

November 7, 2013

BY E-MAIL (CITYCLERK@HAYWARD-CA.GOV)

Miriam Lens
City Clerk
City of Hayward
777 B St.
Hayward, CA 94501-5007

Re: November 7, 2013 Planning Commission Meeting – Proposed Amendment to the Hayward Municipal Code adding Article 16 to Chapter 4 regarding simulated gambling devices and proposed revisions to the definitions section of the Hayward Zoning Ordinance

Dear Madam Clerk:

This firm represents Ron Doyle and Net Connection Hayward, LLC (“Net Connection”). Net Connection operates a business at 778 B Street in Hayward. Net Connection’s business is one of the direct targets of the proposed ordinance before the Planning Commission. While Net Connection has yet to have sufficient time to fully analyze the proposed ordinance, which is highly technical, Net Connection presents this letter in order to submit its brief comments regarding the proposed ordinance.

In the current federal lawsuit, entitled *Net Connection Hayward, LLC v. City of Hayward*, Northern District of California Case No. 12-1212, the court determined following an evidentiary hearing that Net Connection has a vested property right in its business license to operate its current business at 778 B Street. Because the proposed ordinance contains a provision expressly making it retroactive (Section 4.16.60), the proposed ordinance improperly threatens to deprive Net Connection of its vested property right without just compensation.

Moreover, “[i]t is settled in this state as elsewhere that a zoning ordinance which requires the discontinuance of nonconforming uses existing when the ordinance was adopted is a deprivation of property without due process of law contrary to the federal and state constitutions.” *Livingston Rock & Gravel Co. v. Los Angeles County*, 43 Cal.2d 121 (1954); see *Santa Barbara Patients’ Collective Health Coop.*, 2012 WL 5964353, at *5-6 (citing cases); *McCaslin v. City of Monterey Park*, 163 Cal.App.2d 339, 346-347 (1958); see also *Hansen Bros. Enterprises v. Board of Supervisors*, 12 Cal.4th 533, 551-52 (1996). “Interference with the right to continue an established business is far more serious than the interference a property owner experiences when

denied a conditional use permit in the first instance. Certainly, this right is sufficiently personal, vested and important to preclude its extinction by a nonjudicial body.” *Bauer v. City of San Diego*, 75 Cal.App.4th 1281, 1295 (1999) (emphasis added) (citing *Goat Hill Tavern v. City of Costa Mesa*, 6 Cal.App.4th 1519, 1529 (1992)).

Importantly, due to the fact that Net Connection has a vested property interest in its business license, under no circumstance can the City deprive Net Connection of that property right by unilaterally declaring Net Connection’s business to be a public nuisance. “Although it is elementary that an owner of property has no constitutional right to maintain it as a public nuisance, it is equally elementary that he has a clear constitutional right to have it determined by due process whether in fact and law it is such a nuisance. As against this right, no *ex parte* declaration, however formal, by municipal authorities that it is a nuisance is final as against him.” *Leppo v. City of Petaluma*, 20 Cal.App.3d 711, 718 (1971). “[N]either at common law nor under such express power can [a city], by its mere declaration that specified property is a nuisance, make it one when in fact it is not.” *Id.* at 718.

Because the City already made the discretionary decision to license Net Connection’s business from a land use perspective, Net Connection’s sweepstakes is a legally permissive use under the current zoning ordinances, and, unless Net Connection’s business otherwise violates California law, the City has no right to amend its zoning ordinance to retroactively declare Net Connection’s business unlawful. The City, however, has no evidence to support any claim that Net Connection’s business is unlawful under California law, and has not received any such determination from a judicial body. Consequently, the proposed retroactive application of the ordinance, if adopted, would violate Net Connection’s due process rights.

Net Connection also has serious concerns regarding whether the proposed ordinance cures the First Amendment or other free speech violations as found by the federal court in the pending litigation. At first glance, it appears that the City’s proposed ordinance continues to be overbroad, ambiguous, and unintelligible, and as such continues to threaten to violate Net Connection’s rights to free speech, as well as Net Connection’s right to equal protection.

Finally, Net Connection adopts and agrees with those comments made by I Biz, LLC, one of the other direct targets of the proposed ordinance, whether those comments are made in writing or in person at the Planning Commission hearing.

Very truly yours,

DOWNEY BRAND LLP



Tory E. Griffin

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