MEMORANDUM OF LAW

DATE: January 21, 1994

TO: Frank Hafner, Housing and Code Enforcement Deputy Director

FROM: City Attorney

SUBJECT: Newsrack Permits

In a memorandum dated November 5, 1993, you ask whether there are any First Amendment legal restrictions which would preclude an amendment to San Diego Municipal Code section 62.1001 et seq. to establish a permit requirement for newsracks located in public rights of way.

Our office last examined this issue in 1983. The state of the law at that time was best reflected in a case from the State of New York called Gannett Co. v. City of Rochester, 330 N.Y.S.2d 648 (1972). Relying upon that authority, in Opinion No. 83-2 (1983 Op. San Diego City Att'y 5) we concluded that imposing a permit fee for newsracks would be an unconstitutional prior restraint on free speech. However, since that time, the United States Supreme Court in Lakewood v. Plain Dealer Publishing Company, 486 U.S. 750 (1988), has disapproved of the reasoning and holding of the court in Gannett. California courts also now recognize the right of municipalities to impose permit requirements as part of a comprehensive scheme to regulate newsracks.

In Lakewood, the United States Supreme Court struck down a city ordinance in Lakewood, Ohio, which set forth regulations and license requirements for the installation of newsracks in the public right of way. However, the reason the ordinance was declared unconstitutional was because the regulations gave the mayor of Lakewood unfettered discretion to deny a permit for any reason the mayor deemed to be "necessary and reasonable." In spite of this adverse ruling for the city, the case is instructive on the issue you raise because the court did otherwise recognize the legitimacy of the city's right to place reasonable time, place and manner restrictions upon newsracks, including establishment of a permit requirement. In this regard, the court compared the regulation of newsracks with parade permits and billboards.

More recently, the Second District Court of Appeal in California addressed the issue of permit fees charged in connection

with First Amendment activity in Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach, 14 Cal. App. 4th 312 (1993). In that case the plaintiff contended that an ordinance regulating parades was unconstitutional because the service fee charged in connection with issuance of a parade permit abridged the permittee's right to free speech. The City of Long Beach requires a parade permittee to reimburse the city for, and pay in advance an estimate of, "all actual costs ('departmental service charges') it incurs in connection with the event, as well as the cost of any City property damaged or destroyed 'by reason of' the event." Id. at 323. After a thorough discussion of the case law, the court concluded that the ordinance did not "impose a forbidden burden on speech or association, and that its departmental service charge requirement is a content-neutral, adequately tailored time, place and manner restriction." Id. at 337.

In summary, it is fair to say that the case law is well settled on this issue. The City may establish a permit requirement and associated permit fee for newsracks located in the public right of way so long as the time, place and manner restrictions are narrowly tailored, content-neutral and reasonable.

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By
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