

CITY OF OAKLAND

CITY ATTORNEY'S OFFICE

LEGAL OPINION

FROM: John A. Russo
City Attorney

DATE: January 9, 2009

RE: **City Authority to Regulate Filming Activities for HBO Production on Prostitution**

I. INTRODUCTION

This memorandum responds to requests from the public and at least one Councilmember for information regarding the City's legal parameters for permitting HBO's filming of a program on prostitution in Oakland.

II. QUESTIONS

1. Can the City legally deny permits or otherwise restrict HBO's filming on the basis of the production's subject matter?
2. What limitations legally can the City impose on HBO's proposed filming activities?

III. SUMMARY CONCLUSION

1. No. Content-based restrictions on protected speech activities (such as the HBO filming) are almost never permissible under the First Amendment of the U.S. Constitution. They also are not permitted under the filming permit provisions of the Oakland Municipal Code.
2. Reasonable, content-neutral time, place and manner restrictions on filming activities in the public forum are permissible as long as they are narrowly tailored to serve a significant government interest (e.g., public safety) and leave open ample alternative channels of communication. Consistent with these principles, the Oakland Filming Permit Ordinance specifies content-neutral bases for consideration of filming permits and authorizes the

imposition of time, place and manner restrictions on proposed filming activities.

IV. BACKGROUND

HBO is proposing to film a drama based in Oakland regarding prostitution. We understand from news reports that the filming is proposed to begin in 2009 but that no City permits for the filming have yet been issued. We have no further details on the location or nature of the proposed filming.

Although we are not aware of HBO's specific plans to film within Oakland, we would anticipate that HBO will need to seek permits under the Oakland Filming Permit Ordinance (discussed below) for activities involving streets, public right of way, City buildings and other City property. Lacking more specific detail of HBO's proposal, we provide the following general discussion of the parameters of the City's authority to regulate filming activities.

V. ANALYSIS

A. Content-Based Regulation on Expressions Violate the First Amendment of the US Constitution Except in Rare Circumstances.

Generally speaking, government regulation of speech cannot be based on its content without violating the First Amendment's guarantees of freedom of speech and expression. See *Ashcroft v. American Civil Liberties Union, et al.*, 535 U.S. 564, 573 (2002)(as a general matter, under "the First Amendment, government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.")(citations omitted).

Content-based regulation is a restriction that distinguishes favored speech from disfavored speech on the basis of ideas or views expressed, while restrictions that confer benefits or impose burdens on speech without reference to ideas or views expressed are in, most instances, content-neutral. See *Turner Broadcasting System, Inc. v. Federal Communications Commission, et al.*, 512 U.S. 612, 644 (1994). As the United Supreme Court has stated, the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The "government may not regulate [speech] based on hostility or favoritism towards the underlying message expressed." *R.A.V. v. St. Paul*, 505 U.S. 377, 382-383 (1992).

Content-based regulations are "presumptively invalid." *Davenport v. Washington Education Association*, 127 S.Ct. 2371, 2374 (2007) (citations omitted). With very limited exceptions, a content-based restriction on protected speech will be subject to the rigorous "strict scrutiny" standard of judicial review. To justify a content-based regulation of protected speech, there must be a compelling governmental interest in

limiting speech, and the regulation must be narrowly drawn to achieve that objective. If a less restrictive alternative would serve the government's purpose, that alternative must be used.

Although the strict scrutiny standard theoretically could allow content-based regulation of First Amendment protected speech in rare cases, in practice, the likelihood of defending a restriction under this standard is remote. As a practical matter, if the strict scrutiny standard applies, the court will almost certainly overturn the restriction on speech.

1. The Proposed HBO Filming Activities Fall Within Categories of Speech That Are Protected by the First Amendment.

Although restrictions on the content of speech have traditionally been allowed in a few limited areas, the proposed HBO filming does not appear to fall into any of these categories.

For example, the proposed filming does not appear to qualify as "commercial" speech. Commercial speech generally is afforded less protection under the First Amendment than noncommercial speech.¹ For purposes of First Amendment analysis, commercial speech is an expression that is related *solely* to the economic interests of the speaker and his/her audience or is likely to influence consumers in their commercial decisions. See *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). The most common type of commercial speech is advertising for the sale of products or services.

Although the HBO filming activity undoubtedly would relate to the economic interests of HBO (as the speaker), it is not likely to qualify as "commercial" speech for purposes of reduced constitutional protection. In addition to serving HBO's economic interests, the production almost certainly would be construed to serve other purposes, such as artistic, social, political or other expressions that are protected by the First Amendment. When, as in this case, a commercial expression is "inextricably intertwined" with noncommercial expression, it is entitled to the full protections of the First Amendment. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Gaudiya Vaishnava Society v. City and County of San Francisco*, 952 F.2d 1059, 1066 (9th Cir. 1990)(*cert. denied*).

The proposed HBO filming also falls outside the other specified categories of speech that courts have held to be unprotected by the First Amendment. The judicial rationale for excluding these categories of speech is that they have such slight social value that their benefit is clearly outweighed by social interest in order and morality.

¹ Government regulation of commercial speech must advance a substantial governmental interest, must directly advance that interest and must not be more extensive than necessary to serve that interest. To receive any First Amendment protection, commercial speech must be lawful and not misleading *Id.*

Chaplinsky v. State of New Hampshire, 315 U.S. 568 (1942) (“fighting words” are not protected speech); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (defamation is not protected speech); *Miller v. State of California*, 413 U.S. 15 (1973) (obscenity is not protected speech).

2. Reasonable, Content-Neutral, Time, Place and Manner Restrictions May Be Placed on Protected Speech Located Within the Public Forum.

As noted above, we are unaware of HBO’s specific proposal; however, we anticipate that at least some portion of their activities would involve use of public streets, rights of way, City buildings or other City property.

Citizens generally are entitled to constitutional freedom of speech protections when the government acts either as a regulator of conduct or in its proprietary interest as a property owner. These considerations preclude a municipality from banning public access to city-owned property that is within the “public forum.” That is, in areas traditionally recognized as a venue for free public discourse, or when the government has created a place or means of communication, speakers cannot be excluded without a compelling government interest.²

To balance the interests of the government as a property owner against the citizens’ First Amendment rights, courts allow government property owners to enforce regulations of the time, place and manner of expression that are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. Such restrictions are permitted in quintessential public forums, such as streets and parks and so-called, limited public forums, such as city council chambers. *Perry Education Assn. v. Perry Local Educators’ Assn*, 460 U.S. 37, 45 (1982).

As discussed below, the Oakland Filming Permit Ordinance, provides content-neutral criteria for the City’s evaluation of filming permits and limits conditions of approval applicable to permits to reasonable time, place and manner restrictions. Protection of public safety is one of the primary governmental interests that frequently has been upheld as a basis for content-neutral time, place and manner restrictions. For example, courts have upheld restrictions on speech to designated areas, and during

² The courts have held adopted a fact-based “forum” analysis to determine when the government’s interest in limiting the use of its property outweighs the interests of those wishing to use the property for other purposes. *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 799-800 (1985). In “public forums,” such as streets and parks, there is a judicially recognized tradition that the place has been historically used by the public for free exchange of ideas. There also are judicially recognized “limited public forums,” which generally include places such as City Council chambers, in which the governmental property owner has created a forum for expressive activity. In addition, there are nonpublic forums, which are public property that is not generally utilized for public debate, such as mailrooms or workplace offices.

certain times in order to substantially reduce traffic hazards. See e.g., *Lushbaugh v. Home Depot U.S.A.*, 93 Cal. App. 4th 1159 (2001); *Costco v. Gallant*, 96 Cal. App. 4th 740 (2002).

For purposes of the HBO production, we would need to evaluate the nature and location of the proposed filming activities to determine what types of reasonable, content-neutral time, place and manner restrictions may be allowed for activities involving public property. In addition, for any proposal that would involve utilization of City-owned buildings that are not generally open to free public access, there may be broader latitude for the City to establish terms and conditions for use. We also would need to evaluate any restrictions for this type of use based on the facts of the specific proposal.

B. The Oakland Municipal Code Establishes Requirements for Filming Permits But Does Not Authorize Permit Denial on the Basis of the Content of the Filming.

Oakland Municipal Code Chapter 5.24 (“Filming Permit Ordinance”) establishes standards and requirements for filming activities within the City. The stated intention of the Filming Permit Ordinance is “to ensure that still photographers and motion picture, television, commercial and non-theatrical filming companies will be encouraged to use locations within the [C]ity so long as those are consistent with public safety and the protection of property.” O.M.C. Section 5.24.010.

The Filming Permit Ordinance language reflects the constitutional limitations on a municipality’s ability to regulate First Amendment protected activities, such as the proposed HBO production.

Unless the HBO filming activities would be conducted exclusively on private property, HBO likely would be required to comply with the requirements of the Filming Permit Ordinance, described below.

1. Film Permit Requirement.

Under the Filming Permit Ordinance, it is unlawful to conduct a filming activity within the City without first obtaining a permit from the City’s Film Development Office. Filming activities include staging, shooting, filming videotaping, photographing, or other similar activities. The permit is issued for the purpose of filming on City-owned, leased or controlled real property or city streets. O.M.C Section 5.24.030. The Filming Permit Ordinance specifies exemptions from the permit requirements when the activities will not require street closures or substantially impede vehicular traffic. These exemptions include filming for news purposes, filming at studios, filming for use in criminal investigations or court proceedings, private or family noncommercial filming on private property, and certain still photography activities.

Permits issued under the Filming Permit Ordinance address issues regarding the physical and legal requirements for filming activities, such as street closures, clean up of the filming site, and insurance and indemnification requirements.

Applications for a film permit must be filed with the Film Development Office a minimum of two business days in advance of the date filming activities begin or a minimum of five business days in advance of filming where the activities will involve street closures, stunts or pyrotechnics. O.M.C. Section 5.24.050. The Filming Permit Ordinance specifies that the City shall approve or deny an application within two business days of receipt of the application unless the proposed filming activity requires extensive review by other City departments due to fire or traffic safety.

2. The Filming Permit Ordinance Applies Content-Neutral Criteria for Permit Evaluation and Provides for Reasonable Time, Place and Manner Restrictions.

The provisions of the Filming Permit Ordinance do not authorize the City to deny a permit on the basis that the City objects to the subject matter of the film in question. To the contrary, the ordinance generally encourages approval of filming permits and restricts the City's discretion to deny permits to specified public health and safety grounds. See O.M.C. Section 5.24.070. The Ordinance states that a "film permit shall be approved by the Film Development Office unless the City determines after consideration of the application or other pertinent information" that specified conditions exist. These conditions are summarized as follows:

- a. The filming would substantially disrupt the use of a street at a time when it is usually subject to traffic congestion or interfere with the operation of emergency vehicles in the proposed permit area;
- b. The location of the filming would substantially interfere with street maintenance work or a previously-authorized excavation permit;
- c. The activity is located on City property and the filming activity will substantially interfere with other previously authorized activities, contracts or safety of the public or employees;
- d. The activity would be located on City property and would substantially interfere with municipal functions or the scheduled maintenance of City buildings or grounds.
- e. The activity creates a substantial risk of injury to persons or damage to property;
- f. The applicant failed to complete the application after being requested to do so or the application contains false material information;
- g. The activity would violate federal, state or local law.

The Filming Permit Ordinance specifies that the Film Development Office may impose "reasonable requirements concerning the time, place, manner and duration of filming activities" where grounds for permit denial can be corrected by conditions of approval. O.M.C. Section 5.24.080. Examples of such conditions include requiring the

applicant to pay for City employees' time and other expenses or fees, requirements for posting signs or provide other advance notice of filming activities, limitations on filming hours, requirements for clean up, and other restrictions necessary to protect public health and safety.

VII. CONCLUSION

For the reasons discussed in this opinion, the City does not have the option to deny permits based on the content of the proposed HBO series. The City, consistent with its Filming Permit Ordinance and federal constitutional parameters, has the right to establish reasonable, content-neutral, time, place and manner restrictions on the filming activities.

Accordingly, we strongly advise against any denial of permits or restrictions on HBO's proposed filming activities on any grounds that could be constructed as content-based.

Recommendation

We recommend that staff work closely with this Office to ensure that the City's review of the proposal is defensible under the Constitution, the Filming Permit Ordinance and applicable legal requirements.

We hope you find this information helpful. If you have any questions, please call us.

Very truly yours,



JOHN RUSSO
City Attorney

Attorney Assigned:
Heather Lee