FIRST AMENDMENT COALITION

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VIA ELECTRONIC MAIL

Mayor Betsy Stix (betsy.stix@ojai.ca.gov)
Mayor Pro Tempore Suza Francina (suza.francina@ojai.ca.gov)
Council Member Rachel Lang (rachel.lang@ojai.ca.gov)
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Council Member Andrew Whitman (andrew.whitman@ojai.ca.gov)
City of Ojai
401 South Ventura Street
Ojai, CA 93023

Re: Ordinance No. 944

Dear Mayor, Mayor Pro Tempore, and Council Members:

The First Amendment Coalition ("FAC") is a nonprofit public interest organization dedicated to advancing free speech, more open and accountable government, and public participation in civic affairs. I am writing on behalf of FAC to object to Ordinance No. 944 ("Ordinance"), which compels speech in violation of the First Amendment.

The Ordinance mandates that a "developer of any proposed rental housing development project" with "at least one deed-restricted affordable unit" must "include in every written communication to the public regarding the project" a large amount of detailed information "in at least twelve point font," such as anticipated income limits and rents, the number and dimensions of deed-restricted affordable units, the length of the deed restriction, compliance with applicable housing laws, and similar matters. The term "developer" includes "the applicant of record for any proposed rental housing development project," the "property owner or owners," and "any person or entity acting on their behalf."

This provision cannot be justified as a "regulation of commercial speech," as asserted in the Ordinance's findings. Because the Ordinance covers "*every* written communication to the public" about covered projects (emphasis added), it goes far beyond purely commercial speech. For example, the Ordinance applies to an op-ed or letter to the editor in a local newspaper discussing public policy reasons to support a project, such as a shortage of housing and increasing rates of homelessness. That kind of "speech on public issues occupies the highest rung of the hierarchy of First Amendment values." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). The Ordinance implicates "fully protected expression" by burdening the right to engage in "informative and perhaps persuasive speech" on matters of public concern. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (quoting *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)).

The mere fact that one might have an "economic motivation" for speaking "is insufficient by itself to render speech commercial." *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1122 (9th Cir. 2020) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 (1983)). A person's speech is not "necessarily commercial whenever it relates to that person's financial motivation for speaking," especially when any commercial component "is inextricably intertwined with otherwise fully protected speech." *Riley*, 487 U.S. at 795 (citation omitted). A "speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Id.* at 801 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265–66 (1964)).

It is a "basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) (quoting *Rumsfeld v. F. for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006)). There is no distinction of "constitutional significance" between "compelled speech and compelled silence," because the First Amendment protects "the decision of both what to say and what *not* to say," and the "the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners."[1] *Riley*, 487 U.S. at 791, 796–97.

"Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech," and the Ordinance therefore imposes "a content-based regulation of speech" that violates the First Amendment. *Id*. at 795; *cf. Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (statute compelling newspaper to print reply to editorial "exacts a penalty on the basis of the content of a newspaper"). It makes no difference whether the Ordinance involves "compelled statements of opinion" or "compelled statements of 'fact,'" because "either form of compulsion burdens protected speech." *Riley*, 487 U.S. at 797–98.

For example, as the Supreme Court noted, "we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects," because although such information "might be relevant to the listener … a law compelling its disclosure would clearly and substantially burden the protected speech." *Id.* at 798.

Just as a project's proponents may not be compelled to state average cost overruns in every statement they make to the public, a developer favoring a housing project may not be compelled to include detailed and burdensome disclosures about income, rents, and unit dimensions in every written communication to the public regarding the project.[2]

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[1] Certain disclosures may sometimes be required in purely commercial speech not at issue here. *See, e.g., Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct.*, 471 U.S. 626, 651 (1985); *Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1275 (9th Cir. 2023).

[2] By controlling the content of material such as op-eds or letters to the editor, the Ordinance also violates the First Amendment by interfering with the "editorial control and judgment." of the press. *Mia. Herald*, 418 U.S. at 258.

Perhaps developers may be required to make certain disclosures in their applications or other communications to the City. To the extent the City has an interest in providing the public with "precise, clear, and transparent information" about a proposed development that is "already required in the development permit application process," as stated in the Ordinance's findings, the City "may itself publish" the relevant information. *Riley*, 487 U.S. at 800. That "procedure would communicate the desired information to the public without burdening a speaker with unwanted speech." *Id.* This "narrowly tailored" alternative for serving the City's interest confirms that the Ordinance is unconstitutional to the extent it compels speech to the public. *Id.*

For the foregoing reasons, the City should immediately amend the Ordinance to remove the requirement of detailed disclosures in every written communication to the public. Thank you for your attention to these matters. Please let me know if you have any questions.

Sincerely,

FIRST AMENDMENT COALITION

David Loy
Legal Director

cc: City Attorney (msummers@chwlaw.us)