

NET CONNECTION HAYWARD LLC
778 B STREET
HAYWARD, CA

February 19, 2013

Mayor and City Council
City of Hayward, City Hall
777 B Street
Hayward, CA 94541

Re: **Opposition to Agenda Item #9** – Adoption of Interim Urgency Ordinance
Imposing Temporary Moratorium on the Development, Establishment and
Operation of Computer Gaming and Internet Access Businesses in Hayward
February 19, 2013 Council Meeting

Dear Mayor and City Council Members:

We **OPPOSE** the Adoption of an Interim Urgency Ordinance Imposing Temporary Moratorium on the Development, Establishment and Operation of Computer Gaming and Internet Access Businesses in Hayward as recommended in the Recommendation to Mayor and City Council dated February 19, 2013 regarding Adoption of Interim Urgency Ordinance Imposing Temporary Moratorium on the Development, Establishment and Operation of Computer Gaming and Internet Access Businesses in Hayward (“the Recommendation”). *At a minimum*, the matter should be continued for at least 45 days for thoughtful consideration and review.

I am one of the owners of Net Connection Hayward LLC. We operate a lawful business in your district. We have a business license, pay our taxes, employ a dozen or so residents, and maintain all other good elements of a local business.

Our Business License was issued on 11-26-2012 authorizing us to operate an “internet service/ business center. Our customers purchase Internet net which they use at their discretion for any legal purpose of their choice. Many check emails, shop on line, do their banking, etc. As a way of marketing our business, we provide No Purchase Necessary sweepstakes games to customers who purchase Internet time or other items – just like thousands of other businesses across the state do.

We **OPPOSE** the Recommendation presented by the Director of Development Services and the City Attorney because:

- i) It is based on erroneous facts;
- ii) Is based on invalid assumptions;

- iii) Misinterprets the law; and
- iv) Is not based on any information whatsoever about our business and computers.

The Recommendation falsely accuses our business of constituting "online gambling" (Recommendation, Page 1, ¶2, Line 8) without any factual or legal foundation whatsoever.

The Recommendation then defines our business as "Computer Gaming and Internet Access Business" without verifying that any "gaming" as that term is defined in the law occurs. (Recommendation, Pg. 2, ¶5, L. 2). No "gaming" occurs at our property.

Although the City Attorney admits having received invitations from counsel offering to provide "legal positions regarding the legality of the businesses," the Recommendation **fails** to inform the Council that the City Attorney failed to respond to such invitations, failed to obtain any of the available information which establishes these businesses as lawful and failed to advise our counsel or the others of this proposed moratorium.

The Recommendation also falsely asserts that one business closed "in response to the cease and desist letter." I know that operator and have spoken with him. I can assure you that the cease and desist letter had no impact at all – his lease simply expired and a new location was identified.

The Recommendation then seeks to mislead the Council by overgeneralizing "internet and computer gaming establishments" in other jurisdictions. While it is true that some jurisdictions have imposed moratoria, others are in the process of creating conditional uses and others are evaluating the potentially significant revenue derived from allowing such businesses with appropriate use taxes imposed.

Perhaps most glaring is the reference to search warrants that were executed in March and April of **2012**. The Recommendation is wholly **misleading** in omitting the fact that no charges have been brought against those operators, no cases have been brought to trial, nor has any court anywhere adjudicated whether any such establishment was operating any gaming devices. The Recommendation then includes references to law enforcement activities related to gambling parlors without any nexus, legal or otherwise, between those operations and ours, all in a veiled attempt to influence the Council with improper innuendo.

The Recommendation then asserts "Other municipalities that have similar establishments where on-line gambling is occurring." This too is based on the same unfounded accusation.

There is no evidence of increased criminal activity occurring at our establishment; in fact we discourage such activity by employing security guards and staff to monitor against any such activity. The Recommendation appears based on hearsay evidence from Antioch, which is irrelevant to these proceedings.

The Recommendation also falsely asserts that the "games have the appearance of Vegas-style games of chance" and "creating a casino-like atmosphere." These are both unequivocally false. We do not offer gambling themed games, nor would anyone ever suggest that our business has the look and feel of a "casino." Again, these unfounded accusations are proffered in the Recommendation in an attempt to influence the council, not with facts but with over generalizations and false facts.

The Recommendation is correct where it informs the Council that "Sweepstakes" are indeed legal under the California Business and Professions Code. Nothing about our business relates to banked or percentage games, thus that reference appears intended to confuse rather than clarify the issue.

Our business was lawfully designed to fit within the parameters of lawful sweepstakes. We do distribute something of value by lot or chance – that is what sweepstakes are and have always been – the potential for a prize is appealing to human nature particularly where, as here, NO PURCHASE IS NECESSARY TO OBTAIN A SWEEPSTAKES ENTRY. Because our business was lawfully designed, every entry is treated the same - whether or not any purchase is made by the customer.

Moreover, there is no element of chance created by operation of the computer. As with all lawful sweepstakes, the outcome of the game is determined before the consumer reveals his or her code – that is the way the McDonald's Monopoly game is played, the Publisher's Clearinghouse sweepstakes were played and our sweepstakes are played. In order for sweepstakes to be legal, the odds of winning must be permanently posted – thus, the outcome must be determined before the game is played to assure compliance.

One last key point of clarification must be made. The Recommendation refers to a December 2012 Bureau of Gambling Control Law Enforcement Advisory indicating that the agency's belief that certain sweepstakes games offered at Internet Cafes "constitute illegal gambling." The memo fails to make clear that the advisory states, "*This advisory is for informational purposes only and is not intended to be legal advice.*" (emphasis original) Moreover, all the advisory states is that the Bureau "considers Internet cafes that offer these types of sweepstakes games to be illegal gambling operations." There is no finding and no basis for including our business within those types of Internet cafes, and the many distinguishing features of the games offered by some operators and ours make this moratorium hasty and ill founded.

We respectfully request that the Council carefully consider the following points:

1. Not all sweepstakes are illegal in California.

The original sweepstakes games were operated by American Family Publishers Sweepstakes (and it's celebrity spokesman, Ed McMahon). More recently, Publishers Clearing House, Readers Digest, the McDonalds "Instant Win"

Monopoly Sweepstakes, the VISA Olympic Sweepstakes, and the Pepsi Billion Dollar Sweepstakes, etc. have become popular, lawful marketing devices.

2. The sweepstakes offered by us are compliant with California law.

Unequivocally, Penal Code section 330b is not violated because these are a *No Purchase Necessary* game system, and no "slot machine or device" is used in the sweepstakes. These sweepstakes have been specifically designed so that there is no "operation" of a machine that creates an unpredictable outcome. All sweepstakes outcomes are *pre-determined*, based on a static system, such that *no outcome is generated* at the user level, thus placing these sweepstakes outside these statutory confines.

3. The "sweepstakes" operators who businesses are a nuisance can be eradicated without eliminating jobs and revenue from legitimate operators.

There are adequate nuisance ordinances in place to address the loitering, parking and other troubling conditions. My business is not one of these types of operators, and should not be swept away with the nuisance operators.

4. There is no legal justification for imposing a moratorium that would deprive me of the opportunity to lawfully conduct my business.

There is no risk to the public health, safety, general welfare or aesthetic quality of the City by my business. There is no "on-line gambling" occurring at my business, nor is mine a gambling establishment such as those that are lawfully and unlawfully operated within the City. There is absolutely no basis upon which this Council could rationally conclude that my business in any way provides for undesirable criminal activity, gambling neither additional nor undesirable impacts upon adjacent businesses and residential neighborhoods. There is certainly no basis upon which this Council could rationally conclude that my business in any way encourages participation by a significant number of unsupervised minors! These broad generalizations based on hyperbole are an insufficient basis upon which this Council could or should act, much less to deprive me of my right to conduct a lawful business.

5. This Ordinance is NOT necessary to preserve public health, safety and welfare or to avoid a current and immediate threat to the health, safety and welfare of the community.

There is no reliable evidence that any risk exists. What is evident is that insufficient research has been done to justify the Recommendation.

- 6. If the City Attorney believes that sufficient evidence exists to declare out business a nuisance, then let that be tested in a court of law, rather than by misleading the City Council. Thus a feasible alternative exists that would not deprive me of my state and federal constitutional rights.**

There is no evidence that my facility constitutes a common law nuisance, thus to act upon this Recommendation would deprive me of my constitutional right to conduct my business, which is a protected right. *Lucas v. South Carolina Coastal Council*, 112 Sup. Ct. 2886 (1992). Every individual has the right to engage in a lawful calling or business subject to reasonable regulations necessary only for the public welfare. *Angelopolous v. Bottorff* (1926) 76 Cal. App. 61, 625.

Therefore, we **OPPOSE** the adoption of the proposed Moratorium unless and until appropriate studies are made, evidence is obtained and facts presented based upon careful consideration, rather than hyperbole and gross-generalizations.

I welcome the opportunity to discuss any questions or concerns you may have.

Ron Doyle

Net Connection Hayward, LLC – Ron Doyle

cc: Finnerty Law Offices, Inc.