



CITY OF BIG BEAR LAKE *California*

MEETING

DATE: October 12, 2020

TO: Honorable Mayor and Members of the City Council

FROM: Frank A. Rush, Jr., City Manager

SUBJECT: Review of City of Big Bear Lake Authority to Restrict Access and/or Issue Evacuation Orders

ACTION TO BE CONSIDERED

The City Manager and City Attorney will review applicable State law and City ordinances that permit the City to restrict access to and from the City and/or order the evacuation of residents and visitors during emergency situations. The City Manager and City Attorney will also review the limits of the City's authority, discuss the role of other State and local authorities involved in such decisions for the City and the entire Big Bear Valley, cite recent specific examples, and note other practical concerns. City Council is encouraged to present additional questions and requests for additional information as desired.

BACKGROUND

The City has faced threats from both the COVID-19 pandemic and the El Dorado Fire in recent months, and there have been numerous requests from City residents, from residents in unincorporated areas outside the City of Big Bear Lake, and others for the City to take action to restrict access to and from the Big Bear Valley due to these emergencies.

As noted in this report and the attached memorandum from Stephen Deitsch, City Attorney, there are important legal considerations and restrictions on the City's authority. Additionally, there are important public safety and practical considerations, and ultimately the City Council and City Manager are charged with making appropriate judgments for our community after considering the public safety, legal, and practical issues.

To this point, neither the City (nor any other State or local government authority) has restricted access or ordered evacuations from the City or the Big Bear Valley due to COVID-19 or the El Dorado Fire. These decisions, by the City and other State and local government authorities, were made in close coordination with other government agencies and with careful consideration of the public safety, legal, and practical issues.

DISCUSSION

As noted in the attached memorandum from the City Attorney, there are two fundamental legal points to consider in this discussion:

1. the City's authority is limited to the ~ 6.5 square miles included in the City limits, and the City has no authority over the remainder of the inhabited Big Bear Valley (estimated at more than 30 square miles in close proximity to SR 18 and SR 38 between the dam and the Baldwin Lake community), and
2. the City is empowered to restrict access, order a curfew, and/or order an evacuation if and when reasonably related to the protection of life and property.

The first of these two points is straightforward and does not require any judgment, but is frequently misunderstood by residents outside the City limits. The City's authority, in every matter we confront, is limited to the area generally located between the Castle Rock trailhead on SR 18 on the western end of the City and the intersection of SR 18 and Division Drive on the eastern end. The lake itself is not in the City limits, and the City boundary is on the southern edge of Stanfield Cutoff near its intersection with SR 18. The western half of the upper Moonridge area is the City limits, while the eastern half is in unincorporated San Bernardino County.

The City may certainly take action to restrict access and/or order an evacuation from the City limits, however, this action would not apply to Fawnskin, Big Bear City, Baldwin Lake, Erwin Lake, or any other unincorporated areas in the Big Bear Valley. The City simply has no authority whatsoever in these areas, and any decisions to restrict access and/or order an evacuation from these areas would fall to San Bernardino County and/or other State and local government agencies with authority over these areas.

The second of these two points, i.e., the assessment of the emergency threat and the degree of action necessary to protect life and property, requires judgment, and in the City of Big Bear Lake that judgment ultimately rests with the City Council and the City Manager. In reality, the City regularly consults and coordinates with State and County officials, law enforcement officials, Fire officials, and public health officials to assess both the *nature* and *immediacy* of any emergency threat, and makes these judgments in a collaborative manner that considers the expertise of all of these partners. The City has used that approach for both COVID-19 and the El Dorado Fire, and I expect the City to continue to utilize this approach for any future emergencies that may impact the City of Big Bear Lake.

In the case of COVID-19 (continually evolving since mid-March), both the *nature* and *immediacy* of the emergency threat have not risen to the level of formally restricting access to and from the City of Big Bear Lake, and the legality of such an action is questionable. There are other tools available to protect life and property for the COVID-19 emergency, and various tools have been utilized by the State, County, and City since mid-March. These tools have included restrictions on which types of businesses may operate and how, prohibitions on certain types of events and activities, the use of face coverings, social distancing guidelines, community testing events, and more. To my knowledge, no cities or counties in California are legally restricting access to their communities due to the COVID-19 emergency, and no Federal, state, and local roads have been closed in California due to COVID-19.

In the case of the El Dorado Fire, the City is fortunate that Fire crews were able to sufficiently contain the spread of the fire so that it (thankfully) never became an *immediate* threat to the City of Big Bear Lake or anywhere else in the Big Bear Valley. Various trigger points were established by Fire incident commanders, and if the El Dorado Fire had reached certain locations closer to the City, it is likely that Fire incident commanders and/or the City would have issued evacuation

warnings and evacuation orders. The *nature* of the threat of the El Dorado Fire likely would have warranted a restriction on access, however, the *immediacy* of the threat did not – as the fire remained more than 5 miles away from the City with additional Fire containment strategies still available to Fire crews. Had the fire, for example, reached the Santa Ana River, it is almost certain that the evacuation of certain areas in the City (but likely not all areas of the City or the Big Bear Valley) would have been initiated, and access to and from these areas by everyone would have been restricted.

There has been considerable discussion suggesting that the City should have prevented non-residents from accessing the Big Bear Valley due to COVID-19 and the El Dorado Fire. It is again important to note that any action taken by the City would apply only to the ~ 6.5 square miles within the City limits, and that the *nature* and *immediacy* of the threat must warrant such action. It is also important to note that any such action would apply equally to residents, second home owners, and visitors. For example, if an evacuation order was issued, and a City resident left the City limits to travel for work, family, or personal business outside the City limits, they would not have been permitted to re-enter the City. Similarly, if the City restricted access to the City limits, residents of Fawnskin, Big Bear City, and other unincorporated areas would not be permitted to enter the City to shop at grocery stores, drug stores, or other businesses, or to visit family or friends. Essentially, the City would be taking action to require everyone in the City to leave, and allowing no one to re-enter the City until the *nature* and *immediacy* of the threat had ended. San Bernardino County and/or other State or local authorities had the authority to take similar actions in Fawnskin, Big Bear City, and other unincorporated areas in the Big Bear Valley, however, no such orders were issued for any area of the Big Bear Valley for COVID-19 or El Dorado Fire, thankfully.

In the event that an evacuation order had been issued and the El Dorado Fire had caused significant damage in the City limits, resulting in lingering post-fire public safety concerns, I believe the City could limit access to the City limits to property owners only - for the purpose of checking their property and salvaging any remaining property – due to the *nature* and *immediacy* of those specific post-fire threats (for example, debris in roadways, electrical lines down, gas lines damaged, unstable structures, etc.). However, if the fire (fortunately) bypassed the City and the *nature* and *immediacy* of the threat had ended, the City would be required to allow access to everyone.

The City Attorney will expand on the legal provisions and limitations in greater detail during the October 12 Council meeting. It is also important to note that specific efforts relative to non-resident access were considered for both COVID-19 and the El Dorado Fire. When the City was discussing a responsible COVID-19 business reopening plan in early May, the City initially sought to establish checkpoints on SR 18 and SR 38 entering the Big Bear Valley for the sole purpose of providing direct, one-on-one, courtesy education about the need to maintain social distance and to wear face coverings in the Big Bear Valley. After consultation with law enforcement officials and the City Attorney, the City learned that it did not even have that authority (let alone restricting access entirely), either in the City limits or outside the City limits. Additionally, when the El Dorado Fire continued to migrate north of the Forest Falls and Mountain Home communities, representing a greater concern for the Big Bear Valley, the Fire Chief and I discussed the establishment of checkpoints on SR 18 at Snow Valley and SR 38 at the Mitsubishi plant to check identification and prevent non-residents and non-property owners from entering the Big Bear Valley. This approach was not approved by Fire incident commanders primarily because there was not an *immediate* threat to the Big Bear Valley and because law enforcement officials objected to implementing that restriction on State highways. In that instance, it is important to note that, if approved, such an action would have been implemented by Fire incident commanders and not the City. An argument could potentially be made that the City could have taken such an action at the

City limits, however, because the threat was not *immediate*, the legality would have been questionable and all other non-residents (including those living elsewhere in the Big Bear Valley) would have also been prevented from accessing the City.

Finally, it is important to also consider the practical ramifications of such actions. There are three key concerns that Council should thoughtfully consider as we confront future decisions. First, it is critical to maintain public confidence for future evacuation decisions, and not overreact or act prematurely when the threat is not *immediate*. In short, we don't want to "cry wolf", and then have the public ignore future evacuation orders when the threat may be greater and urgent. Second, the implementation of an evacuation order (or other action to restrict access) is a labor-intensive effort that requires significant law enforcement and other staff resources to implement effectively. Additionally, although some may perceive "gray areas" in determining who should be permitted to enter the City and why, it is necessary to operate in "black and white" once such a restriction is implemented. This process inevitably leads to conflict and discord in the community, and the implementation of such restrictions should only be implemented in a thoughtful, uniform, and consistent manner.

FISCAL IMPACT

There is no fiscal impact associated with the City Council review of these issues, except for expenses associated with the City Manager's and City Attorney's time spent preparing for this review.

ENVIRONMENTAL CONSIDERATIONS

None requiring review under the California Environmental Quality Act (CEQA).

RECOMMENDED MOTION

No formal action required. City Council should review the information presented, and present any further questions or requests for additional information to the City Manager and/or City Attorney as desired.

ATTACHMENT

1. Memorandum from Stephen Deitsch, City Attorney.

ATTACHMENT 1



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Memorandum

ATTORNEY WORK PRODUCT
ATTORNEY-CLIENT PRIVILEGE

To: Honorable Mayor and Members of the City Council
From: Stephen P. Deitsch
Date: October 6, 2020
Re: The Authority of the City Council and the City Manager to Restrict Travel and/or Order Evacuations During Emergencies
File No.: 19361.00000

QUESTIONS PRESENTED

What authority do the City Council and the City Manager have to restrict travel and/or order evacuations during emergencies? Who else has the authority to restrict travel and/or order evacuations within the City of Big Bear Lake (“City”) and/or the areas surrounding the City? Must any measures taken by the City Council or the City Manager be applied equally to both City residents and non-residents?

ANALYSIS

I. Restrictions on Travel

The ability of the City Council and/or the City Manager to restrict travel to and/or from the City and/or its surrounding areas will naturally depend on the ability of the City to prevent individuals from using public streets and highways. Courts have described individuals’ right to use public streets and highways as “a common and fundamental right, of which the public and individuals cannot rightfully be deprived.”¹ Moreover, state law expressly preempts local regulation regarding the use of public streets and highways.² Accordingly, “any right of a local authority to interfere with the free flow of traffic, such as closing a street, must be derived from an express delegation of authority from the [State] Legislature.”³

Vehicle Code section 21101 specifies under which instances a local authority may close a street. Specifically, subdivision (e) of Vehicle Code section 21101 provides that a local authority may temporarily close a street “for celebrations, parades, local special events, and *other purposes* when, in the opinion of local authorities having jurisdiction *or a public officer or*

¹ *Citizens for Improved Sorrento Access, Inc. v. City of San Diego* (2004) 118 Cal.App.4th 808, 817 [13 Cal.Rptr.3d 259, 266].

² Vehicle Code, § 21; 75 Ops. Cal. Atty. Gen. 80 (1992).

³ California Governor’s Office of Emergency Services (“CalOES”), *Legal Guidelines for Controlling Movement of People and Property During an Emergency* at p. 25, available at [https://www.caloes.ca.gov/PlanningPreparednessSite/Documents/Legal%20Guidelines%20for%20Controlling%20Movement%20People%20Property%20\(FEAT%20doc\).pdf](https://www.caloes.ca.gov/PlanningPreparednessSite/Documents/Legal%20Guidelines%20for%20Controlling%20Movement%20People%20Property%20(FEAT%20doc).pdf) [hereinafter *Legal Guidelines*].



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employee that the local authority designates by resolution, the closing is necessary for the safety and protection of persons who are to use that portion of the street during the temporary closing.” (Emphasis added.) During an emergency, such as a flood, fire, or epidemic, it may be necessary for the City Council to close a public street or highway “for the safety and protection” of the public. Accordingly, pursuant to Vehicle Code section 21101, subdivision (e), the City Council is likely empowered to close public streets and highways during an emergency.

However, the language of the statute indicates that the City Manager will only be empowered to do so if the City Council has expressly authorized him or her to do so by resolution because, as to public officers and employees, the statute only vests such authority to those public officers and employees “that the local authority designates by resolution.” Moreover, the language of the statute suggests that the City Council, and the City Manager if so authorized by resolution of the City Council, would only be authorized to close streets and highways under its jurisdiction—i.e., within the City—because it vests such authority only in local authorities “having jurisdiction.” For areas outside of the City, the City would have to rely on other local authorities having jurisdiction over those areas. That would be the County of San Bernardino (“County”) for any unincorporated areas.

II. Evacuation Orders

According to the CalOES, “[a] governing body may impose voluntary or mandatory evacuation orders pursuant to the general police power with which government is imbued.”⁴ The “police power” generally “enables governments to take action for the good of the public,” so “governing bodies may enact laws, ordinances, or regulations to protect the health, safety, morals, or general welfare of the population.”⁵ Moreover, the California Constitution expressly provides that “[a] county or city may make and enforce within its limits all local, *police*, sanitary, and other ordinances and regulations not in conflict with general laws.”⁶

However, CalOES also notes that “the preferred practice is to order an evacuation pursuant to statutory authority, e.g. the Emergency Services Act.”⁷ The Emergency Services Act (“ESA”) expressly provides that “[d]uring a local emergency the governing body of a political subdivision, or officials designated thereby, may promulgate orders and regulations necessary to provide for the protection of life and property, including orders or regulations imposing a curfew within designated boundaries where necessary to preserve the public order and safety.”⁸ Moreover, the ESA defines a “local emergency” to include those “caused by conditions such as air pollution, fire, flood, storm, epidemic, riot, drought, cyberterrorism, sudden and severe energy shortage, plant or animal infestation or disease, the Governor's warning of an earthquake

⁴ *Legal Guidelines, supra*, at p. 7.

⁵ *Ibid.*

⁶ Cal. Const., art. XI, § 7

⁷ *Legal Guidelines, supra*, at p. 7.

⁸ Gov. Code, § 8634.



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or volcanic prediction, or an earthquake, or other conditions, other than conditions resulting from a labor controversy.”⁹

Accordingly, both under its general police powers and under the ESA, the City may likely order evacuations from the City during an emergency. Doing so under the ESA would allow the City to punish those who violate its evacuation order under the provisions it has established in Big Bear Lake Municipal Code section 2.24.090. Moreover, since the City Council has designated the City Manager as its Director of Emergency Services and empowered the Director “[t]o make and issue rules and regulations on matters reasonably related to the protection of life and property as affected by such emergency,” then the City Manager would additionally be authorized to issue an evacuation order, provided that such order is “confirmed at the earliest practicable time by the city council.”¹⁰

Moreover, the City’s police department is empowered to issue a mandatory evacuation order “[w]henever a menace to the public health or safety is created by a calamity *including* a flood, storm, fire, earthquake, explosion, accident, or *other disaster*.”¹¹ (Emphasis added.) However, the authority of the City’s police department to order an evacuation does not apply to duly authorized representatives of any news service, newspaper, radio, or television station or network, unless the police determine that unrestricted access would interfere with emergency operations.¹² An individual who remains in the evacuation area “and who willfully remains within the area after receiving notice to evacuate or leave” is guilty of a misdemeanor.¹³

The County may declare its own local emergency and issue relevant orders, including an evacuation order, that will apply to the unincorporated areas surrounding the City, but also within the City.¹⁴ Additionally, under Penal Code section 409.5, subdivision (a), certain officers of the State may issue evacuation orders. For federal lands, Courts have upheld the issuance of evacuation orders by agencies of the federal government in cases where “a life-threatening emergency could reasonably be found to exist.”¹⁵ Accordingly, the U.S. Forest Service may be authorized to order evacuations in areas of the San Bernardino National Forest.

III. Application of Measures to Residents and Non-residents

The U.S. Supreme court has held that municipal action that discriminates between residents and non-residents may violate the Privileges and Immunities Clause of Article 4 of the U.S. Constitution.¹⁶ There is a two-prong test to determine whether that is the case: (1) whether

⁹ Gov. Code, § 8558

¹⁰ See Big Bear Lake Municipal Code section 2.24.060, subdivision (A)(6)(a).

¹¹ Pen. Code, § 409.5, subd. (a).

¹² See Penal Code, § 409.5, subd. (d); *Leiserson v. City of San Diego* (1986) 184 Cal. App. 3d 41, 51.

¹³ Penal Code, § 409.5, subd. (c).

¹⁴ See Gov. Code, § 8630, subd. (a); 62 Op.Atty.Gen. 701, 11-16-79.

¹⁵ See, e.g., *Thames Shipyard and Repair Co. v. U.S.* (1st Cir. 2003) 350 F.3d 247, 261 [Coast Guard was empowered to evacuate a vessel].

¹⁶ *United Bldg. and Const. Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden* (1984) 465 U.S. 208, 217 [104 S.Ct. 1020, 1027, 79 L.Ed.2d 249]



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the challenged action implicates a fundamental right covered by the Privileges and Immunities Clause and (2) whether there is a “substantial reason” for the discriminatory action.

With respect to travel restrictions and evacuations, it seems clear that the first prong would be satisfied given that both implicate the right to travel, which is one of the rights most commonly associated with the Privileges and Immunities Clause.¹⁷ The harder question is whether the City has a “substantial reason” for the discriminatory action in each instance. Unfortunately, there is little guidance on this issue in the context of emergencies. Nevertheless, with respect to evacuations, it would make sense for an order to apply equally to both residents and non-residents alike from the outset given that it would be difficult for the City to argue that it would be safe for residents to remain in the City, but too unsafe for non-residents to remain there during an ongoing threat. However, once the immediate threat has subsided, the City could likely allow residents to reenter sooner than non-residents, but only if they have a reason to enter that is unique to them, such as the need to check on and/or recover property, which could constitute “substantial reasons” for the discriminating between residents and non-residents.

In the context of an epidemic, such as COVID-19, there may be good arguments for why the restrictions would not be applied equally to residents and non-residents from the outset. However, it is unlikely a court would uphold the distinction without sufficient analysis of the risks and compelling justification for the distinction.

CONCLUSION

The City Council may restrict travel to and from the City when it is authorized to close streets during emergencies, in accordance with Vehicle Code section 21101. Moreover, the City Council may delegate its authority to close streets to the City Manager. As to evacuation orders, the City may issue such orders within the City pursuant to its police powers, as well as under the ESA, during emergencies. For areas outside of the City, the authority to restrict travel and/or order evacuations will lie with the County, the State, or relevant agencies of the federal government, depending on who has jurisdiction over the streets or land at issue. Lastly, any measures taken by the City Council or the City Manager should generally be applied equally to both City residents and non-residents, except that the City may discriminate between the two when it has “substantial reasons” for doing so.

Please let me know if you have any questions or concerns regarding the foregoing.

STEPHEN P. DEITSCH
ABRAHAM J. GALVAN SANCHEZ

cc: Frank A. Rush, Jr., City Manager

¹⁷ See, e.g., *Zobel v. Williams* (1982) 457 U.S. 55, 66 [102 S.Ct. 2309, 2316, 72 L.Ed.2d 672]