MEMORANDUM OF LAW

DATE: May 5, 1992

TO: Christiann L. Klein, Executive Director, Human Relations Commission

FROM: City Attorney

SUBJECT: Proposed Human Relations Ordinance

At the March meeting of the Human Relations Commission ("HRC"), a recommendation was made that the City adopt an ordinance prohibiting the issuance of a business license to individuals who refuse to agree in advance that they will not use visually or verbally derogatory items in their business. You have requested a legal opinion regarding the legality of the proposed ordinance.

There are two distinct factors to your inquiry. First, there is the issue concerning the nature and purpose of a business tax. Second, there is a concern regarding whether the restrictions you suggest would violate the constitutional guarantee of freedom of expression.

In addressing the first issue, it should be noted that a business license is a tax. It is not a regulatory device. As such, licenses may not be denied arbitrarily or capriciously. Licensing authorities are limited in the number of factors they may consider in granting or denying a license. Such factors include things such as the character, fitness or other qualifications of an applicant, or the suitability of the premises by reason of location. Grounds for denial of a license must be legal grounds and not mere reasons resting in the opinion of the licensing board or official, as is contemplated with the proposed ordinance.

A small number of businesses, such as adult book stores or massage parlors, are actually police regulated businesses. As police regulated businesses, such businesses are subject to additional licensing strictures. These strictures, however, are limited to areas which affect the health, safety or morals of the public. They do not attempt to limit expressions of speech or opinion.

Limitations on the expression of speech or opinion lead to the second issue concerning the constitutional guarantee of

freedom of expression. The California Constitution is independent of the United States Constitution and may in some instances, such as speech, afford broader constitutional guarantees. As the court explained in Women's Internat. League Etc. Freedom v. City of Fresno, 186 Cal. App. 3d 30, 37 (1986).

> Though the framers could have adopted the words of the federal Bill of Rights they chose not to do so. Special protections thus accorded speech are marked in this court's opinions. Wilson v. Superior Court (1975) 13 Cal.3d 652, 658 . . ., for instance, noted that "(a) protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press." (Citation omitted.)

The section reads in pertinent part: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." California Constitution, article I, section 2(a).

Logos, business names and business paraphernalia are similar in nature to advertisements. The courts have interpreted the constitutional protections of Article I to include advertisements. For example, in the case of Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 57 (1967), a case involving the regulation of advertisements in buses, the court said: "A regulation which permits those who offer goods and services for sale and those who wish to express ideas relating to elections access to such forum while denying it to those who desire to express other ideas and beliefs, protected by the First Amendment, cannot be upheld." Id. at 63.

By analogy, this same type of disparate treatment, that is, allowing the expression of some speech while prohibiting other speech, would occur should the proposed ordinance be adopted. Individual businesses would be granted or denied the right to conduct business based solely on the content of its name, logo or advertisements. The courts have been extremely protective of the right of freedom of speech. Justice Douglas eloquently explained the importance of this right in Terminiello v. Chicago, 337 U.S., 93 L. Ed 1131, 1134 (1949) when he said:

> A function of free speech under our system of government is to invite dispute. . . . Speech is often

> provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.

Ordinances which infringe upon first amendment rights are subject to strict judicial scrutiny. Legislation must be content neutral if it is to withstand this scrutiny. As has been explained in a long line of cases,

> the principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

People v. Library One, Inc., 229 Cal. App. 3d 973, 981 (1991).

Clearly, the proposed ordinance would not be found content neutral. In fact, just the opposite is true. The proposed ordinance is specifically aimed at regulating the content of the business name and/or the types of advertising used by the business establishment.

Therefore, based upon the taxing as opposed to the regulatory purpose of a business license and in view of the broad protections granted to first amendment rights, the proposed ordinance would not withstand constitutional judicial scrutiny.

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