

February 18, 2000

JOINT REPORT TO THE COMMITTEE ON PUBLIC  
SAFETY AND NEIGHBORHOOD SERVICES

PROPOSED ORDINANCE RESTRICTING  
OUTDOOR ALCOHOL ADVERTISING

**INTRODUCTION**

At the Public Safety and Neighborhood Services Committee meeting of November 10, 1999, the Committee directed the City Manager and City Attorney to return to the Committee with a report regarding the implementation of an ordinance that would restrict outdoor advertising of alcoholic beverages. The Committee had before it a proposed ordinance submitted by Councilmember George Stevens and the San Diego Coalition for Responsible Outdoor Advertising [the Coalition].

The City Attorney's Office and the City Manager's Office have met and discussed the proposed ordinance with representatives of the Coalition, Eller Media, Outdoor Systems, the San Diego Merchants Association, the California Grocers Association, the Food and Beverage Association of San Diego, and city staff from the Police Department and Neighborhood Code Compliance. This Report reviews the legal restrictions for adopting and implementing the proposed ordinance, the ongoing litigation faced by the cities of Los Angeles and Oakland over their alcohol advertising ordinances, the input received from the community, and recommendations for implementing an ordinance that can withstand court challenge.

Recent court decisions in these cases emphasize the importance of gathering and analyzing reliable evidence showing (1) the need for restrictions on alcohol advertising in San Diego, (2) the kind of restrictions needed, and (3) the efforts that have been undertaken by the community in general and the City in particular to discourage underage drinking. The information gathered should include anecdotal and research evidence regarding the impact of outdoor alcohol advertising on youth and safety, reports on the existence and effectiveness of City, county, and state programs designed to combat underage drinking, reports on the enforcement and effectiveness of existing laws prohibiting the purchase, sale, and possession of alcoholic beverages, and an examination of other efforts that could be made by the City to decrease underage drinking. Without this informed analysis to support the City's interest in imposing the proposed restrictions, courts will be reluctant to agree that the City has met its burden in ensuring that First Amendment rights have not been unnecessarily restricted. Such evidence can be gathered through noticed public hearings, reports from various departments,

agencies, and programs, and by review of existing published research.

Attached to this Report is a draft Proposed Ordinance. This draft has been revised from the original submitted by the Coalition to conform to the Municipal Code and the recommendations made in this Report.

## I

### RECENT CASES AND LEGAL ISSUES

A restriction on alcohol advertising raises several important legal issues that have been and continue to be litigated in the courts. The issue that has received the most attention from the courts is whether such restrictions unfairly infringe upon the free speech rights of advertisers, in violation of the First Amendment of the United States Constitution and Article I, Section 2 of the California Constitution. The courts have also considered whether such local laws are preempted by state laws that regulate the sale of alcohol. These issues are presented in two cases currently pending in federal district court: *Eller Media Company and Outdoor Systems, Inc. v. City of Oakland*, No. C98-2237 (N.D. Cal. filed June 7, 1998) and *Korean-American Grocers Association<sup>1</sup>, et al. v. City of Los Angeles*, No. 99-08560 (C.D. Cal. filed Aug. 23, 1999). In these cases, the plaintiffs seek declaratory relief, injunctive relief, and attorneys' fees.

#### A. Advertising Restrictions Must Meet the *Central Hudson* Test

The most serious legal obstacle to restricting commercial speech is the right to free speech under the United States and California Constitutions. The right to free speech is not an absolute right; courts have long recognized the ability of government to restrict speech, especially commercial speech like advertising, under certain circumstances. Courts determine whether the restrictions imposed by government on commercial advertising cross the line drawn by the Constitution by applying the test set forth in the United States Supreme Court's opinion in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 563-564 (1980).

##### 1. The *Central Hudson* Test: Identifying the City's Needs and Meeting Them

Under the *Central Hudson* test, an ordinance restricting constitutionally protected advertising (such as the proposed ordinance restricting the outdoor advertising of alcoholic beverages) must meet the following criteria:

- (1) The City must have a substantial interest that it is trying to protect or further by imposing the restrictions;
- (2) The ordinance must directly advance the City's substantial interest; and
- (3) The ordinance must go no further than is necessary to advance the City's interest.

One of the first cases applying the *Central Hudson* test to restrictions on alcohol

advertising was a case filed against the city of Baltimore, Maryland; *Anheuser-Busch v. Schmoke I*, 63 F.3d 1305 (4th Cir. 1995), *vacated by* 512 U.S. 1206 (1996), *aff'd in Anheuser-Busch v. Schmoke II*, 101 F.3d 325 (4th Cir. 1996), *cert. denied* 117 S.Ct. 1569 (1997). Baltimore's ordinance restricting alcohol advertising is premised on that city's interest in protecting the health and safety of minors, a substantial governmental interest. Baltimore established the connection between outdoor alcohol advertising and underage drinking through review of scientific and anecdotal evidence, testimony at public hearings, and review of other programs designed to decrease underage drinking. Baltimore tailored the restrictions to meet the problem by making exceptions in the ordinance to allow alcohol advertising in areas not frequented by minors. Based on these efforts, the court found that Baltimore's ordinance satisfied the *Central Hudson* test.

In the pending case of *Eller Media v. City of Oakland*, the District Court for the Northern District of California found, as a preliminary matter, that Oakland's ordinance restricting outdoor alcohol advertising (modeled after Baltimore's) met the *Central Hudson* test and thus the ordinance could remain in effect during the litigation. The court has since ruled, however, that there is a triable issue of fact as to whether the ordinance meets the last criteria of the test, i.e., whether there may be other more effective ways to limit underage drinking that do not impinge on speech, such as more vigorous enforcement of existing laws, increased penalties for selling alcohol to minors, educational campaigns, and restrictions on where alcohol can be sold.

In *Korean-American Grocers v. City of Los Angeles*, the District Court for the Central District of California entered an order on January 3, 2000, staying enforcement of the city's ordinance until the issues in the case can be decided. In its order, the court found that "at a minimum, Plaintiffs have raised serious questions on the merits due to the overbroad nature of the Ordinance and the substantial burden of proof that the City must meet to justify the Ordinance."

A decision in either the *Los Angeles* or the *Oakland* case will assist the City in enacting an ordinance that will withstand court challenge. However, these cases have not yet proceeded to trial. The *Los Angeles* case is currently in the discovery phase, and a trial date has not yet been set. The *Oakland* case is also in the discovery phase, and the parties intend to file cross motions for summary adjudication in the spring of this year.

## **2. Gathering Information to Meet the *Central Hudson* Test**

As has been made clear in the cases discussed above, the City Council must have a strong factual basis to support restrictions on alcohol advertising. This information should include:

review of scientific and anecdotal evidence;

review of other social and law enforcement programs designed to decrease underage drinking including enforcement of existing laws, increased penalties for selling alcohol to minors, educational campaigns, etc.;

testimony from members of the community as to the effects of outdoor advertising, including testimony from members of the business, educational, and scientific communities;

factual information showing the prevalence of outdoor alcohol advertising in areas frequented by youth.

This information can be gathered at scheduled hearings before this Committee or at community venues and through the efforts of staff. The Police Department has already gathered information reflecting the enforcement of laws prohibiting the sale and possession of alcohol by minors, including minor decoy operations and statistics regarding arrests of juveniles for offenses involving alcohol. The Coalition has compiled and provided a large binder of research articles covering many of the different aspects of the youth drinking problem and the role that marketing plays in the problem. More information is needed, however, addressing the role of outdoor alcohol advertising in underage drinking, and specifically as it relates to the neighborhoods of San Diego. This information would form the basis for the City Council's findings supporting the advertising restrictions.

## **B. Preemption Issues**

The complaints filed in the Los Angeles and Oakland cases allege that the respective alcohol advertising restrictions are preempted by existing state laws, including Article 20, section

22 of the California Constitution and provisions of the California Business and Professions Code. Article 20, section 22 gives the State the “exclusive right or power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State.”

The ordinance contemplated here, however, does not involve licensing authority or regulation of the manufacture, possession, or transportation of alcoholic beverages, and does not regulate the sale or purchase of such beverages. *See California Restaurant Assn. v. City of Los Angeles*, 192 Cal.App.3d 405 (1987) (ordinance requiring posting of signs warning of the dangers of alcohol was not preempted); *Ainsworth v. Bryant*, 34 Cal.2d 465 (1949) (ordinance imposing excise tax that would apply to the sale of alcoholic beverages was not preempted); *Park & Shop Markets, Inc. v. City of Berkeley*, 116 Cal.App.3d 78 (1981) (ordinance requiring collection of deposit on beverage containers was not preempted). A local ordinance is not preempted where the ordinance does not directly affect the licensee’s ability to sell alcoholic beverages to a willing purchaser. *California Restaurant Assn.*, 192 Cal.App.3d at 411.

The plaintiffs in the *Oakland* case moved for summary adjudication on their preemption claim arguing that advertising is an incident of sale regulated by California law. The district court rejected that claim. *Eller Media v. City of Oakland*, No. C98-2237, 1998 WL827426 (N.D. Cal. Nov. 25, 1998). The district court held that Article 20, section 22 does not explicitly vest in the state the power to regulate advertising and was unwilling to read new powers into the Constitution that were not specifically set forth in it. Further, the district court ruled that Oakland’s ordinance was not duplicative of state law and did not contradict state law and accordingly was not preempted on either of those grounds.

## II

### ISSUES RAISED BY THE LOCAL, HEALTH, AND BUSINESS COMMUNITIES

Since the PS&NS Committee meeting on November 10, 1999, staff from the City Attorney’s Office, Manager’s Office, and Councilmember Stevens’ Office have met with members of the San Diego Coalition for Responsible Outdoor Advertising [the Coalition], Eller Media, Outdoor Systems, the San Diego Merchants Association, the California Grocers Association, and the Food and Beverage Association of San Diego. Although members of the business community conveyed their strongly held position that there should be no further regulation of alcohol advertising than already exists under state law, these discussions served to highlight their issues with particular provisions of the proposed ordinance.

#### A. Treatment of Billboards Versus Treatment of Other Outdoor Advertising

The proposed ordinance treats billboards in the same manner as any other type of outdoor advertising and would prohibit alcohol advertising in a publicly visible location unless that advertising is in a designated industrial or heavy commercial zone and not within 1000 feet of a school, playground, recreation center or facility, child care center, arcade, or library and not within 1000 feet of the boundary of a non-commercial or non-industrial zone. Under these restrictions, any existing billboard could not display alcohol advertising if it is located near but

not in a residential or light commercial zone. The billboard companies argue that these restrictions present a “de facto ban” rather than a reasonable restriction because alcohol advertising would be permitted at less than ten percent of the City’s billboards. This claim is also made in the *Oakland* and *Los Angeles* cases.

To determine whether the ordinance would create a de facto ban, staff would need to conduct a study of existing billboards and determine how many billboards are both (1) located in the specified industrial or commercial zones and not within 1000 feet of a designated site or zone and (2) located outside 1000 feet of a school or other designated site.

Eller Media and Outdoor Advertising propose that the ordinance define billboards separately<sup>2</sup> and not permit the advertising of alcoholic beverages on billboards that are within 1000 feet of a school, playground, recreation center or facility, child care center, arcade, or library, or within 500 feet if the face of the sign is not visible from the designated site.

The Coalition strenuously objects to treating billboards differently from other types of outdoor advertising. The Coalition points out that the size and placement of billboards make them one of the most powerful forms of outdoor advertising, especially for young people. Further, the Coalition argues that the older neighborhoods of the City, where residential and commercial uses are often mixed, will be more heavily impacted by this approach. Because new billboards have not been permitted for a number of years, most billboards are in the more established areas of the City. Allowing alcohol advertising on billboards that are located, for example, on El Cajon Boulevard, University Avenue, or Fairmont Avenue, puts that advertising in the daily path of students traveling to and from school and home, even if the billboard is more than 1000 feet from the school.

The Coalition proposes that alcohol advertising not be permitted within 1000 feet of a “residential use,” that is, any lot containing at least one dwelling unit. This would be a difficult approach to comply with and enforce because residential dwelling space can be located on commercially zoned property or even as part of a commercial building, and the City has no comprehensive data identifying such uses. Accordingly, this approach is not recommended.

The language of the proposed ordinance parallels the tobacco advertising ordinance in using zoning designations to identify where a sign would be allowed. Thus, the proposed ordinance allows alcohol advertising only in certain commercial and industrial zones, and conversely, does not allow alcohol advertising in residential zones, and does not allow alcohol advertising in the following commercial zones that include residential uses: Commercial—Neighborhood (CN); Commercial—Regional (CR-1); Commercial—Office (CO); Commercial—Visitor (CV); Commercial—Parking (CP); Commercial—Community (CC-1, CC-3). Where the commercial and industrial zones include schools, etc., alcohol advertising is not permitted within 1000 feet of those sites. Again, these restrictions should be studied to determine whether they create a de facto ban on alcohol advertising.

## **B. Restrictions on Advertising and Displays Inside Stores**

Like the tobacco advertising ordinance, the Coalition’s original proposal included

restrictions on advertising inside retail establishments located within 1000 feet of a school or other designated site. For those stores, displays of alcohol products were not to be placed within two feet of candy, snack, or non-alcoholic beverage displays. Also, alcohol advertising could not be placed within four feet of the floor, within two feet of candy, snack, or non-alcoholic beverage displays, or on the inside or outside of windows or doors and facing the outside.

This language was included in the tobacco advertising ordinance based on research showing that retailers near schools had higher concentrations of tobacco advertising and displays below four feet and near candy, snacks, and sodas. We have not located any comparable research relating to alcohol advertising and displays in stores within 1000 feet of schools. Also, the San Diego Merchants Association and the California Grocers Association have raised practical concerns regarding compliance with these restrictions because displays of beer and wine require a considerable amount of floor space. For these reasons, restrictions on advertising and displays inside stores have not been included in the proposed ordinance.

The proposed ordinance would restrict the advertising of alcoholic beverages in doors and windows and facing the outside as “publicly visible” advertising. The San Diego Merchants Association has proposed that instead of restricting all alcohol advertising on doors and windows, the ordinance permit ads to cover no more than 33% of window area (as is currently required by the Department of Alcoholic Beverage Control) and prohibit all other outdoor alcohol advertising for stores such as banners, sidewalk signs, and the like. This proposal would provide more uniform regulation, especially for those owners who have stores inside and outside the City.

### **C. Effective Date**

Typically, City ordinances become effective within thirty days of enactment. However in dealing with these type of advertising restrictions, other cities have extended this time to allow businesses to comply. The business community has requested one year for the ordinance to become effective. The Coalition would like the ordinance to become effective in a shorter period of time. The tobacco advertising ordinance became effective after thirty days, but provided up to one year for business owners to comply with the restrictions on advertising and displays in stores. Los Angeles provided a one year time frame for compliance in its ordinance. The current proposed ordinance provides that the ordinance will be effective one year after enactment.

## **III**

### **ESTIMATED COSTS**

At the PS & NS Committee meeting of November 10, 1999, the Committee directed the City Manager to review and report on potential funding sources for an advertising campaign to educate young people regarding abstinence and strategies to avoid over-consumption of alcoholic beverages.

On February 9, 1999, the City Council adopted The Smart & Healthy San Diego Plan. As a result of this action, the City Manager included \$3.83 million in anticipated tobacco

settlement funds in the FY 2000 budget. A portion of these funds (\$250,000) has been allocated to establish a Youth Anti-Smoking and Anti-Substance Abuse Enforcement Fund. These funds would assist the Neighborhood Code Compliance, Police and City Attorney Departments in enforcing the City's anti-smoking and anti-substance abuse laws, including City laws that restrict tobacco companies from marketing cigarettes to minors, smoking in public places, and underage drinking laws.

According to Neighborhood Code Compliance staff, an additional code compliance officer, at a cost of approximately \$54,000, would be required to effectively enforce an alcohol advertising ordinance. The position would respond to complaints and conduct random inspections to ensure that the conditions of the ordinance are met. Enforcement can be difficult because violations are not readily apparent upon inspection of the sign or billboard. The officer will be required to research the uses of the property, and the zoning within specific distances of the alcohol advertising signs or billboards to determine if a violation exists.

If the City Council desires to allocate additional funding for educational programs related to abstinence and the over-consumption of alcoholic beverages, the City Manager's Office recommends that this be considered as a part of the annual budget process.

#### **IV**

#### **RECOMMENDATIONS**

The City Manager and the City Attorney recommend that the PS&NS Committee take the following steps to obtain the information necessary to support the Proposed Ordinance:

1. Schedule a series of hearings on the Proposed Ordinance for the presentation of testimony regarding the outdoor advertising of alcoholic beverages and its effects on the youth of the City of San Diego. These hearings could be held at different neighborhoods in the City where outdoor alcohol advertising is of particular concern and should be broad enough in scope to allow testimony regarding underage drinking issues in general.
2. Based on the evidence presented at the hearings, determine what measures are being taken and what additional measures can be taken to prevent youth drinking.
3. Based on the evidence presented at the hearings, determine whether outdoor advertising of alcoholic beverages in San Diego has impacted youth drinking and whether the restrictions in the proposed ordinance will address any negative impacts.



4. Conduct a study of existing billboards and determine (a) how many billboards are located in the specified industrial or commercial zones and not within 1000 feet of a designated site or zone and (b) how many billboards are located outside 1000 feet of a school or other designated site.

Respectfully submitted,

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City Attorney

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MICHAEL T. UBERUAGA  
City Manager

Appendices:

Appendix A: Proposed Ordinance

Appendix B: Definitions and Zones

Appendix C: Information from the San Diego Police Department re Underage Drinking Programs and Crime Analysis

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RC-2000-2