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MEMORANDUM OF LAW

DATE: May 4, 2012

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Use of Exhibit Space on the First Floor of the City Administration Building

QUESTION PRESENTED

Can the City deny an application to display an exhibit in the exhibit space located in the lobby on the first floor of the City Administration Building?

SHORT ANSWER

At this time, without an existing policy and given that the City has opened the exhibit space to the public, the City's ability to deny a request for a display is very limited. The City can prohibit unprotected speech (e.g., obscene or defamatory material) or reasonably regulate the manner in which materials are displayed (e.g., to not block walkways). This Office recommends that the City adopt a policy with clearly stated objectives and restrictions for the use of the space.

ANALYSIS

I. THE LOBBY EXHIBIT SPACE IS A PUBLIC FORUM SUBJECT TO FIRST AMENDMENT PROTECTIONS

For the last few years, the City has made an area in the lobby of the City Administration Building available for the display of exhibits. There is no written policy that governs the exhibit space. A person or organization seeking to display an exhibit completes the City's "Request for Lobby Display" form with basic information including the title of the display and the number of items to be displayed and submits the form to the City for approval. The City permits one display

at a time. Examples of past displays include displays sponsored by City departments, displays by civic organizations, and displays by local amateur artists.

Essentially, by opening the exhibit space to the public as a place for expressive activity, the City has created a "public forum." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Dulaney v. Municipal Court for the San Francisco Judicial Dist.,* 11 Cal. 3d 77 (1974). Once a forum is opened to the public for speech, government is limited in its ability to limit or abridge that speech. *Wirta v. Alameda-Contra Costa Transit Dist.,* 68 Cal. 2d 51 (1967). Any restrictions placed by the City on use of the forum must be consistent with free speech protections under state and federal law. This is true even though the City was not required to create the forum in the first place. *Perry,* 460 U.S. 37, 45, *citing Widmar v. Vincent*, 454 U.S. 263 (1981) (re university meeting facilities); *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167 (1976) (re school board meetings); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (re municipal theater).

The City is not required to retain the open character of the exhibit space indefinitely, but as long as it does so, it is limited in what it can do to regulate the use of the space. *Id.* Specifically, the City can only enforce content-neutral restrictions that reasonably seek to regulate the time, place, or manner of the expressive activity, and content-based restrictions that are narrowly drawn to serve a compelling governmental interest. *Widmar v. Vincent*, 454 U.S. 263, 269-270 (1981). The reason for any content based restriction must be more important than the right to free speech that is being restricted. *Perry*, 460 U.S. 37, 45.[1] Courts will invalidate regulations restricting speech if the government's stated purpose for the regulations is merely a pretext for censorship. *See, e.g., Gerritsen v. City of Los Angeles,* 994 F.2d 570, 575 (9th Cir. 1993).

Government may prohibit unprotected speech such as false advertising, speech intended to incite unlawful activity, defamatory speech, "fighting words," and obscene speech. *Chaplinsky v. State of New Hampshire,* 315 U.S. 568, 572 (1942). For government to restrict speech intended to incite lawful activity, the speech must be directed toward inciting or producing *imminent* lawless action, and be likely to produce such action. *Brandenburg v. Ohio,* 395 U.S. 444 (1969). For example, a policy that prohibited advertising in bus shelters that "might be interpreted as condoning or soliciting any unlawful act or conduct" was overbroad and likely unconstitutional. 1999 Op. City Att'y 73 (99-3; Nov. 3, 1999). Generally, government cannot restrict protected speech in anticipation of unlawful conduct. *Collins v. Jordan,* 110 F.3d 1363 (9th Cir. 1996).

[1] *See, e.g.,* the City's restrictions on alcohol advertising based on the City's interest in protecting youth as set forth in SDMC §§ 58.0501-57.0504 and explained in 2000 City Att'y Report 403 (2000-8; Sept. 7, 2000). As commercial speech, however, alcohol advertising is subject to a less protective standard than the non-commercial speech at issue here.

> The law is clear that First Amendment activity may not be banned simply because prior similar activity led to or involved instances of violence . . . The courts have held that the proper response to potential or actual violence is for the government to ensure an adequate police presence and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.

Id. at 1372 (citations omitted).

Any restrictions imposed by the government on speech in a public forum must be stated in narrow, definite, and certain terms so that officials do not have unbridled discretion to prohibit protected speech. 1999 Op. City Att'y 73, 83 (99-3; Nov. 3, 1999) and cases cited therein. The City's lack of a policy at this time makes it even more difficult for the City to regulate use of the exhibit space without abridging free speech. Nonetheless, in the absence of any written policy or regulations, it appears that to date the City has appropriately focused on addressing the manner in which the exhibits are to be displayed and not the content or message of the displays.

II. RECOMMENDATION AND CONCLUSION

We strongly recommend that the City examine its practice of open access to the lobby exhibit space and adopt a policy for the use of the space to avoid problems with administering the space in the future. Such a policy could impose content-neutral time, place and manner restrictions such as, for example, setting specific hours for the display, limiting the time period for the display, ensuring compliance with fire and building codes. Such a policy should also clearly prohibit unprotected speech.

At this time, without a policy in place and because the City has opened the exhibit space to the public, the City's ability to regulate exhibits or to deny an application for an exhibit is very limited. The City can, however, change the character of the exhibit space from that of a public forum to a space limited to use for City purposes. If the City reclaimed the space and adopted a policy that sets forth the City's objectives and guidelines for use of the space, the City would have the ability to exercise its discretion in choosing displays based on the policy that promote the City's objectives. *See* City Att'y MOL 2011-4 at 16 (May 19, 2011) re "government speech" and citing *Rust v. Sullivan,* 500 U.S. 173, 193 (1991) and *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-588 (1998). Until such a change is made, however, the City cannot deny an application for a lobby display based on the subject matter of the display.

In either case, this Office is ready to assist to ensure that the City's policy and use of the space are consistent with state and federal law.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Carrie L. Gleeson
Carrie L. Gleeson
Deputy City Attorney

CLG:als
cc: Wally Hill, Asst. Chief Operating Officer
Debra Fischle-Faulk, Department Director
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