



## LAW DEPARTMENT

### MEMORANDUM

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To: Mayor Leffingwell and Council Members

Through: Karen M. Kennard, City Attorney

From: Jennifer Ferri, Assistant City Attorney

Date: August 6, 2013

Subject: Local Regulation of Aerial Advertising

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By resolution signed June 27, 2013, you asked staff to review the legality of passing an ordinance regulating aerial advertising. Our research indicates that an ordinance attempting to regulate aerial advertising based on citizen noise complaints would be problematic and would likely not survive a court challenge. In this memorandum we summarize our legal analysis and provide options if council would like to move forward with an ordinance.

I. *Background.* The motivation behind the proposed regulation of aerial advertising seems to be noise complaints from residents of the Zilker neighborhood. At the June 27 meeting, council heard a resident express frustration over the noise created by banner-towing planes passing over his property. If there are reasons other than noise, they have not been articulated in public to date.

II. *Legal Analysis.* The legal challenge to an ordinance banning aerial advertising would likely involve preemption and First Amendment claims. "Preemption" is the legal doctrine that prohibits local governments from regulating in a way that conflicts with federal regulation. The Supreme Court has held that the federal government has exclusive authority to regulate aircraft noise, and any local efforts to do so are preempted by federal law. The City does not have the

authority to regulate aircraft noise and any ban enacted on the current record of noise complaints would be difficult to defend in court. Some cities have enacted bans on aerial advertising, but they have done so as part of an overall scheme of sign regulation, supported by their interests in preserving their visual landscape and reducing distractions for drivers and pedestrians. These interests—aesthetics and traffic safety—are the same ones courts have identified in upholding total bans on off-premise advertising.

But even an ordinance based on these interests could be struck down on preemption grounds by the Fifth Circuit. The Ninth Circuit held in 2002 that Honolulu's ban on aerial advertising was not preempted by federal law, but the court based its decision in part on language in FAA rules mentioning local regulation, some of which has since been removed. Courts will give some weight to a federal agency's opinion on the preemption issue. Although the FAA filed an amicus brief with the Ninth Circuit arguing that Honolulu's ordinance was permissible, since then its views on the issue have been inconsistent and sometimes hostile towards local regulation of aerial advertising.

The Fifth Circuit has not ruled on whether an aerial ad ban violates the Free Speech Clause of the First Amendment, or on what standard of review applies to regulation of speech in the public airspace. The Ninth Circuit held that Honolulu's ordinance was permissible under the First Amendment because it applied equally to all banners regardless of their content and it was a reasonable way to preserve the City's aesthetic beauty and enhance traffic safety. The City would need a similar record showing that these are the interests justifying its speech regulation.

III. *Other Jurisdictions.* Honolulu is the only large city that has banned aerial advertising. By 2010, all of the counties in Hawaii had followed suit. Huntington Beach, CA repealed its aerial advertising ordinance during litigation after the FAA reportedly refused the same support it gave Honolulu. Radnor, PA and Hilton Head Island, SC, have seen some backlash to enforcement of their ordinances and FAA spokesmen told local press that the cities' ordinances conflicted with federal regulation of the airspace. Brunswick, OH banned aerial advertising in 2005. San Francisco is currently investigating the legality of a proposed ban on aerial advertising, demonstrating that the law remains unclear even within the Ninth Circuit.

IV. *Options for Pursuing an Ordinance.* If council wishes to proceed, any ordinance should be supported by a strong record that the City's interests in regulating aerial advertising are aesthetics and traffic safety, and not aircraft noise or the safety of people on the ground from crashing planes. To strengthen the City's arguments against preemption, the ordinance should be located in City Code Chapter 25-10 (*Sign Regulations*) within the Land Development Code. Amendments to Title 25 must be initiated by either council or the Planning Commission and have a recommendation from the Commission and two public hearings.

If council would like further information, we are happy to share a more detailed legal memorandum we drafted on this issue.

Cc: Mark Ott, City Manager  
Cc: Sue Edwards, Assistant City Manager  
Cc: Karen Kennard, City Attorney