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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

CONSTITUTIONALITY OF THE CITY'S REGULATION OF "FOR SALE" SIGNS ON
PARKED VEHICLES

INTRODUCTION

In 1978, the California Appellate Court, Alameda County, held unconstitutional a Berkeley ordinance prohibiting the operator of any vehicle from parking upon any city street "for the principal purpose of demonstrating it or displaying it for sale, unless authorized by resolution of the Council." *People v. Moon*, 89 Cal. App. 3d Supp. 1 (1978).

The Court stated in *People v. Moon* that "Berkeley could achieve its interest by restricting the size, quantity, and nature of the communication media without prohibiting all attempts to communicate the message." At the time, the City of San Diego's [City] regulation of "for sale" signs on parked vehicles was similar to the one that was struck down by the court in the *Moon* case. Following the *Moon* decision, the City amended its regulation, Municipal Code section 86.23(a), to allow private owners to advertise automobiles for sale by displaying a sign no greater than eight and one-half inches by eleven inches. The City's amendment limiting the size of the sign was designed to preserve a valid city aesthetic interest within the interpretation of *People v. Moon*.

Later cases have held the regulation of parking to be preempted by state law, with local regulation permitted only to the extent it is expressly delegated to local authorities. *Rumford v. City of Berkeley*, 31 Cal. 3d 545 (1982). This report discusses the effect of the *Rumford* case and First Amendment concerns on the enforceability of the City's existing regulation of "for sale" signs on parked vehicles and recommends its repeal.

DISCUSSION

Commercial speech is a constitutionally protected First Amendment right. *Linmark Associates, Inc. v Willingboro*, 431 U.S. 85 (1977). In *Linmark*, a Willingboro, New Jersey ordinance prohibited the posting of “for sale” signs on real estate. The government justification was that the signs would help stem “white flight” from the community. However, the Supreme Court found the regulation to be content based, and not even the stated rationale was sufficient to overcome the First Amendment protection provided to commercial information.

At issue in *Moon* was a Berkeley ordinance prohibiting anyone from parking on a city street for the principal purpose of displaying the vehicle for sale. In finding the ordinance an unconstitutional restriction on commercial speech, the court applied a three-step test for constitutionality (the *Linmark* test) by first assessing the importance of the governmental objective. The stated reasons for the ordinance, aesthetics and traffic management, were found to be significant municipal interests. Having established the importance of the governmental objective, the court moved on to the second step, determining whether the ordinance was necessary to meet the objective. The court found that prohibiting all for sale signs on vehicles was not necessary to meet the objectives of aesthetics or traffic management, and suggested that Berkeley could instead achieve its interest by restricting the size, quantity, and nature of the communication. The court found that the third step, balancing the governmental interests against the appellant's First Amendment rights, would not conclude in Berkeley's favor either, as its interests in aesthetics and traffic management were not nearly as significant as the objective claimed by the City of Willingboro, which was racial integration.

In response to the decision in *Moon*, the City amended the Municipal Code in 1980 to meet the “necessary” requirements of the *Linmark* test by restricting the size, quantity, and nature of the for sale sign, without prohibiting all attempts to communicate that the car was for sale. Currently, a sign on a car communicating that the car is for sale cannot be greater than eight and a half inches by eleven inches, and the sign must be on a side window in such a way as to not block the driver's view. Since the decision in *Moon*, the regulation of traffic, including parking, has been held to be preempted by state law, and local regulation is permitted only to the extent it is expressly delegated. *Rumford v. City of Berkeley*, 31 Cal. 3d at 550; 73 Op. Cal. Att'y Gen. 13 (1990). None of the express grants of authority to regulate parking would provide for a prohibition of “for sale” signs.

Applying a First Amendment analysis to the City's current regulation, governmental objectives of aesthetics and traffic management are important, but the ordinance would fail the second part of the test because the ordinance is not necessary to meet the objective. For example, the ordinance does not limit the use of other types of signs or parking for other reasons.

Due to recent challenges to the City's regulation, we have examined the ordinance in light of the decision in *Rumford*. In our opinion, the City's current ordinance prohibiting “for sale” signs larger than a particular size on parked vehicles is preempted by state law. There is no express grant of authority that would allow local regulation of this type. Furthermore, the

THE HONORABLE
MAYOR AND CITY COUNCIL
January 14, 2003
Page 3

ordinance would not likely withstand scrutiny of its restrictions on commercial speech. In December 2001, the Parking Management Division of the Transportation Department suspended enforcement of this ordinance.

CONCLUSION

In light of the decision in *Rumford v. City of Berkely*, the City's regulation of "for sale" signs on parked vehicles is preempted by state law. Furthermore, a First Amendment analysis of the restriction on commercial speech leads to the conclusion that the ordinance likely violates the First Amendment. We recommend that this Municipal Code section be repealed. An ordinance repealing this section has been prepared for the Council's consideration. The Transportation, Neighborhood Code Compliance, and Police Departments, along with the Abandoned Vehicle Abatement Authority, have been working with volunteers in several communities in an effort to address the specific parking issues in those communities.

Respectfully submitted,

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