**Office of**
**The City Attorney**
**City of San Diego**

**MEMORANDUM**

**DATE:** June 2, 2006

**TO:** Planning Commission

**FROM:** Nina M. Fain-Newman, Deputy City Attorney

**SUBJECT:** Eruv Line of Demarcation in Public Right-of-Way

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## INTRODUCTION

At the May 4, 2006 meeting of the Planning Commission our office was asked to opine on various legal issues related to the consideration of Public Right-of-Way Use Permit No. 138120 [Permit] for an eruv line of demarcation for Congregation Chabad in City Council District 5 (University City). This office, through both a memorandum and a letter (attached as Exhibits 1 and 2), previously addressed various issues related to the erection of eruv lines, and the instant memorandum is meant to supplement those previous responses.

## QUESTIONS PRESENTED

1. Does the grant of the Permit violate the First Amendment Establishment clause by allowing the use of the public right-of-way for a religious symbol/purpose?

2. Does the refusal to grant the Permit create a disparate impact on housing under the federal Fair Housing Act?

3. Does the refusal to grant the Permit implicate the Constitutional right to travel?

## SHORT ANSWERS

1. No. Federal and state laws make it clear that the authorization to erect an eruv by a city does not violate the establishment clause of the Constitution. However, if a city prevents the erection of an Eruv on public utility poles where it allows others access to the same poles for other uses (private, commercial, holiday, etc.), the City may be in violation of the free exercise clause to the extent that the only reason for denying the eruv permit in this case is based on its religious purpose.

2. No. The granting or denying of the Permit is dependent upon the specific facts of this particular Permit, and the ability to make the findings set forth in San Diego Municipal Code Section 126.0905 as it relates to it. As such, it could not be construed as racial discrimination in the provision, sale, and/or lease of housing as well as the provision of related brokerage and residential real estate services, and does not implicate the Federal Fair Housing Act.

3. No. Although no court has addressed the specific issue of whether the refusal to allow the erection of an Eruv is a denial of Orthodox Jews' right to travel, since it is Jewish custom and not state law that prevents Jews from carrying items in public on the Sabbath, there is insufficient state action to state a claim under the constitutional right to travel.

## DISCUSSION

### 1. First Amendment Establishment/Free Exercise

The First Amendment to the United States Constitution provides that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." As spelled out in the memorandum issued by this office to Councilmember Jim Madaffer on May 28, 2004 (attached as Exhibit 1), the New Jersey District Court in *American Civil Liberties Union of New Jersey v. City of Long Branch*, 670 F.Supp. 1293 (1987) held that there was no violation of the establishment clause when the City of Long Branch allowed the erection of an eruv using public utility poles where the eruv was barely discernable to the naked eye and it was neither erected nor maintained by city funds. The New Jersey federal court in that case used the Lemon Test[1] to determine whether the establishment clause had been violated and stated:

> As set forth in *Lemon v. Kurtzman*, 403 U.S. 602, [612-13] (1971), state action must meet a three part test in order to avoid violating the establishment clause.

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[1] This office previously evaluated the eruv using the three part Lemon Test, but it appears that the United States Supreme Court may prefer to apply the Endorsement Test which collapses the inquiry into one single question, that is, "would a reasonable, informed observer, i.e. one familiar with the history and context of private individuals access to the public money or property at issue, perceive the challenged government action as endorsing religion?" *Tenafly Eruv Association v. The Borough of Tenafly*, 309 F.3d 188 (3d Cir. 2002). The Third Circuit using the Endorsement Test came to the same conclusion as the New Jersey District Court, and held that "because the eruv is maintained solely with private funds, and because allowing the [eruv] to remain in place would represent neutral rather than preferential treatment of religiously motivated conduct, no reasonable, informed observer would believe the Borough is 'affirmatively sponsor[ing]' an Orthodox Jewish practice. *Id.* (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 131 (2000)).

> The state action must (1) have a secular purpose; (2) have a principle effect which does not advance religion; and (3) not foster excessive entanglement with religion.

*Id*. To elaborate on this office's May 2004 memo, the New Jersey court explained that all three parts of the Lemon Test were met because the "secular purpose of this resolution is that it allows a large group of citizens access to public property," the erection of an eruv does not advance religion because it is "unobtrusive" and "sends no religious message to the rest of the community,"[2] and finally it does not create excessive entanglement because "[t]he city is expending no funds on the project" nor did it give any "aid other than the passage of the resolution permitting the boundary of the eruv to be delineated." *Id.* at 1295-97.[3]

While the court in *ACLU of New Jersey* held that the establishment clause was not violated by allowing the delineation of an eruv, it also warned, "the establishment clause does not forbid all interaction between religious organizations and the state. Certain accommodations by the state will always be necessary in order to insure that people of all religions are accorded rights given them by the free exercise clause of the First Amendment." *Id.* at 1296. The *Tenafly* court held that preventing Orthodox Jews from using City property that the City allows other non-religious groups to use may be a violation of the Orthodox Jews' rights to free exercise. Specifically, the court in *Tenafly* explained that where there is a facially neutral law that is applied to "target religious conduct for distinctive treatment" and "that 'singles out ' the [applicant's] religiously motivated conduct for discriminatory treatment," it triggers strict scrutiny and is likely a violation of free exercise. *Id.* (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993)). The court noted that there would be no free exercise problem if there were no individualized exemptions granted for use of the utility poles at all. *Id.*

**2. Fair Housing Act**

The federal Fair Housing Act (Title VIII of the Civil Rights Act of 1968), hereinafter referred to as the "FHA" is meant to prevent racial discrimination in the provision, sale, and/or lease of housing as well as the provision of related brokerage and residential real estate services. See 42 U.S.C.A. sections 3601 et seq. While a person need not show actual discriminatory intent, but can assert a violation based upon the disproportionate impact upon a protected class, it does not appear that such a claim could be made with regards to the granting or denying of the Permit. As discussed below, the findings required to be made pursuant to the Code specifically address the

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[2] Similarly, the court in *Tenafly* held that the lines demarcating the eruv were not expressive conduct or symbolic speech because the Orthodox Jews did not intend to send a message by making the eruv boundary and "the eruv serves a purely functional, non-communicative purpose indistinguishable, for free speech purposes, from that of a fence surrounding a yard or a wall surrounding a building." *Tenafly Eruv Association v. The Borough of Tenafly*, 309 F.3d 188 (3d Cir. 2002).

[3] See also *Smith v. Community Board No. 14*, 491 N.Y.S.2d 584 (1985) (refusing to enjoin the further construction of an eruv in New York based on the application of the Lemon Test).

needs of the public to travel. Further, since it is Jewish custom and not city or state law that prevents Jews from carrying items in public on the Sabbath. For these reasons it is our opinion that the decision on the Permit does not implicate the Federal Fair Housing Act.

**3. Right To Travel**

"Although no provision of the federal Constitution expressly recognizes the right to travel among and between the states, that right is recognized as a fundamental aspect of the federal union of the states… The right of intrastate travel has been recognized as a basic human right protected by Article I, sections 7 and 24 of the California Constitution." *Quackenbush v. The Superior Court of the City and County of San Francisco*, 60 Cal.App. 4th 454, 469 (1997). Here, the applicant has stated that "the principle of eruv is based upon the enactments of the Rabbis of ancient times… The principle states that it is prohibited to move any object from one domain in which it is located to another domain during the Sabbath." Any prohibition from travel in this case is based upon Jewish custom, and not governmental action. As such, the granting or denying of the Permit does not implicate the constitutional right to travel.

Finally, notwithstanding the foregoing analysis, the Planning Commission in determining whether or not to grant the Permit must make the findings set forth in San Diego Municipal Code Section 126.0905. For a more thorough discussion of these findings, please see Exhibit 1, attached hereto.

**CONCLUSION**

The decision to grant or deny the Permit does not implicate the establishment clause of the Constitution. While case law supports the ability of the Planning Commission to grant permits for the erection of eruvs, they must, as the decision maker evaluate each application on its own merits, and determine based upon the evidence before them if the findings can be made.

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By
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Attachments
cc: Michael Aguirre, City Attorney
Karen Heumann, Assistant City Attorney
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