# MEMORANDUM OF LAW

**DATE:** July 25, 2001

**TO:** Council Member Toni Atkins

**FROM:** City Attorney

**SUBJECT:** Sign Regulations for Businesses With a Mixture of Adult and Non Adult Uses

## QUESTION PRESENTED

May the City require businesses using fifteen percent or less of their floor space to sell sexually oriented products to use only fifteen percent or less of their onsite sign space for advertising or identifying those adult products?

## SHORT ANSWER

No. There are no current regulations in the Municipal Code limiting the sign content of mixed use adult businesses in this manner. Amending the Code to create such a restriction will require evidence that businesses devoting fifteen percent or less of their display space to adult products create adverse secondary effects on the surrounding community. Without this evidence or proof of other compelling governmental interests, the City cannot justify restricting the sign content of mixed use businesses.

## ANALYSIS

### I

**NO CURRENT PROVISIONS IN THE MUNICIPAL CODE ALLOW THE CITY TO LIMIT THE SIGN CONTENT OF MIXED USE ADULT BUSINESSES.**

Chapter 14, Article 1, Division 6 of the City's Municipal Code [the Code] regulates adult entertainment businesses, which includes "any business that devotes more than fifteen percent of the total display" to products depicting specified sexual activities or specified anatomical areas. San Diego Municipal Code 141.0601(a)(2). Businesses that dedicate fifteen percent or less of their display space to sexually oriented products do not meet this definition and face no additional regulation under the division. At the same time, nothing in the Code's sign regulations prevents these businesses from using more than fifteen percent of their allowable onsite sign space to advertise the availability of sexually oriented products. As long as the sign lists a product or service lawfully found on the premises, the Code does not regulate the content of the sign. San Diego Municipal Code 142.1210(a)(1)(A). The result is that a business may use some or all of their allotted sign space to advertise any product offered for sale on the premises, including adult items.

**II**

**THE CITY MAY AMEND THE CODE TO REQUIRE BUSINESSES USING FIFTEEN PERCENT OR LESS OF THEIR FLOOR SPACE FOR ADULT PRODUCTS, TO USE ONLY FIFTEEN PERCENT OR LESS OF THEIR SIGN SPACE TO ADVERTISE OR IDENTIFY THOSE PRODUCTS, SUBJECT TO CERTAIN REQUIREMENTS.**

Attempts to regulate signs invoke the free speech protections of the First Amendment to the United States Constitution. The courts have divided speech regulations into two groups. Restrictions that restrain speech on the basis of its content presumptively violate the First Amendment unless the law advances a compelling governmental interest by the least restrictive means. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). By contrast, laws that regulate the time, place, and manner of speech without regard to content are acceptable, "so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres Inc.*, 475 U.S. 41, 47 (1986) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). For commercial speech, such as signs identifying or advertising a business, the courts have applied a similar test to content neutral regulations. *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). Where the commercial speech concerns lawful activity and is not misleading, the government may restrict it if it shows a substantial governmental interest, the restriction directly advances that interest, and it reaches no further than necessary to accomplish the interest. *Id*.

A restriction on signs advertising adult products based on the percentage of floor space a business uses to sell those products will necessarily focus on the content of commercial speech.

In cases where the government has regulated the speech content of a sexually oriented business, the United States Supreme Court has nevertheless treated the restrictions as content neutral where evidence exists of the speech's secondary effects on the surrounding community. *Renton*, 475 U.S. at 49 (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976)). In *Renton*, the Court essentially found a substantial government interest when it reasoned that such regulations permissibly aim at reducing the secondary effects of speech rather than at the content of the speech itself. *Id*. Examples of secondary effects from adult businesses would include reduced property values, increased crime, and neighborhood blight. *Id*. at 48. In order to justify its restriction, the government must provide factual evidence of these secondary effects. *Id*. at 51. However, the Court does not require a city "to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id*. At the same time, the regulation must be "'narrowly tailored' to affect only that category of [businesses] shown to produce the unwanted secondary effects." *Id*. at 52 (quoting *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981)).

While *Renton* addressed the free speech rights of an adult theater, few cases have focused on businesses with a mixture of adult and non-adult uses. In *Wolff v. City of Monticello*, 803 F. Supp. 1568 (D. Minn. 1992), a city passed an ordinance that created two categories of adult uses: "adult use/accessory" for businesses which provided sexually oriented products on a limited scale, and "adult use/primary" for businesses that provided these goods as part of their primary activity. Finding adverse impacts on surrounding neighborhoods, the city limited both uses to particular areas, established a licensing system, and prohibited adult use/accessory businesses from identifying and advertising adult products by sign. *Id*. at 1570. Plaintiffs operated video stores with less than ten percent of their floor space comprised of adult videos, and claimed the city failed to make sufficient findings that adult use/accessory businesses created the same adverse secondary effects on the community as adult use/primary businesses. While noting that nothing in *Renton* prevented the city from setting up a two tiered system, the court found no facts in the legislative record which justified the identical treatment of all businesses dealing in sexually oriented material:

> [T]he Court finds that the city has failed to show that its regulatory scheme is narrowly tailored to affect only the category of businesses shown to produce the unwanted secondary effects...Defendant appears to believe that because businesses that deal primarily in sexually explicit material create adverse secondary effects, it can be assumed that businesses that deal in such material on a limited scale create the same effects. Defendant points to no evidence, however, showing that such an assumption is valid.

*Id*. at 1573. Using this rationale, the court enjoined the city from enforcing both the licensing system and the restraint on signs as applied to adult use/accessory businesses. *Id*. at 1575-1576.

> *Wolff* shows the difficulties with limiting signs of mixed use businesses. To gain less demanding judicial review of a sign ordinance, the City must show that businesses which devote fifteen percent or less of their store space to adult products create secondary effects on the surrounding community. However, most evidence of secondary effects

comes from studies of businesses that are largely sexually oriented, such as adult theaters or nude dancing venues. *See*, *Renton*, 475 U.S. 41 (adult theater); *Young*, 427 U.S. 50 (adult theater); *City of Erie v. PAP's A.M.*, 529 U.S. 277 (2000) (nude dancing establishment); *Lim v. City of Long Beach*, 217 F.3d 1050 (9th Cir. 2000) (adult book and video stores, adult mini-theaters); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988) (nude dancing establishment). While *Wolff* would likely allow the City to divide businesses into two classes, a speech based regulation on all businesses which sell adult products would require concrete evidence that currently does not exist. This regulation would not only be unjustifiable, but it would also cover an impermissibly wide breadth of businesses, including most video stores and newsstands.

Without proof of secondary effects, a court would harshly review a regulation on mixed use adult businesses because of the law's focus on speech content. The City would then need to show how the restriction advances a compelling governmental interest by the least restrictive means. However, if no secondary effects create a substantial government interest under the moderate *Renton* analysis, then no facts could likely ever show a compelling governmental interest under the demanding content based review. Additionally, were the regulation to apply to all businesses without regard to the content of speech, such an ordinance would be onerous and impractical to enforce, even assuming the City could justify the law under *Central Hudson* in the first place.

## CONCLUSION

Under current sign regulations, the City may not require businesses with fifteen percent or less of their floor space committed to sexually oriented products, to use only fifteen percent or less of their allowable sign space for advertising or identifying those products. To justify this type of speech regulation, the City must both provide evidence that businesses which sell adult products on a limited scale create adverse secondary effects on surrounding communities, and show how the sign limits will reduce these negative effects. Without this evidence, a court will apply strict scrutiny because of the regulation's focus on the content of speech, and will most likely find the City in violation of the Constitution.

CASEY GWINN, City Attorney

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By
William W. Witt
Deputy City Attorney

WWW:cdk:mm
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