MEMORANDUM OF LAW

DATE: October 29, 2002

TO: Meredith Dibden-Brown, Office of Small Business Program Manager

FROM: City Attorney

SUBJECT: Street Furniture Ban in the Public Right-of-Way in Gaslamp Historic District

QUESTION PRESENTED

Would a City ban of temporary or permanent structures [street furniture] in the public right-of-way within the historic Gaslamp Quarter violate the First Amendment rights of newspaper distributors?

SHORT ANSWER

Probably not. A City regulation banning street furniture in the public right-of-way within the Gaslamp Quarter will not violate First Amendment speech protections provided the regulation is content-neutral, is narrowly tailored to serve a significant government interest, and allows ample alternative channels of newspaper distribution.

BACKGROUND

City staff, with the participation of interested community and publication industry representatives, has been reviewing proposed changes to the City's existing regulations governing placement of newsracks in the public right-of-way. In the course of this review, you have asked if the City may adopt a ban on all street furniture[1] within the Gaslamp Quarter.

The Gaslamp Quarter is an historic district in the heart of downtown measuring roughly 16 blocks.[2] The City adopted the Gaslamp Quarter Planned District Ordinance in 1976, establishing use and design regulations for the redevelopment of the Gaslamp Quarter as a national historic district. In 1980, the entire district was placed on the National Register of Historic Places. In 1982, the Gaslamp Quarter became a major redevelopment project area of the City of San Diego. The Gaslamp Quarter was named an entertainment district in 1989, and has

become a prime location for various music festivals and other celebrations throughout the year, including the annual *Street Scene*, which draws thousands of visitors to downtown San Diego every September, and the annual Mardi Gras celebration in February. The 16-block area currently houses more than 65 restaurants, coffeehouses, and night clubs and is the downtown "hub" for entertainment in San Diego.

DISCUSSION

We have written previously on First Amendment related issues on a number of occasions, and the standard of legal review for alleged infringement of First Amendment rights has not changed since the issuance of a prior memorandum in 1996. 1996 City Att'y MOL 225.[3] That standard is discussed below.

Cities may adopt legitimate time, place and manner restrictions for the placement of newsracks in the public right-of-way. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). A regulation which effectively precludes the placement of newsracks in the public right-of-way will pass constitutional muster if it meets a three-part test. The regulation "must 1) be content-neutral; 2) be 'narrowly tailored to serve a significant government interest'; and 3) leave open ample alternative channels of communication." *Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1043 (9th Cir. 2002) quoting *Foti v. City of Menlo Park,* 146 F.3d 629, 635 (9th Cir. 1998); see also *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

A regulation is content-neutral if it can be "justified without reference to the content of the regulated speech." *One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009, 1019 (9th Cir. 1996). If the purpose of the regulation is unrelated to the content of speech regulated, it will be held content-neutral "even if it has an incidental effect on some speakers' messages but not others." *Ward* at 791. In determining whether a regulation of speech is content-neutral, the Court will ask if the "government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.*

In *Globe Newspaper Co. v. Beacon Hill Architectural Commission*, 100 F.3d. 175 (1st Cir. Mass. 1996), the United States Court of Appeals for the First Circuit upheld a "Street Furniture Guideline" promulgated by the Beacon Hill Architectural Commission which precluded private structures in the public right-of-way with the Historic Beacon Hill District in Boston, Massachusetts. The Court found the regulation content-neutral because it affected all publications without regard to the message. *Id.* at 183. The Court stated that the regulation was "the very model of a content-neutral regulation." *Id*. Because the proposed Gaslamp Quarter regulation would regulate the place and manner of publication distribution, not any message content, it meets the content-neutral standard, just as did the *Beacon Hill* regulation.

Although the *Beacon Hill* decision is not controlling in California, it is consistent with the most recent ruling in the Ninth Circuit Court of Appeals, whose decisions are controlling law in San Diego. In *Honolulu Weekly*, the Ninth Circuit upheld as content-neutral a City of Honolulu regulation banning distributor-owned newsracks within a special district. In that case, the City of Honolulu required distributors within the special district to submit to a lottery process

for slots in designated City newsracks. There were separate coin-operated newsracks and newsracks for free publications. A distributor of free publications challenged the regulation claiming that by being forced to locate in the newsracks with other free publications, it would not be deemed a "credible media publication." *Honolulu Weekly* at 1042. The court noted that the regulations applied without regard to message content and were therefore content-neutral, notwithstanding the complaint that the free publication might suffer from a perceived "loss of credibility." *Id.*

The second prong of the test requires that the regulation be "narrowly tailored to serve a significant government interest." *Perry Educ. Ass'n* at 44. In the case of the Gaslamp Quarter proposal, the purpose of the regulation would be twofold: protection of pedestrian safety given the crowded conditions of the Gaslamp Quarter, and protection and promotion of the Gaslamp Quarter's unique aesthetic qualities. There is no question that both aesthetics and safety have been recognized as significant government interests that justify speech regulations. *Honolulu Weekly* at 1045, (citing *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) ("[T]he state may legitimately exercise its police powers to advance esthetic values.") and *One World*, 76 F.3d at 1013 ("[C]ities have a substantial interest in protecting the aesthetic appearance of their communities by 'avoiding visual clutter'")); *Kash Enterprises, Inc. v. City of Los Angeles,* 19 Cal. 3d 294, 305 (1977) (acknowledging aesthetics as a significant government interest and giving the city the benefit of the presumption that its regulations were necessary to serve those means).

The next question is whether the proposed regulation is narrowly tailored to serve the significant interest identified. This requirement will be met so long as the government interest would be achieved *less effectively* without the regulation and the regulation "is not substantially broader than necessary to achieve the government's interest." *Honolulu Weekly* at 1045, quoting *Ward*, 491 U.S. at 799-800 (emphasis added). The Waikiki Special District at issue in the *Honolulu Weekly* case was not historic, but was "one of the most renowned, visited, and congested areas of the City." *Id.* at 1041. The City noted that the visual clutter of newsracks had become a problem and that there were public safety concerns as a result of the tourist congestion. *Id*. at 1045. Limiting the distribution to City-owned facilities at specified locations directly served the City's interest in safety and aesthetics. The court refused to inquire into whether the regulation was the best possible solution or least restrictive means of addressing the City's concerns. *Id.* at 1046. In the *Beacon Hill* case, the court found City preclusion of all "street furniture" within the historic district sufficiently narrow, because only an outright ban was consistent with the stated purposes of the district, to allow for the review of exterior architecture of proposed structures within the district. *Beacon Hill* at 189.

Likewise, in the Gaslamp Quarter, the street furniture ban may be the most direct way to address aesthetic and safety concerns. The one issue not addressed directly by the courts and likely to be raised by newspaper distributors is that of sidewalk cafes and whether they should likewise be banned. Because these uses are part of permitted uses by property owners in the district and enhance rather than detract from the aesthetic of this entertainment district, they can be distinguished from "street furniture." Moreover, sidewalk cafes are permitted subject to additional regulations in the City's Land Development Code designed to protect pedestrian safety.

Finally, the regulation must allow for reasonable alternative channels of distribution. Just like the historic district in the *Beacon Hill* case, the Gaslamp Quarter is a relatively small area, approximately 16 city blocks. There is no point in the Gaslamp Quarter that is more than 600 feet from public right-of-way where newsracks are permitted. The *Beacon Hill* court found ample alternatives where there were newsracks within 1,000 feet of any point in the district. *Id*. at 180. Bans on newsracks in residential areas have been upheld where access was available within one-quarter mile of any point in the area of the ban. *Plain Dealer v. Lakewood*, 794 F.2d 1139, 1147-48 (1986), *affirmed on other grounds*, 486 U.S. 750 (1988). In addition, the proposed Gaslamp Quarter regulation would not preclude newsracks or the distribution of publications from within buildings in the Gaslamp Quarter. Therefore, there are ample alternative means of communication and distribution of publications without putting newsracks in the public right-of-way.

CONCLUSION

The City may adopt regulations that preclude private street furniture within the Gaslamp Quarter, provided the regulations are content-neutral, narrowly tailored to serve a significant government interest, and allow ample alternative channels of communication. The proposal as presented meets those constitutional requirements.

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Attachment
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