MEMORANDUM
OFFICE OF THE CITY ATTORNEY

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

DATE: December 9, 2016

TO: Sign Ordinance Review Committee File
FROM: Ariel Calonne, City Attorney
Noah Ickowitz, Law Clerk
SUBJECT: Regulating Sign Aesthetics in El Pueblo Viejo

I. ISSUES PRESENTED

How can the City of Santa Barbara ("the City") regulate signs in the El Pueblo Viejo District ("the EPV") in such a way that leaves room for art but manages commercial advertising?

II. EXECUTIVE SUMMARY

The City can institute certain time, place, or manner regulations in the EPV that would exempt art but exclude unaesthetic commercial signs. Before delving into specific suggestions, below is a brief overview on the differences between regulating commercial and noncommercial speech. Following that section is a brief overview on how municipalities can regulate signs that might bear federally registered trademarks. The last section provides suggestions that allow the City to regulate signs in the EPV with art in mind.

III. DISCUSSION

A. An overview of regulating commercial speech.

Historically, the Supreme Court has distinguished between the regulation of commercial and noncommercial speech, providing less protection for commercial speech. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562-63 (1980). Commercial speech is an "expression related solely to the economic interests of the speaker and its audience." *Id.* at 561. In other words, speech is commercial if it does "no more than propose a commercial transaction." *Coyote Pub., Inc. v. Miller*, 598 F.3d 592, 598 (9th Cir. 2010). When a court deems speech commercial, government restrictions on that speech must pass the four-part *Central Hudson* test calling for intermediate scrutiny:

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507 (1981) (citing *Cent. Hudson*, 47 U.S. at 563-66.

Though the Supreme Court has not explicitly ruled on whether *Reed* applies to commercial speech, the Ninth Circuit touched on the issue in the footnote of a case after *Reed*. In *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, the Ninth Circuit noted that "although laws that restrict only commercial speech are content based…such restrictions need only withstand intermediate scrutiny. 827 F.3d 1192, 1198 n.3 (9th Cir. 2016). However, a court could interpret that footnote as merely dicta because the

speech at issue there was not commercial speech and thus it did not influence the holding.

Falling in line with *Lone Star*, California federal district courts have thus far consistently held that *Reed* does not apply to commercial speech, and that when speech is deemed commercial intermediate scrutiny still applies. In *Contest Promotions, LLC v. City & Cty. of San Francisco*, the District Court for the Northern District of California held that "*Reed* does not concern commercial speech, and therefore does not disturb the framework which holds that commercial speech is subject only to intermediate scrutiny as defined by the *Central Hudson* test." No. 15-CV-00093-SI, 2015 WL 4571564, at 4 (N.D. Cal. July 28, 2015). Indeed, *Reed* did not cite the test in *Central Hudson*, making it more likely that *Metromedia* and its progeny still stand. *Id.* Other California district court decisions have taken the same position. *California Outdoor Equity Partners v. City of Corona*, No. CV 15-03172 MMM AGRX, 2015 WL 4163346, at 10 (C.D. Cal. July 9, 2015) (holding that "*Reed* does not concern commercial speech, let alone off-site billboards"); *San Francisco Apartment Ass'n v. City & Cty. of San Francisco*, 142 F. Supp. 3d 910, 922 (N.D. Cal. 2015) (holding that *Reed* was inapplicable because it did "not concern commercial speech," which is instead analyzed under *Central Hudson*).

B. An overview of sign regulations that affect registered trademarks.

Though courts give more leeway to regulating commercial speech, the Lanham Act restricts the regulation of registered trademarks. Under the Lanham Act, no governmental entity can "require alteration of a registered mark." 15 U.S.C.A. § 1121 (1998) (formerly labeled as Section 39(b)). The Ninth Circuit has held that restrictions

that would require the alteration of a mark, such as its color, are prohibited. *Blockbuster Videos, Inc. v. City of Tempe*, 141 F.3d 1295, 1301 (9th Cir. 1998). A zoning ordinance prohibiting a mark entirely, on the other hand, does not violate the Act. *Id.*

The Ninth Circuit ruling controls in Santa Barbara, but the Second Circuit has broken away and allows more restrictions than the Ninth Circuit. In *Lisa's Party City, Inc. v. Town of Henrietta*, the Second Circuit (New York Connecticut, Vermont) upheld an ordinance prohibiting businesses from having exterior signs "in any color than red." 185 F.3d 12, 15 (2d Cir. 1999). The court summed up the Act as merely prohibiting "state-mandated changes in the mark itself, which are, of necessity, reflected in *every* subsequent display of that mark within the relevant jurisdiction." *Id.* at 15 (emphasis added). The Court held that this ordinance did not did not require businesses to alter their trademarks because "they remain free to use their trademarks without alteration" in every location but on the exterior of the store, such as "on letterhead, leaflets, billboards, magazines, newspapers, television and Internet advertising, point-of-sale displays inside the store, and external signs at other locations." *Id.* Because of the circuit split, the City might be able to push restrictions on the color of signs in historic districts in order to regulate commercial logos—if its goal is to take the case up to the Supreme Court or have the Ninth Circuit change its decision. However, that is unlikely to work, so the City should consider time, place, or manner restrictions that do not fall into the category of altering a registered mark under the Ninth Circuit's view.

C. Time, place, or manner restrictions in the EPV

With time, place, or manner restrictions, the City can implement regulations that inherently accommodate art but restrict unaesthetic commercial signs. As long as the

City stays away from restrictions that would require the alteration of a registered mark, then it can have relative freedom in doing so.

1. The City should consider three time, place, or manner restrictions that accommodate art but restrict unaesthetic commercial signs.

The City should further limit the materials used for signs in the EPV to leave room for art, while restricting unaesthetic commercial signs. To a degree the City already does this by stating that certain materials are "acceptable and desirable" such as "resawn or rough sawn wood." 22.70.040(B)(5)(A). But, the enumerated materials that are acceptable under the statute are part of an inclusive, rather than exclusive list. As of now, the discretion in choosing materials for signs in the district belongs to the applicant, "subject to the approval of the Sign Committee." 22.70.040(B)(5). The City should consider adding more materials to the list and making those materials listed the *only* acceptable choice of materials for signs in the district. In expanding this list, the City should consider other materials that are conducive to artistic signs. This modification would eliminate the necessity of having the 22.70.040(B)(6) list of excluded materials and would reduce the risk that an applicant accuses the Sign Committee of content-based decisions in the guise of time, place, or manner restrictions.

Implementing restrictions on time could also allow for art but prohibit unaesthetic commercial signs in the historic district. Certain types of art, such as murals, are temporary by nature and might pop up more frequently during certain times of the year. Specifically in Santa Barbara, the code could make exceptions for signs posted on the first Thursday of every month. This would exempt art that is displayed as part of the "First Thursday" programming in Downtown Santa Barbara.

Though unconventional, the City might be able to exempt signs that contain no typeface other than that which appears on a registered trademark. In other words, they could give more leeway for signs in the EPV bearing only images compared to those that also contains words. Art is more likely to fall under this exemption, whereas commercial signs usually contain words. If the City pursued this change, it should use the same caveat listed in 22.70.040(B)(2), which says that typeface on signs should be in Hispanic styles *except for* business logo or trademark uses of a different typeface. Thus, the proposed change should offer an exemption for signs with no words at all, but make an exception for a sign bearing a registered mark that contains typeface. This way the regulation would not alter the mark, surviving scrutiny under the Lanham Act.

These suggestions meet the general requirements for time, place, or manner restrictions. First, they make no mention of the content of regulated speech within the EPV. Second, the regulations are narrowly tailored to a significant government interest. As per the statute, the government interest in regulating the District is the "retention or restoration of the historical character of the area." SBMC 22.70.040(B). Third, the regulations leave open "ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

2. At least one EPV restriction in the current sign code should be eliminated.

The restriction on color for signs in the EPV should be eliminated or at least not enforced against signs bearing a registered mark of a different color. Section 22.70.040(B)(1) of the code states that signs in the district must comply with the requirement that "[c]olors shall be consistent with the Hispanic styles specified in Chapter 22.22." This requirement directly conflicts with the Ninth Circuit decision in

Blockbuster, where the court held that a municipality cannot implement regulations that would require a company to alter the color of its registered mark. 141 F.3d at 1300. There, a municipality could not enforce a regulation requiring Video Update to change its registered mark on a sign to a different color because consumers might not recognize that the storefront was indeed a Video Update location, which normally bears a different color mark. Because the regulation in Tempe resembles SBMC 22.70.040(B)(1), a court would likely hold that the City could not enforce the provision against a registered mark.

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