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February 12, 1999

To: Board of Representatives

From: Andrew J. McDonald, Director of Legal Affairs

Re: Proposed Ordinance Amending Sections 164-5 through
164-8 164,10, and 164-13 of the Code of Ordinances
Concerning Noise

I have reviewed the foregoing ordinance and wish to bring
several issues to your attention:

Of particular concern are:

- Section 164-5.E.(3) which states that the use of domestic power equipment is prohibited between 6:00 P.M. and 8:00 A.M., Monday through Friday, and between 3:00 P.M. and 8:00 A.M. on Saturday, Sunday, and holidays; and,
- Section 164-6.D., which prohibits the use of gasoline-powered leaf blowers from May 1 through Labor Day, and the use of more than one such leaf blower from Labor Day through April 30.

The authority for the legislation embodied in Chapter 164, which is entitled "Noise Control Ordinance", is in the police power of the City. However, a municipality's exercise of its police power cannot violate constitutional rights and is subject to limitations implicit in the nature

of that power. To justify use of the police power, a municipality must demonstrate that the means adopted are reasonably necessary for the accomplishment of a legitimate purpose in protecting the public health, safety, or welfare. In addition, an ordinance enacted under a city's police power must not be unduly oppressive upon any particular class of individuals.

I will address the constitutional issue. The amendments to the Noise Ordinance concerning the use of power equipment and leaf blowers have implications upon individuals who are primarily engaged in the building construction and landscaping businesses, respectively. Under the terms of the amendments, a building contractor would be restricted from using power equipment during certain hours. Similarly, a landscaper would be barred from using gasoline-powered leaf blowers for a period of several months and prohibited from using more than one such leaf blower during the remainder of the year. Both amendments place these restrictions upon power equipment and leaf blowers **regardless** of the amount of noise which they generate.

These limitations upon the use of private property may place unconstitutional restrictions upon the rights of building contractors and landscapers to engage in commerce. Legislation under the guise of the police power cannot impose unnecessary and unreasonable restrictions on the use of private property and the pursuit of lawful activities. As noted above, the ordinance as drafted may be considered unreasonable because it prohibits the use of these devices at certain times without regard to the amount of noise which they generate. Thus, the ordinance would prohibit a landscaper from using a leaf blower upon which he had placed a muffler, even if the level of noise generated was less than that contemplated by Section 164-5.B. Moreover, the ordinance does not contemplate variances in the noise levels generated by different machines.

For the foregoing reasons, it is my opinion that the amendments, in their current form, are susceptible to court challenge. Therefore, I have taken the liberty of redrafting Section 164-5.E. to increase the period during which domestic power equipment may be operated and to require that the noise level generated exceed the standards set by Section 164-5.B; and to narrow the prohibitions upon the use of leaf blowers in Section 164-6.D.

Similarly, I have redrafted Section Section 164-6.D. to remove the period of blanket prohibition of the use of leaf blowers and to require that the noise level generated exceed the standards of Section 164-5.B.

It is my opinion that these modifications result in an ordinance with more reasonable restrictions, which will not unnecessarily interfere with lawful business activities, and which is, therefore, less susceptible to legal challenges.