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OPINION	:	No. 84-901
of	:	MAY 8, 1985
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THE HONORABLE JOHN SEYMOUR, MEMBER OF THE CALIFORNIA STATE SENATE, has requested an opinion on the following questions:

1. May a city authorize by ordinance "controlled access," as described herein, to the public streets in a residential neighborhood?

2. May the Legislature by statute expressly permit a city to authorize by ordinance "controlled access," as described herein, to the public streets in a residential neighborhood?

CONCLUSIONS

1. A city may not authorize by ordinance "controlled access," as described herein, to the public streets in a residential neighborhood.

2. The Legislature may not by statute expressly permit a city to authorize by ordinance "controlled access," as described herein, to the public streets in a residential neighborhood.

ANALYSIS

For purposes of the present inquiry, "controlled access" is described as follows: (1) the neighborhood is a 300 acre site with five streets connecting to a major highway; (2) none of the five streets provide through access to surrounding areas; (3) card key gates would be installed at the entrance to four of the streets which could only be opened by the residents; (4) metal prongs would be placed in the streets near the gates to prevent entrance to the neighborhood except through the gates; (5) in the middle of the fifth street would be installed a guardhouse where a private security guard employed by the residents would observe vehicles entering the subdivision and record the license plate numbers; (6) a "speed bump" would be placed next to the guardhouse to slow traffic; and (7) exit from any of the five streets would be unrestricted. The inquiry is whether a city may by ordinance authorize the construction and operation of the system by a private association of residents.

A city may regulate traffic on its public streets[1] only to the extent it is so expressly authorized in the Vehicle Code. (See *Rumford* v. *City of Berkeley* (1982) 31 Cal.3d 545, 550, 553; *Pipoly* v. *Benson* (1942) 20 Cal.2d 366, 370; *Aguilar* v. *Municipal Court* (1982) 130 Cal.App.3d 34, 37; *City of Lafayette* v. *County of Contra Costa* (1979) 91 Cal.App.3d 749, 754; *People* v. *Moore* (1964) 229 Cal.App.2d 221, 228-229.)[2]

Vehicle Code[3] section 21101 provides:

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[1] While the owners of a private street may place card key gates and a guardhouse upon their street, we note that certain private streets are subject to limited local government control under specified circumstances. (See, e.g., Veh. Code, §§ 21107-21108.)

[2] Regulating the use of the public roads and highways by whatever means is outside the "municipal affairs" constitutional grant of authority to chartered cities. (*Rumford* v. *City of Berkeley*, *supra*, 31 Cal.3d at 550, fn. 3; *County of Los Angeles* v. *City of Alhambra* (1980) 27 Cal.3d 184, 192-193; *Pipoly* v. *Benson*, *supra*, 20 Cal.2d at 369; *Ex Parte Daniels* (1920) 183 Cal.636, 639; *Aguilar* v. *Municipal Court*, *supra*, 130 Cal.App.3d at 37; *City of Lafayette* v. *County of Contra Costa*, *supra*, 91 Cal.App.3d at 753.)

[3] Hereinafter, all section references are to said code, unless otherwise indicated.

"Local authorities, for those highways under their jurisdiction, may adopt rules and regulations by ordinance or resolution on the following matters:

"(a) Closing any highway to vehicular traffic when, in the opinion of the legislative body having jurisdiction, the highway is no longer needed for vehicular traffic.

"(b) Designating any highway as a through highway and requiring that all vehicles observe official traffic control devices before entering or crossing the highway or designating any intersection as a stop intersection and requiring all vehicles to stop at one or more entrances to the intersection.

"(c) Prohibiting the use of particular highways by certain vehicles, except as otherwise provided by the Public Utilities Commission pursuant to Article 2) commencing with Section 1031) of the Chapter 5 of Part 1 of Division 1 of the Public Utilities Code. No ordinance which is adopted pursuant to this subdivision after November 10, 1969, shall apply to any state highway which is included in the National System of Interstate and Defense Highways, except an ordinance which has been approved by the California Transportation Commission by a four-fifths vote.

"(d) Closing particular streets during regular school hours for the purpose of conducting automobile driver training programs in the secondary schools and colleges of this state.

"(e) Temporarily closing a portion of any street for celebrations, parades, local special events, and other purposes when, in the opinion of local authorities having jurisdiction, the closing is necessary for the safety and protection of persons who are to use that portion of the street during the temporary closing.

"(f) Prohibiting entry to, or exit from, or both, from any street by means of islands, curbs, traffic barriers, or other roadway design features to implement the circulation element of a general plan adopted pursuant to Article 6 (commencing with Section 65350) of Chapter 3 of Division 1 of Title 7 of the Government Code. The rules and regulations authorized by this subdivision shall be consistent with the responsibility of local government to provide for the health and safety of its citizens."

As is readily apparent from its terms, section 21101 does not contemplate authorization of the controlled access ordinance at issue. Subdivision (c) might arguably be applicable, except that it is phrased in terms of classes of vehicles (such as trucks, tractors, or excessively noisy vehicles) rather than classes of persons. (*City of Lafayette* v. *County of Contra Costa*, *supra*, 91 Cal.App.3d at 756, fn.2 ["It does not permit exclusion of *classes of persons* from using any of a city's streets"].) Subdivision (f) requires that the circulation element of a general plan be implemented by the ordinance and in any event does not authorize selective closures to some persons and not others. In the absence of any other applicable statute, a city may not by ordinance or otherwise authorize the installation of selective barrier devices. (*City of Lafayette* v. *County of Contra Costa*, *supra*, at 756-757.) In this regard, section 21101.6 expressly provides:

> "Notwithstanding section 21101, local authorities may not place gates or other selective devices on any street which deny or restrict the access of certain members of the public to the street, while permitting others unrestricted access to the street."

It is concluded that a city may not authorize by ordinance "controlled access," as described above, to the public streets in a residential neighborhood.

The second inquiry is whether the Legislature may by statute expressly permit a city to authorize the implementation of such a system. In considering the constitutional dimension of such a program we first examine both the purpose as well as the effect of the proposal, not in terms of its component aspects but as an integrated system, upon the nonresident motorist. First, access is simply prohibited at four of the five entry points. Second, the mere existence of the closed gates at four entry points and of a manned guardhouse and speed bump at the remaining fifth entrance conveys the impression that the area is restricted, that the area is private and not open to public use, and that entry is conditional upon special invitation, permit, or other preestablished criteria. Third, entry is subject to close visual inspection facilitated by reduction of normal rate of speed and by the physical proximity of the centrally located guardhouse, and to the systematic recordation of license plate numbers; thus, the concern is not unwarranted that any nonresident traveler would be suspect in connection with any crime committed in the neighborhood during the period of his presence there.

Most rights secured by the Constitution are protected only against infringement by governments. (*Lugar* v. *Edmondson Oil Co.* (1982) 457 U.S.922, 936.) The equal protection clause of the fourteenth amendment, for example, applies to acts of the states, not to acts of private persons or entities. (*Rendell-Baker* v. *Kohn* (1982) 457 U.S. 830, 837.) Since the perceived deprivation of personal liberty involved in the present inquiry would be "fairly attributable" to the city's action in granting a permit instrumental

to the implementation of the proposal, such action is subject to the constraints of the state and federal constitutions. (Cf. *Lugar* v. *Edmondson Oil Co.*, *supra*, at 937; *Rendell-Baker* v. *Kohn*, *supra*, at 838.) Obviously, such a statute would permit a city to authorize the establishment of a classification between resident and nonresident motorists. Both the state (art.I, § 7) and federal (amend. XIV) constitutions prohibit the state (or its political subdivisions) from denying to any person the equal protection of the laws. With respect to such classifications there are two standards of review. As to classifications which are "suspect" in constitutional terms (e.g., national origin, alienage), or which touch upon a "fundamental interest" (i.e., rights "explicitly or implicitly guaranteed by the Constitution"), strict scrutiny is required and the state bears the burden of establishing that it has a "compelling interest" which justifies the classification and that such classification is necessary to further that purpose or interest. (*San Antonio School District* v. *Rodriguez* (1973) 411 U.S.1, 33-34; *D'Amico* v. *Board of Medical Examiners* (1974) 11 Cal.3d 1, 17-18.) The conventional standard, on the other hand, requires only that differential treatment have some "reasonable basis" or bear "some rational relationship to a conceivable legitimate state purpose." (*Schwalbe* v. *Jones* (1976) 16 Cal.3d 514, 517-518; *Dandridge* v. *Williams* (1970) 397 U.S.471, 485; and see 62 Ops.Cal.Atty.Gen. 106, 107, 113 (1979).)

While the classification in question is not suspect in constitutional terms, it may be argued that it touches upon the fundamental right to travel, thus invoking the strict scrutiny standard of review. In *Escobedo* v. *State of California* (1950) 35 Cal.2d 870, 875-876,[4] the court stated in part:

> "Fundamentally it must be recognized that in this country 'Highways are for the use of the traveling public, and all have ...the right to use them in a reasonable and proper manner, and subject to proper regulations as to the manner of use.' (13 Cal.Jur.371, § 59.) '*The streets of a city belong to the people of the state*, *and the use thereof is an inalienable right of every citizen*, subject to legislative control or such reasonable regulations as to the traffic thereon or the manner of using them as the legislature may deem wise or proper to adopt and impose.' (19 Cal.Jur.54, § 407.) 'Streets and highways are established and maintained primarily for purposes of travel and transportation by the public, and uses incidental thereto. Such travel may be for either business or pleasure . . . *The use of highways for purposes of travel and transportation is not a mere privilege*, *but a common and fundamental right*, of which the public and individuals cannot rightfully be deprived . . . '*[A]ll persons have an equal right to use them for purposes of travel by proper means*, and with due regard for the corresponding rights of others.' (25 Am.Jur.456-457, § 163; see, also, 40 C.J.S. 244-247, § 233.)

[4] Overruled on other grounds in *Rios* v. *Cozens* (1972) 7 Cal.3d 792.

> Notwithstanding such general principles characterizing the primary right of the individual, it is equally well established (as is recognized in the texts above cited) that usage of the highways is subject to reasonable regulation for the public good. In this connection, the constitutionality of various types of financial responsibility laws has been often upheld against contentions that they violated the due process clause of the Fourteenth Amendment. 'The use of the public highways by motor vehicles, with its constant dangers, renders the reasonableness and necessity of regulation apparent. . . ." (Emphases added.)

(And see *Rumford* v. *City of Berkeley*, *supra*, 31 Cal.3d at 549-550.)[5]

In *Hernandez* v. *Department of Motor Vehicles* (1981) 30 Cal.3d 70, 78-79, the court in passing upon a substantive due process challenge to a legislative police power measure stated in pertinent part:

> "Plaintiff contends, however, that although this deferential substantive due process analysis may be appropriate in reviewing most police power measures, the foregoing constitutional principles should not apply to measures which impinge upon an individual's 'right to drive.' Pointing to a number of California cases which indicate that legislative measures which significantly interfere or impinge upon 'fundamental constitutional rights' are properly subjected to 'strict judicial scrutiny' (see, e.g., *Fair Political Practices Com.* v. *Superior Court* (1979) 25 Cal.3d 33, 48-49 (right to petition government); *People* v.*Glaze* (1980) 27 Cal.3d 841, 845-846 (freedom of speech)), plaintiff contends that the 'right to drive' constitutes such a 'fundamental constitutional right.' He argues that legislative measures, such as the instant statute, which operate to limit one's right to drive are constitutional only if they pass muster under the rigorous strict scrutiny standard.
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> "Past California cases, however, provide no support whatsoever for plaintiff's contention." (Citing *Escobedo* v. *State of California*, *supra*, 35 Cal.2d 870.)

As distinguished from *Hernandez* which involved the suspension of a license to drive, the situation presented here involves only a limited restriction upon access to a discrete geographical area. "The test is not whether the penalty imposed on the right to travel is the

[5] Neither *Rumford* nor *Escobedo* concerned any issue respecting a classification between residents and nonresidents in a residential neighborhood.

denial of a fundamental right, . . . [but] whether the penalty is significant and consequential rather than merely inconsequential . . . ." (*Bay Area Women's Coalition* v. *City and County of San Francisco* (1978) 78 Cal.App.3d 961, 969.)

Ector v. *City of Torrance* (1973) 10 Cal.3d 129 involved city residence as a condition of employment by the city. The court stated (*id.*, at 135):

> "Appellant contends in the alternative that respondent's residence requirement must be judged by the 'strict' equal protection test, i.e., must be shown to be 'necessary' to promote a 'compelling' governmental interest. To justify invoking the strict standard of scrutiny, appellant proposes a number of 'fundamental rights' which he asserts are curtailed by the provision in question.
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> "First it is said that the residence requirement impinges on appellant's 'right to travel.' The contention is not persuasive. Viewed realistically, appellant is claiming the right to 'travel' between his home and his place of employment each morning and evening of each working day -- in other words, a 'right to commute.' We cannot discern such a right in the United States Supreme Court decisions relied on by appellant. Clearly the cultural and educational rewards of international travel (*Kent* v. *Dulles* (1958) 357 U.S.116, 126-127) are not reaped from routine daily trips of a harassed metropolitan commuter. Nor have such trips any relevance whatever to the right to migrate among the several states for the purpose of starting a new life without fear of being denied welfare if a job is not immediately available (*Shapiro* v. *Thompson* (1969) 394 U.S. 618), or to the right to move within the confines of a state for the same purpose without fear of being denied prompt access to public housing facilities (*King* v. *New Rochelle Municipal Housing Authority* (2d Cir.1971) 442 F.2d 646; *Cole* v. *Housing Authority of City of Newport* (1st Cir. 1970) 435 F.2d 807)."

In our view, the right to use city streets for the purpose of travel does not fall within that category of fundamental rights as to invoke the strict scrutiny standard of review in connection with an equal protection analysis. (Accord, *People* v. *Housman* (1984) 163 Cal.App.3d Supp.43, 52.)

Another right which is fundamental is the right of privacy. In 67 Ops.Cal.Atty.Gen.414, 419 (1984) we summarized:

> "In this state, privacy is expressly declared to be an inalienable right. (Cal.Const., art.I, § 1.) Although it has been only 12 years since the people

> elected to place privacy among the inalienable rights expressly guaranteed in the Declaration of Rights, traditional principles of constitutional law inform its application. (*Fults* v. *Superior Court* (1979) 88 Cal.App.3d 899, 903.) Prior to 1972, privacy had been identified as a fundamental liberty implicitly guaranteed by the federal Constitution; as such, it is protected even from incidental encroachment absent the demonstration of some compelling interest that is both legitimate and overriding. (*Id.*)"

A concern arises in connection with the observation and recordation of license plate numbers. Quoting the 19th century historian, Sir Thomas Eskin May, the Supreme Court in *White* v.*Davis* (1975) 13 Cal.3d 757, 776, emphasized the consequences of unbridled surveillance:

> "'Next in importance to personal freedom is immunity from suspicious and jealous observation. Men may be without restraints upon their liberty; they may pass to and from at pleasure: but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators, - who shall say that they are free? Nothing is more revolting . . . than the espionage which forms part of the administrative system of continental despotisms. It haunts men like an evil genius, chills their gayety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency.'"
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> As a noted commentator has more recently observed:
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> "[O]ne of the central elements of the history of liberty in Western societies since the days of the Greek city-state has been the struggle to install limits on the powers of economic, political and religious authorities to place individuals and private groups under surveillance against their will. The whole network of American constitutional rights . . . was established to curtail the ancient surveillance claims of governmental authorities." (Westin, Privacy and Freedom (1967) p.57.)

It cannot fairly be asserted, however, that there is a "reasonable expectation of privacy" (cf. *Burrows* v. *Superior Court* (1974) 13 Cal.3d 238, 243; *Doyle* v. *State Bar* (1982) 32 Cal.3d 12, 19-20) in one's license number or location on a public street. "[T]here simply can be no reasonable expectation of privacy in that which is already public." (*Stackler* v. *Department of Motor Vehicles* (1980) 105 Cal.App.3d 240, 247.)

We turn, therefore, to an equal protection analysis under the less stringent conventional standard of review. As previously noted, "[A]ll persons have an equal right to use [the public streets] for purposes of travel by proper means . . . ." (*Rumford* v. *City of Berkeley*, *supra*, 31 Cal.3d at 550.) In *Arlington County Board* v. *Richards* (1977) 434 U.S.5, 7 the United States Supreme Court sustained the constitutional validity of a preferential parking ordinance:

> "To reduce air pollution and other environmental effects of automobile commuting, a community reasonably may restrict on-street parking available to commuters, thus encouraging reliance on car pools and mass transit. The same goal is served by assuring convenient parking to residents who leave their cars at home during the day. A community may also decide that restrictions on the flow of outside traffic into particular residential areas would enhance the quality of life there by *reducing noise*, *traffic hazards*, *and litter*. By definition, discrimination against nonresidents would inhere in such restrictions.
>
> "The Constitution does not outlaw these social and environmental objectives, nor does it presume distinctions between residents and nonresidents of a local neighborhood to be invidious. *The Equal Protection Clause requires only that the distinction drawn by an ordinance like Arlington's rationally promote the regulation's objectives*. See *New Orleans* v. *Dukes*, 427 U.S.297, 303 (1976); *Village of Belle Terre* v. *Boraas*, 416 U.S.1, 8 (1974). On its face, the Arlington ordinance meets this test." (Fn. omitted; emphases added.)

(See also *People* v. *Housman*, *supra*, 163 Cal.App.3d Supp.at 50.)

The situation here considered differs from *Arlington* in a number of respects. First, the proposed restriction is at the point of entry. Second, the license plate number of each nonresident motorist is systematically recorded. Most important, in any event, is the absence of any factual predicate respecting any legitimate governmental objectives. Our research has revealed no legitimate objectives which would support the Legislature's enactment of the type of statute in question. Absent such a legitimate governmental objective which would provide a constitutionally sufficient rational basis for such an ordinance, it is concluded that the Legislature may not by statute expressly permit a city to authorize by ordinance "controlled access" to the public streets in a residential neighborhood.

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