informed them that they would have to leave because their activity violated Prune Yard regulations. The guard suggested that they move to the public sidewalk at the Prune Yard's perimeter. Appellees immediately left the premises and later filed this lawsuit in the California Superior Court of Santa Clara County. They sought to enjoin appellants from denying them access.

THE CALIFORNIA SUPREME COURT [HELD] THAT THE CALIFORNIA CONSTITUTION PROTECTS "SPEECH AND PETITIONING, REASONABLY EXERCISED, IN SHOPPING CENTERS EVEN WHEN THE CENTERS ARE PRIVATELY OWNED." 23 Cal. 3d 899,910,592 P. 2d 341,347 (1979). IT CONCLUDED THAT APPELLEES WERE ENTITLED TO CONDUCT THEIR ACTIVITY ON PRUNEYARD PROPERTY.

Here the requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause. There is nothing to suggest that preventing appellants from prohibition this sort of activity will unreasonably impair the value or use of their property as a shopping center.

The Prune Yard is a large commercial complex that covers several city blocks, contains numerous separate business establishments, and is open to the public at large.

THE DECISION OF THE CALIFORNIA SUPREME COURT MAKES IT CLEAR THAT THE PRUNEYARD MAY RESTRICT EXPRESSIVE ACTIVITY BY ADOPTING TIME, PLACE, AND MANNER REGULATIONS THAT WILL MINIMIZE ANY INTERFERENCE WITH ITS COMMERCIAL FUNCTIONS. APPELLEES WERE ORDERLY, AND THEY LIMITED THEIR ACTIVITY TO THE COMMON AREAS OF THE SHOPPING CENTER.

In these circumstances, the fact that they may have "physically invaded" appellants' property cannot be viewed as determinative. There is also little merit to appellants' argument that they have been denied their property without due process of law. In Nebbia v. New York, 291 U.S. 502 (1934), this Court stated:

"[NEITHER] PROPERTY RIGHTS NOR CONTRACT RIGHTS ARE ABSOLUTE.... EQUALLY

FUNDAMENTAL WITH THE PRIVATE RIGHT IS THAT OF THE PUBLIC TO REGULATE IT IN THE COMMON INTEREST....

The shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public IN PASSING OUT PAMPHLETS or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message. Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or HANDBILLERS stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law. We conclude that neither appellants' federally recognized property rights nor their First Amendment rights have been infringed by the California Supreme Court's decision recognizing a right of appellees to exercise state protected rights of expression and petition on appellants' property. The judgement of the Supreme Court of California is therefore Affirmed.

THE EXERCISE OF FREE SPEECH AT **SHOPPING CENTERS**

In 1980, in Robins v. Pruneyard Shopping Center, the California Supreme Court held that the California Constitution protects speech and petitioning, reasonably exercised, in privately owned shopping centers because the modern shopping center is a "public forum." Large retail malls, it reasoned, are the modern-day equivalent of town squares, and owners of such facilities cannot both invite the public and exclude those who wish to communicate with them.

The Pruneyard decision, however, does not stand for the blanket proposition that every large retail establishment must permit unregulated expressive activity on its property. The Pruneyard court itself limited the obligations of shopping center owners, and subsequent California cases have further trimmed back the Pruneyard holding.

The Pruneyard court specified that owners of "modest real estate establishments" that were not performing the "quasi-town square" function would not need to permit such expressive activity. In addition, it made clear that property owners may reasonably regulate expressive activity as to time, place, and manner. **Subsequent decisions have further defined and narrowed the** original **Prunevard ruling.**

Limiting Free Speech Rights. In 1999, in Trader Joe's Co. v. Progressive Campaigns, Inc., a California appellate court held that an *11,000* square foot Trader Joe 's store did not constitute a public forum that required Trader Joe 's to permit solicitation of signatures from customers and employees without Trade Joe 's consent. This Trader Joe 's was a stand-alone structure that was not part of a shopping center and did not share property with any other retailer. The store had a parking lot containing 68 spaces for the exclusive use of Trader Joe 's patrons and employees.

Using the balancing test cited in Pruneyard, the appellate court held that Trader Joe 's constitutionally protected property interests outweighed the public's interest in using the grocery store as a forum for free speech and petitioning activity. The court determined that Trader Joe 's invitation to the public to visit its store was more limited than the invitation made by a large, regional shopping center. Trader Joe 's invited people to come and shop for food and food-related items, not to meet friends, to eat, to rest or to be entertained, or to congregate. It contained no plazas, walkways or central courtyard where patrons could congregate and spend time together. Further, because the store was a stand-alone structure, there could be no contention that its relationship to other establishments transformed it into a public forum. The court

determined that Trader Joe 's was not a public meeting place, and society had no special interest in using it as such.

Similarly, in Costco Coso v. Gallant *(2002),* the California appellate court determined that the public was invited to Costco's stand-alone stores solely for the purpose of purchasing goods and services and, unlike customers of a large regional shopping center, Costco customers did not come to its stores with the expectation they will meet friends, be entertained, dine or congregate. Accordingly, because Costco's stand-alone stores were not essential forums for the general exercise of free speech, the court upheld a prohibition on expressive activity at Costco's stand-alone stores.

This public-purposes approach was made even more clear in Albertson's, Inc. v. Young *(2003),* in which the court held that the walkway at the entrance to Albertson's grocery store was not a public forum requiring Albertson's to permit expressive activity, even though Albertson's grocery store contained 44,237 square feet, had a large parking lot in front of its store, and was part of a shopping center that contained 10 retail stores (including a *37,000* square foot hardware store), five restaurants and five service businesses (including a travel agency, photo store, video library and mail box rental). The court's reasoning was that, despite the store's size and setting in a large shopping center, the store was a single structure, single-use grocery store that contained no plazas, walkways, or courtyards for congregating. Further, the physical layout of the center was not under unified ownership and had no common areas that would invite the public to meet, congregate, or engage in other activities typical of a public forum that would distinguish the Albertson\'s store from an ordinary stand-alone grocery store.

Reasonable Regulation of Expressive Activity. Even where privately-owned retail establishments may be required to permit expressive activity, California courts have also upheld reasonable regulations for limiting the time, place and manner of that activity.

In the Costco case, the court determined that Costco could impose the following regulations at its stores that share a parking lot with other retailers: (a) no expressive activities on 34 of Costco's busiest days during the year, (b) no individual or organization may use Costco property for expressive activity on more than five days within any 30 day period, (c) no individual or group may use Costco facilities on consecutive weekends, (d) expressive activities may occur only within designated areas in front of Costco stores, (e) only three participants may engage in expressive activity at anyone time, after identifying themselves, and (f) individuals or groups must complete an application at least three days in advance of any expressive activity.

The court found that these regulations were narrowly tailored to protect Costco\'s substantial interests in the smooth operation of its stores. Because the 34-day ban was content neutral, such days were during times when Costco had legitimate reasons to wish to avoid disruption, and more than 300 other days remained in the calendar year in which expressive activity was permitted, the court was satisfied the requirements were a valid regulation of time, place and manner. In addition, the court permitted Costco to enforce its 5 days out of 30 restriction so long as such enforcement was performed on a uniform basis or on the basis of some objective, content-neutral standards.

Likewise, in Lushbaugh v. Home Depot (2003) the California appellate court upheld Home Depot's written policy guidelines allowing non-commercial speech activities in a designated area, on a first-come, first-served basis and upon written application to store management, concluding that such regulations complied with any duty it may have had to provide public access by enforcing reasonable time, place and manner rules.

The emerging trend from these cases is that the crucial element in balancing private property rights against free speech rights is the nature of the premises and the extent to which they have been opened up

to the public for congregation and other public purposes, as opposed to strictly directed commercial purposes. In each of these cases, the retailers did not create an environment that encouraged the public to gather for any purpose other than to purchase goods. However, these cases leave open the question as to how the courts might treat other retail settings that do invite the public to congregate for purposes other than just to buy merchandise or services, as, for example, a large bookstore that (along with its bookselling) invites people to gather and meet in, and even offers performance space in, its cafe.