Grayson Barber, L.L.C.
68 Locust Lane
Princeton, New Jersey 08540
(609) 921-0391

VIA FAX AND MAIL

December 1, 1999

Lyle Hough, Esq.
Legal Department
Trenton City Hall
319 East State Street
Trenton, NJ 08608

Re: Martinez v. City of Trenton, Docket No. 99-3812 (AET)

Dear Mr. Hough:

Thank you for providing a revised draft of the ordinance that would govern use of the Trenton city hall atrium and plaza. As revised, the current draft is much closer than before to meeting the constitutional standards established by the United States Supreme Court, and we sincerely appreciate the changes the city has made.

The current draft still contains provisions that are constitutionally defective, however, and we dispute the city's characterization of the atrium. Nevertheless, as set forth below, we are willing to accept the ordinance if the city will make two further amendments.

Charging for Free Speech

The ordinance still runs afoul of the constitutional prohibition against prior restraints. The defect is set forth in the italicized portion of paragraph 7 of the ordinance as follows:

> 7. Conditions of Permit. The Director of Public Works is authorized to include reasonable conditions in the permit which are necessary to ensure safety of persons using City Hall and the safety of the property of the City of Trenton, to ensure that the activity does not interfere with the conduct of normal municipal operations, ***and to ensure that the activity does not result in additional cost or expense to the municipal government. Such conditions shall include a requirement that the applicant pay to the City the amount of any additional reasonable expenses the City will incur as a result of the use of the City's facilities, including overtime for security and maintenance***. Nothing in the grant of a permit shall be deemed a waiver of the City's right to bring an action for contribution and/or indemnification for claims which result from the negligence or other wrongful conduct of any person, including the person to whom a permit is issued.

The highlighted portion of paragraph 7 violates the constitution in two ways. First, it is impermissibly content based. In order to assess accurately the cost to the city, the Director of Public Works must examine the content of the applicant's message, estimate the response to the message, and judge the number of security personnel necessary to meet that response. See Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992). Second, it vests unbridled discretion in a government official, making the ordinance a form of prior restraint. See City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988).

For example, the city has indicated that if a controversial speaker wants to use the atrium, and is likely to draw counterdemonstrators, that speaker would be required to pay for extra security guards. The cost to the speaker will depend on the city's estimate of the amount of hostility likely to be created by the speech, based on its content. "Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit." Forsyth County, 505 U.S. at 134.

This kind of requirement has repeatedly been invalidated by the United States Supreme Court. In Forsyth County, the ordinance at issue required applicants to defray "the cost of necessary and reasonable protection of persons" at parades, assemblies, demonstrations and other activities, if the costs exceeded "the usual and normal cost of law enforcement...." 505 U.S. at 126. The county administrator was empowered to "adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed." Id. at 127.

The Supreme Court invalidated the Forsyth County ordinance in its entirety, notwithstanding its recitation of the phrase "necessary and reasonable." Trenton's proposed ordinance, like Forsyth County's, offers administrators no objective standards, much less any that could be characterized as "narrowly drawn, reasonable and definite." Id. at 133. As such, it "contains more than the possibility of censorship through uncontrolled discretion." Ibid.

In City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988), the Supreme Court invalidated an ordinance that similarly gave a city official unfettered discretion to deny a permit application and unbounded authority to condition the permit on any additional terms he deemed "necessary and reasonable." The Court refused to presume that the city would adhere to standards absent from the face of the ordinance. Id. at 770.

Without objective standards, Trenton's ordinance will provoke uncertainty among city officials, raising the specter of censorship, and similar uncertainty among speakers, creating a chilling effect. See ACLU v. Reno, 521 U.S. 844, 871 (1997). At most, Trenton can require a nominal fee. See Forsyth County, 505 U.S. at 136. This should be no problem, since Trenton has historically required only a nominal fee for using the atrium after hours.

The time to cure any constitutional defects is now. "The very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court." Forsyth County, 505 U.S. at 129. See also Lakewood, 486 U.S. at 759 ("a facial challenge lies

whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers.").

We suggest that the objectionable portions of paragraph 7 be stricken from the proposed ordinance and replaced by language allowing the city to require applicants to pay for incidental costs unrelated to the content of the applicant's speech. Thus, for example, if an applicant wanted to use a special public address system, the city could charge a rental fee. We respectfully suggest that the city consider adopting the italicized portion of paragraph 7 below:

> 7. Conditions of Permit. The Director of Public Works is authorized to include reasonable conditions in the permit which are necessary to ensure safety of persons using City Hall and the safety of the property of the City of Trenton, to ensure that the activity does not interfere with the conduct of normal municipal operations. ***The City may require applicants to pay for incidental costs unrelated to the content of the applicant's speech. Such incidental costs shall not include costs for security or public safety, but may include costs for such services as sound amplification and temporary janitorial services.*** Nothing in the grant of a permit shall be deemed a waiver of the City's right to bring an action for contribution and/or indemnification for claims which result from the negligence or other wrongful conduct of any person, including the person to whom a permit is issued.
>
> Please note that the city remains free to:
>
> 1. Require a license.
> 2. Charge a nominal administrative fee.
> 3. Limit events to one at a time.
> 4. Limit the number of people in the room, per event.
> 5. Prohibit loud, raucous or disruptive noise.
> 6. Prohibit littering, or any other activity that might damage the atrium or the plaza.
> 7. Schedule events to avoid overlap, or overuse of the space.

These are examples of time, place and manner restrictions, which, if narrowly tailored, will ensure orderly use of the atrium and amply serve the city's interests.

The Atrium as a "Lobby"

The second amendment we request to the proposed ordinance pertains to the first paragraph, which is set forth below, with the objectionable portion highlighted.

> 1. Public Forum. The City Hall Atrium and its adjoining plaza shall be open to the public for expressive activity, subject to the terms and conditions set forth in this ordinance. The intent of this ordinance is to authorize the use of the

Atrium by members of the public for expressive activities, while recognizing and declaring that its primary purpose is to serve as a ***lobby for people seeking to do business with the City and by the employees of the City.*** Nothing in this ordinance shall be deemed to prevent the use of the City Hall Atrium by the municipal government
for official press conferences and other government functions.

We do not agree that the primary purpose of the atrium is to serve as a "lobby," but frankly do not believe it worth quibbling about. We do think the phrase "for people seeking to do business with the City and by the employees of the City" is unnecessarily and inaccurately limiting. We request that it be deleted, so that the paragraph would read as follows:

1. Public Forum. The City Hall Atrium and its adjoining plaza shall be open to the public for expressive activity, subject to the terms and conditions set forth in this ordinance. The intent of this ordinance is to authorize the use of the Atrium by members of the public for expressive activities, while recognizing and declaring that its primary purpose is to serve as a lobby. Nothing in this ordinance shall be deemed to prevent the use of the City Hall Atrium by the municipal government
for official press conferences and other government functions.

Further Negotiation

Please note that throughout this letter I have assumed that you and I are working from the same version of the draft ordinance. I have been referring throughout to the copy I received from you at 5:30 p.m. on Monday, November 22, 1999. This is not the same version that we discussed with Magistrate Judge Hughes earlier that afternoon.

We would welcome the opportunity to discuss alternative ways in which the ordinance could be modified to address the concerns outlined above. We would also be happy to ask Judge Hughes for another settlement conference prior to the public hearing on December 2, 1999.

Very truly yours,

Grayson Barber

cc: (via fax and mail)
Hon. John J. Hughes
Juan Martinez
Frank L. Corrado, Esq.
Lenora M. Lapidus, Esq.