MEMORANDUM OF LAW

DATE: November 14, 1994

TO: Councilmember Harry Mathis

FROM: City Attorney

SUBJECT: Regulation of First Amendment Protected Solicitation/ Sales in Parks

This memorandum is in response to your request for an opinion on the legality of revising the regulations for First Amendment protected solicitation/sales in public parks.F

The characterization of First Amendment sales was addressed by the Ninth Circuit Court of Appeals in the case of Gaudiya Vaishnava Societ v. San Francisco, 900 F. 2d 1369 (9th Cir. 1990). The court held that when "nonprofits engage in activities where pure speech and commercial speech are inextricably intertwined the entirety must be classified as fully protected noncommercial speech." Id. at 1375. We are assuming, your memo indicates, that your questions apply only to activity "fully protected" by the First Amendment.

You have asked the following questions:

1. May First Amendment Protected Solicitation/Sales be excluded entirely from Scripps Park in La Jolla?
2. May the City Council limit allowable table size to 18 square feet?
3. May the City Council further limit the number of tables allowed in Scripps Park?
4. May the sales be restricted/relocated to a particular area to minimize damage to the park?

Your questions will be answered in the order in which they were asked in your memo.

1. May such sales be excluded entirely from Scripps Park in La Jolla?

Generally, no. The U.S. Supreme Court has found that public streets and parks are traditional public fora, where "the government's authority to restrict speech is at its minimum. Time, place, and manner restrictions are valid only if they are content neutral, narrowly tailored to serve a significant government interest, and retain ample alternative channels of communication." Gaudiya Vaishnava Society v. San Francisco, 900 F. 2d 1369, 1375 (9th Cir. 1990), (quoting Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45

(1983)). To disallow all First Amendment sales in a particular park, the City would have to show that a significant interest would be served by prohibiting such sales. However, reasonable restriction to a certain area of a particular park would probably be upheld (see No. 4 below).

2. May the City limit the allowable table size to eighteen (18) square feet (as the court ruled was acceptable in the 1992 Port District case)?

The specifics of table size is more a policy decision rather than a legal question. We understand from Park and Recreation staff that the table size currently allowed is the normal size of a portable table commonly used in sales. However, if regulation of table size was narrowly tailored to serve a significant government interest, such a regulation would probably be upheld. One might assume the limitation in the Port District case would be upheld if adopted by the City but specific circumstances of each situation should be analyzed.

3. May the City further limit the number of tables allowed in Scripps Park?

The answer to this question also depends on the exact nature of any proposed regulation since any regulation must serve a significant government interest. If the government interest is not significant and the purpose of the regulation is arbitrary, it would probably not be upheld. It is important to note at this point that total discretion, without guidelines, to grant or deny permits is probably unacceptable. The San Francisco ordinance at issue in Gaudiya was found unconstitutional because that ordinance provided no specific grounds for granting or denying permits. The Gaudiya court cited City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988), in which the Supreme Court found an ordinance unconstitutional when an official had sole discretion to grant or deny a permit application. Gaudiya v. San Francisco, 900 F.2d at 1375. It is thus important that any regulations designed to restrict the number of tables have standards against which discretion can be measured.

4. May the sales be restricted/relocated to a particular area to minimize damage to the park?

Damage to grass and plants, which are City property, is a reasonable basis to require a different location for First Amendment sales. As you know, Park and Recreation staff is in the process of notifying First Amendment sellers that, because of damage to the grass and plants of the park, the allowable sales area will be relocated. The new location will be in an area of the park where grass does not grow, and therefore, sales activity will not damage Park property.

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By
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Deputy City Attorney

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cc Marcia McLatchy, Director
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Terri C. Williams, Deputy Director
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