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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

CITY'S SIGN ORDINANCE AND
RESTRICTIONS ON OFFSITE ADVERTISING

INTRODUCTION

In the past few months, the City Council has been presented with issues regarding the placement of advertising or sponsorship signs in the public rights-of-way or on public property. The legal issues related to signs that advertise goods, services, or persons or entities that are not located or available at that site (referred to as "offsite advertising" or "off-premises signs"), have been addressed by this Office on many occasions in the past. As an aid to Council in its discussions, this Report provides the history of the City's sign regulations, a discussion of the issues that the City has encountered in the past, and the law that applies to those issues.

In summary, the City's existing sign regulations prohibit off-premises signs, except for public interest messages, on both public and private property, and restrict the posting of signs on public property and in the public rights-of-way except as specifically provided in the Municipal Code. San Diego Municipal Code §§ 142.1201–142.1292, 95.0102. The City's sign regulations are based on and designed to further the City's interests in preserving the beauty of San Diego and the clear communication of safety information for motorists and pedestrians in the public rights-of-way. In the *Metromedia* case (discussed below) and in court decisions following *Metromedia*, the courts have emphasized that when sign regulations are based on interests of safety and aesthetics, any exceptions to those regulations must further an interest that is even stronger and more important than the City's interest in safety and aesthetics, or must not affect those interests. Otherwise, the exceptions diminish the credibility of the City's rationale for restricting signs in the first place, and call into question the constitutionality of the entire regulatory scheme. If challenged, the City would bear the burden of demonstrating that its interests in safety and aesthetics are substantial and compelling and justify its regulations.

Accordingly, consideration by the City Council of proposals to place signs in the public rights-of-way or on public property that are not specifically provided for in the sign regulations must be carefully considered in relation to the interests served by the existing regulations (preservation of beauty and clear communication of necessary information) and in relation to the

governmental interest that would be served by the proposed signs. Any exception to the sign regulations that is not consistent with the purpose and intent of the regulations should be avoided.

DISCUSSION

I. History of the City of San Diego's Prohibition on Offsite Advertising

The City's sign regulations were first introduced in 1972, revised and reintroduced in 1981, substantially revised and renumbered in 1984, and added to the Land Development Code in 2000. Throughout these revisions, the sign regulations have remained consistent in restricting off-premises advertising to preserve the beauty of the City and facilitate clear communication in the public rights-of-way.

A. The San Diego Sign Ordinance

On March 14, 1972, the San Diego City Council enacted an ordinance prohibiting most outdoor commercial advertising in the City. Called the "Prohibition and Abatement of Outdoor Advertising Display Signs," the stated purpose and intent of the ordinance was:

> to eliminate excessive and confusing sign displays which do not relate to the premises on which they are located; to eliminate hazards to pedestrians and motorists brought about by distracting sign displays; to ensure that signing is used as identification and not as advertisement; and to preserve and improve the appearance of the City as a place in which to live and work.

San Diego Municipal Code § 101.0700(A) (repealed 1-17-84).[1] The ordinance stated that the regulations would prevent "the destruction of the natural beauty and environment of the City," a valuable resource for the City's tourism industry. *Id.* The ordinance included an abatement schedule for the removal of nonconforming signs, with all nonconforming signs to be removed by April 1, 1976. § 101.0700(D).

The ordinance prohibited all outdoor advertising display signs, except onsite advertising, *i.e.*, signs that identified the goods or services available at that location, or the owner or occupants of the building where the sign is posted. § 101.0700(B); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 493-94 and n.1 (1981). The prohibition of offsite advertising display signs applied to commercial and noncommercial messages on billboards and all other fixed-structure signs, as long as they directed "attention to a product, service or activity, event, person, institution or business." § 101.0700(B)(3); 453 U.S. at 494.

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[1] Unless otherwise indicated, all citations are to the San Diego Municipal Code.

In addition to onsite advertising, the ordinance allowed the following: signs erected and maintained in discharge of a governmental function; permitted signs located at public bus stops (including bus bench advertising); signs being manufactured, transported, or stored within the City and not being used for advertising; commemorative historical plaques; religious symbols and "legal holiday decorations"; signs within shopping malls; for sale and for lease signs; signs depicting time, temperature, and news; signs on public transportation vehicles regulated by the City; signs on licensed commercial vehicles, but not if used as a stationary outdoor display sign; approved temporary, off-premises, directional signs for a subdivision; and temporary political campaign signs. SDMC § 101.0700(F); 453 U.S. at 494-95 and n.3.

B. 1972 Sign Ordinance Litigation: *Metromedia v. City of San Diego*

Several advertising companies joined forces and sued the City in state court seeking to block enforcement of the ordinance. The parties brought cross-motions for summary judgment based on stipulated facts. Among the facts agreed upon, the parties stipulated that if enforced, the ordinance would eliminate the outdoor advertising business in the City. *Metromedia*, 453 U.S. at 497. The trial court held that the ordinance was an unconstitutional exercise of the City's police power and an abridgement of the advertisers' First Amendment rights. *Id.* The California Court of Appeal affirmed on the first ground alone. *Metromedia Inc. v. City of San Diego*, 67 Cal. App. 3d 84 (1977). The California Supreme Court reversed, holding that the two purposes of the ordinance, traffic safety and aesthetics, were legitimate governmental interests and that the ordinance was a proper application of municipal authority over zoning and land use. *Metromedia Inc. v. City of San Diego*, 26 Cal. 3d 848 (1980).

In February of 1981, the parties argued the case before the United States Supreme Court. In a plurality opinion, the Court found the ordinance as a whole unconstitutional under the First Amendment because it "reaches too far into the realm of protected speech." 453 U.S. at 521. The Court specifically found, however, that the ordinance's restrictions on commercial speech were not unconstitutional, and were justified by the City's stated objectives of increasing traffic safety and improving aesthetics. 453 U.S. at 512.

The United States Supreme Court approached the First Amendment analysis of the restrictions contained in the City's ordinance by differentiating between commercial and noncommercial speech as deserving different levels of protection. For each, the Court made a "particularized inquiry" into the effect of the ordinance on the communication in order to weigh the First Amendment interests against the public interests served by the regulation. 453 U.S. at 502-503. To accomplish the weighing part of this test for commercial speech, the Court used the four-part *Central Hudson* test: (1) the speech concerns lawful activity and is not misleading; (2) the restriction seeks to implement a substantial governmental interest; (3) the restriction directly advances that interest; and (4) the restriction reaches no farther than necessary to accomplish the given objective. 453 U.S. at 507 citing *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

In applying the *Central Hudson* test, the Court focused on the third prong: "Does the ordinance 'directly advance' governmental interests in traffic safety and in the appearance of the city?" 453 U.S. at 508. The Court deferred to the judgment of the City Council "that billboards are real and substantial hazards to traffic safety," 453 U.S. at 509, and acknowledged that billboards "can be perceived as an esthetic harm." 453 U.S. at 510. Although there was no dispute that aesthetics was a genuine objective of the statute, the advertisers argued that the City acted contrary to that interest by permitting onsite advertising and other specified exceptions. 453 U.S. at 510-511. The Court rejected this all-or-nothing argument, approving the distinction between onsite and offsite advertising.

> In the first place, whether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising. Second, the city may believe that offsite advertising, with its periodically changing content, presents a more acute problem than does onsite advertising.
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> Third, San Diego has obviously chosen to value one kind of commercial speech — onsite advertising — more than another kind of commercial speech — offsite advertising. The ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interests in traffic safety and esthetics. The city has decided that in a limited instance — onsite commercial advertising — its interests should yield. We do not reject that judgment. As we see it, the city could reasonably conclude that a commercial enterprise — as well as the interested public — has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere.

453 U.S. at 511-512 (citations omitted). By giving strong deference to the City's stated objectives, and because there was no conflicting evidence suggesting that the City was not sincere in its objectives to increase traffic safety and improve aesthetics, the Court was able to conclude that the ordinance met the *Central Hudson* test insofar as it regulated commercial speech. 453 U.S. at 510, 512.[2]

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[2] Five members of the Court joined this part (Part IV) of Justice White's opinion, including one of the three dissenters. 453 U.S. at 493 (White, J. joined by Stewart, Marshall, and Powell, JJ.); 453 U.S. at 541 (Stevens, J., concurring in parts I-IV, dissenting from Parts V-VII). The remaining two dissenters also appear to agree with Part IV. 453 U.S. at 564-565 (Burger, C.J.), 453 U.S. at 570 (Rehnquist, J.). Justices Brennan and Blackmun concurred in the judgment but not the opinion.

The Court ruled against the City, however, based on the effect of the ordinance on noncommercial speech. Because the ordinance was drafted to distinguish between onsite and offsite advertising of goods and services, it effectively prohibited all noncommercial advertising except that permitted in the enumerated exceptions to the ordinance. Those exceptions were based on the content of the speech, placing the City in the position of choosing to allow some types of protected speech but not others. 453 U.S. at 513-514. "With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse." 453 U.S. at 515. Because the exceptions to the restrictions were based on the content of the speech, the restriction itself was based on content. 453 U.S. at 520; see also *National Advertising Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988) (following *Metromedia*). As a content-based restriction, the regulation must serve a compelling governmental interest and be narrowly drawn to achieve that interest. *National Advertising*, 861 F.2d at 249. Although the interests of aesthetics and traffic safety were substantial enough to support the restrictions on commercial advertising, they were not *compelling* in this case, because the City banned all noncommercial signs while allowing onsite commercial signs. *Metromedia*, 453 U.S. at 520; *National Advertising*, 861 F.2d at 249. "[B]y allowing commercial establishments to use billboards to advertise the products and services they offer, the city has necessarily conceded that some communicative interests . . . are stronger than its competing interests in esthetics and traffic safety." 453 U.S. at 520. Accordingly, the Court found that the ordinance was unconstitutional on its face. 453 U.S. at 521.

C. The City's Sign Ordinance Post-*Metromedia*

After the *Metromedia* decision, on July 20, 1981, the City enacted an "Emergency Interim Off-Premises Outdoor Advertising Display Regulation" ordinance establishing interim regulations for offsite advertising displays. SDMC §§ 101.0760-101.0775. The emergency ordinance was repealed on January 17, 1984. At that time, the San Diego Sign Ordinance was substantially revised and renumbered. SDMC §§ 101.1100-101.1126.

The 1984 ordinance emphasized the City's objective of preserving aesthetics and enhancing safety through uniform restrictions:

> This ordinance . . . presents a set of reasonable, non-arbitrary, and non-discriminatory standards and controls, which are designed to optimize communication between the citizen and his environment, to facilitate the protection not only of the public, but the aesthetic character of the City, and to ensure the availability to the community of adequate quality signs.

SDMC § 101.1100(B). The ordinance continued to allow onsite and prohibit offsite advertising, but consistent with the *Metromedia* decision, excluded non-commercial messages from the prohibition. Thus, "permanent or changeable copy" on signs could "include only on-premises or public interest messages." §§ 101.1112-101.1114. Other signs, such as secondary signs

(§ 101.1116), temporary construction site signs (§ 101.1120.1), temporary real estate signs (§ 101.1120.2), and banners § 101.1120.4) were by definition limited in their use.

The ordinance included exceptions for Planned Districts, Special Sign Districts, Architectural Control Districts, and Comprehensive Sign Plans, all of which incorporated comprehensive sign regulations. § 101.1110(AC, E). The ordinance contained a few limited exceptions for government signs, including official signs and notices placed for the purpose of carrying out an official duty or responsibility in the definition of "Public Interest Sign." § 101.1101.169(A)(1). Public interest messages were allowed on any otherwise permitted sign. See, e.g., § 101.1101.1112(F).

The ordinance specifically prohibited placing or posting any signs "on public property, including the public rights-of-way, or on any curb, sidewalk, street, pole, . . . including the public rights-of-way, except those signs that are lawfully authorized in Section 95.0102(d) and (e). § 95.0102(a). The exceptions pertain to clocks and banners.[3]

Following *Metromedia*, the prohibition against posting signs on public property was examined by the United States Supreme Court in *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). In that case the Court reviewed an ordinance from the City of Los Angeles that prohibited the posting of signs on public property. The plaintiffs sued after their political signs and posters had been removed from the public rights-of-way. As in *Metromedia*, the plaintiffs in *Vincent* argued that the prohibition against posting signs on public property could not be justified on aesthetic grounds because the ordinance did not also apply to temporary signs on private property. 466 U.S. at 810. As in *Metromedia*, the Court held that the distinctions could be justified by a countervailing interest in a particular kind of advertising. In *Vincent*, the city's aesthetic interest in eliminating signs on public property was paramount, while on private property that interest was outweighed by the city's stronger interest in permitting private citizens to control the use of their own property, and maintaining the opportunity to communicate through temporary signs. 466 U.S. at 811. Accordingly, the Court held that the ordinance did not violate the First Amendment as applied to the posting of political campaign signs on public property.[4] 466 U.S. at 817.

Numerous court decisions since *Metromedia* have upheld sign regulations that distinguish between on-premise and off-premises signs for reasons of safety and aesthetics. See, for example, *Onsite Advertising Services, LLC v. City of Seattle*, 36 Fed. Appx. 332 (9th Cir. 2002); *One World One Family Now v. City of Miami Beach*, 175 F.3d 1282 (11th Cir. 1999);*Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993); *Infinity Outdoor, Inc. v. City of New York*, 165 F. Supp. 2d 403 (E.D.N.Y. 2001).

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[3] Regulations restricting the placement of newsracks, contained in sections 62.1001 to 62.1013, are also justified by aesthetics and safety. Section 62.1001 cites the safety and welfare of persons using the rights-of-way and the improvement of the "aesthetic appearance of public rights of way in the City of San Diego."

[4] In *Vincent*, the three dissenting Justices from *Metromedia* (Stevens, Burger, and Rehnquist) were joined by Justices White, Powell, and O'Connor to form the majority.

D. Transition to the Land Development Code

The City's sign regulations were reorganized, revised, and renumbered effective January 1, 2000, and are now found primarily in Chapter 14, Article 2, Division 12 of the Land Development Code. This reorganization carried forth the original purpose of the sign regulations to "provide a set of standards that are designed to optimize communication and quality of *signs* while protecting the public and the aesthetic character of the City." § 142.1201.[5]

To effectuate that purpose, the ordinance allows on-premises signs and continues to prohibit off-premises signs. Section 142.1210(a)(1) provides, "Permanent or changeable copy on *signs* shall contain on-premises or public interest messages only." On-premises messages are defined as "those identifying or advertising an establishment, person, activity, goods, products, or services located on the *premises* where the *sign* is installed." San Diego Municipal Code § 142.1210(a)(1)(A).

Section 142.1206(a)(1) prohibits the placement of any sign "on public property or within the *public right-of-way* unless otherwise provided in the Municipal Code or specific state statute." Likewise, section 142.1210(b)(5)(A) states that "*[s]igns* are not permitted to be installed on public property or *public rights-of-way*, except for *signs* that are authorized by law, or as otherwise permitted in the Municipal Code."[6]

Chapter 14, Article 2, Division 12 contains most of the requirements for the copy, location and structures for signs. The sign regulations apply to all signs in the City unless otherwise specifically regulated. § 142.1205. Some areas of the City have more specific sign regulations that apply only to that area and are implemented through Planned Districts, Special Sign Districts and Comprehensive Sign Plans.

E. Special Sign Districts

A number of special sign districts currently exist in the City that were created pursuant to enabling legislation that has since been repealed. §§ 104.0100 through 104.0100.20 (repealed 1997). The general purpose of these districts has been to allow deviations to the general sign regulations within certain areas of the City to maintain and preserve a distinctive community character of that area, while still maintaining the general ban on off-premises signs. § 104.0100.

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[5] "*Sign*" is broadly defined as "any identification, description, illustration, or device, illuminated or nonilluminated, that is visible from the public *right-of-way* or is located on private property and exposed to the public and which directs attention to a product, place, activity, person, institution, business, or solicitation, including any permanently installed or situated merchandise with the exception of window displays, and any emblem, painting, banner, pennant, placard, or temporary *sign* designed to advertise, identify, or convey information." § 113.0103.

[6] Also, section 95.0102(a) prohibiting the placing or posting of any signs on public property or in the public rights-of-way, was retained. Chapter 12, Article 9, Divisions 7 and 8 contain the procedures for obtaining a permit to construct something in the public right-of-way and for obtaining a sign permit. A permit sticker is required to be affixed to all signs.

The intent of the special sign district legislation, consistent with the sign ordinance, was to "preserve and enhance the cultural, aesthetic, economic and environmental values of certain neighborhoods, communities and business districts within the City while at the same time providing for the necessary communicative sign identification which will enable the City to function in a safe manner, as a properly integrated and functional entity." § 104.0100. The proposed regulations for a special sign district had to be in "reasonable compliance with the goals and recommendations of the adopted community plan" and the "special goals, objectives, requirements, criteria and standards of the community plan or plans" were required to be recognized and reflected in the sign regulations. §§ 104.0100 and 104.0100.16.

A number of special sign districts were adopted pursuant to this enabling legislation. Their regulations focused on aesthetics, such as design, size, and location. These sign districts changed the regulations for on-premises signs within a certain community, but consistently maintained the general regulations with regard to the prohibition on off-premises signs. Most of the sign districts contain regulations even more restrictive than the City-wide sign regulations.

Many of the sign districts were approved by Council resolution, and a few were codified. The La Jolla and Ocean Beach Sign Districts were codified and have been incorporated into the Land Development Code. §§ 142.1290, 142.1291.

In 1997, the special sign district enabling legislation was repealed. San Diego Ordinance O-18451 (Dec. 9, 1997). Currently, there is no enabling legislation for the formation of special sign districts. A sign district can, however, still be created by Council ordinance. (See, for example, the discussion of the Centre City Sign District, below.)

II. Exceptions to the Sign Regulations Could Put the Constitutionality of the Regulations at Risk

> [T]he exceptions to the general prohibition are of great significance in assessing the strength of the city's interest in prohibiting [off-premises signs]." *Metromedia*, 453 U.S. at 520.

Although decisions regarding what signs should be allowed in the public rights-of-way are policy matters, such decisions carry serious legal consequences. If the City makes exceptions to the sign ordinance that are not consistent with preserving the beauty of the City or optimizing communication for travelers in the public rights-of-way, the most direct argument that could be made by a challenger to the ordinance is that the justification put forward by the City can no longer support the blanket restrictions on offsite advertising, and enforcement of those restrictions are a violation of the United States Constitution. In other words, the challenger would dispute that aesthetics or public safety remained genuine objectives of the ordinance, and claim that the ordinance no longer served a substantial and compelling governmental interest under the *Central Hudson* test.

Thus, any exception from the general prohibition on off-premises signs must meet the test set forth by the Court in *Metromedia*. The exception must be (1) substantially related to advancing an important state interest that is at least as important as the interests advanced by the underlying regulation, (2) no broader than necessary to advance the special goal, and (3) narrowly drawn so as to impinge as little as possible on the overall goal. *Rappa v. New Castle County*, 18 F.3d 1043, 1065 (1994) (citing concurring opinion J. Brennan, *Metromedia,* 453 U.S. at 533.)

In cases following *Metromedia*, the United States Supreme Court reinforced this concept. In *Vincent*, the Court stated, "Any constitutionally mandated exception to the City's total prohibition against temporary signs on public property would necessarily rest on a judicial determination that the City's traffic control and safety interests had little or no applicability within the excepted category, and that the City's interests in esthetics are not sufficiently important to justify the prohibition in that category." 466 U.S. at 816. Similarly, in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the Court indicated that exceptions made to an otherwise valid ordinance may undermine the legitimacy of the reasons used to justify the original regulations. "Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place." *Id.* at 52 (citation omitted).

Similarly, in *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), the United States Supreme Court invalidated a newsrack ordinance based on its distinction between newspapers (viewed as noncommercial) and magazines containing primarily promotional material (viewed as commercial). In order to decrease the total number of newsracks and improve aesthetics, the ordinance allowed the noncommercial newsracks but not the commercial ones. The Court pointed out that the commercial newsracks were "no greater an eyesore" than the noncommercial ones. 507 U.S. at 425. Therefore, the city could not distinguish between the two based on aesthetics. 507 U.S. at 425-428.

Distinguishing between commercial and noncommercial newsracks is not unlike distinguishing between offsite advertising that supports a public project and offsite advertising that benefits a private party: neither has anything to do with the rationale for imposing the restrictions. Although the City may have an economic justification for allowing advertising kiosks, signs on trash cans, or signs on lifeguard towers, the sign restrictions are based on aesthetics and traffic safety, not economics. *See also Outdoor Systems Inc. v. City of Atlanta*, 885 F. Supp. 1572 (N.D.Ga.1995) (Olympic sign ordinance permitting outdoor signs in areas of the city where they were not normally allowed but only if they pertained to the Olympics was an unconstitutional content-based restriction that could not be justified by facilitating communications and expediting traffic movement).

The courts have consistently required the government, as the party seeking to regulate speech, to present evidence establishing the governmental interests that justify the ordinance. *See cases cited above and Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814, 819

(9th Cir. 1996). In *Desert*, for example, the Ninth Circuit found a sign ordinance unconstitutional because the city failed to present evidence of a substantial and compelling governmental interest. 103 F.3d at 820-821. Although the city cited aesthetics and safety as the reasons for the ordinance, the city failed to show that it held those interests or that the ordinance furthered them. 103 F.3d at 819.

The City's stated substantial governmental interests in the general ban on off-premises signs has been traffic safety and aesthetics. In order to exempt other signs from the general prohibition of off-premises signs, the City would need to show that its traffic safety and aesthetic interests had little or no applicability to such signs and that those interests could not justify a ban on the proposed signs. The City would also have to show that the proposed signs did not have any affect on traffic safety or aesthetics, while all other off-premises signs or signs in the right-of-way did affect those interests. Further, it would be the City's burden to put forth an important government interest for allowing the proposed signs that would be at least as substantial as the traffic safety and aesthetic objectives.

III. Proposals for Offsite Advertising Since the 1972 Sign Ordinance

Periodically since the enactment of the 1972 ordinance, the City Council and its committees have been presented with proposals to earn revenue for the City by installing advertising space on public property or in the public rights-of way. With few exceptions, the City Council has consistently resisted the temptation to undermine the sign ordinance by permitting offsite advertising. Examples of past proposals include: signs on bicycle racks (1978 City Att'y Report 471); advertising on parking meters (1983 City Att'y MOL 137); advertising on waste receptacles located on City streets (1983 City Att'y MOL 146); advertising signs on tennis court fences (1992 City Att'y MOL 571); and advertising on lifeguard towers (1995 City Att'y Report 844); and advertising kiosks in the public rights-of-way to fund public toilets (1999 City Att'y MOL 12). In each instance, this Office has warned that every exception to the City's general regulatory scheme on signs may make enforcement more difficult in the future because courts would look at all of the City's sign control measures and actions to determine whether a particular ban is reasonable in light of exceptions permitting some displays.

A. Advertising on Bus Benches and Shelters

One exception has been for bus benches and shelters. The 1972 sign ordinance excluded permitted signs located at public bus stops. Although not specifically addressed, this exception did not affect the United States Supreme Court's finding in *Metromedia* that the ordinance's restrictions on commercial speech were constitutional. 453 U.S. at 512. Under an agreement between the City and the San Diego Metropolitan Transit Development Board in 1988, the City agreed to allow advertising on bus-stop shelters located in commercial and industrial zones to fund the construction and maintenance of lighted shelters in all zones. *See* San Diego Ordinance No. O-17121 N.S. (July 25, 1988) and attached agreement. The objective of the program is to increase public transit ridership. *Id.*; MTDB Doc. No. 00-17121. The agreement contains regulations for the size and number of signs allowed on the shelters, and provides for shelters in

residential areas with no advertising. *Id.* All revenue generated by the advertising is used for maintaining and building benches and shelters, for roadway and sidewalk improvements at transit stops, and for transit enhancements and service. *Id.*; MTDB Doc. No. B0047.2-88.

This program arguably meets the criteria for a valid exception in that it furthers an important governmental interest of providing for the safety of its citizens, promoting public transportation and increasing the use of existing public transit. It also furthers the City's interest in facilitating communication in the public rights-of-way by more clearly identifying bus stops and providing transit information at those stops and by providing a safe place for patrons to wait.

B. Banners, Clocks, and Community Signs

Banners are permitted in certain designated public rights-of-way under sections 95.0102(e) and 142.1210(b)(5)(C) for the very limited purpose of promoting cultural or civic events or activities of general public interest. Banners may not be used for commercial or political advertising, however the logo and trademark of the event sponsor may be included in no more than five percent of the banner area. § 142.1210(b)(5)(C)(ii).

Clocks that meet the size and construction requirements of the Municipal Code may be located in the public rights-of-way between a curb and sidewalk. §§ 95.0102(d), 142.1210(b)(5)(D). The clock may not contain any advertising, other than a nameplate with the name of the manufacturer. §§ 95.0102(d), 142.1210(b)(5)(D)(vii).

Community entry signs may be located in the public right-of-way if they conform to the guidelines contained in the Land Development Manual. § 142.1210(b)(5)(F).

Each of these exceptions to the general rule prohibiting off-premises signs in the public right-of-way are specific and limited exceptions designed to convey desired non-commercial information to the public. These exceptions should be applied narrowly to protect against abuse that would place the City's general prohibition at risk.

C. The Centre City Sign District

In 1999, a Centre City sign control district was established for the purpose of permitting directional signs on public property and in the public right-of-way. San Diego Ordinance O-18676 (Sept. 4, 1999); § 142.1292. That ordinance allowed a specific, narrowly defined class of directional signs to be placed within the sign district. After a legal review of the proposed ordinance, it was determined that the Centre City sign district would be legally defensible because the exception to the general off-premises sign regulations could be justified by the fact that directional signs furthered the City's stated interests in traffic safety. The legal analysis of that sign district ordinance concluded that if the proposed sign district amendment was drafted to include categories of signage to redress legitimate parking and traffic problems in the Centre City area, it would be defensible.

Although the Centre City sign district ordinance did create a sign district which allowed certain off-premises signs, the type of signs were narrowly defined to be those which could be justified as furthering the City's interests in traffic safety. In creating this exception to the general prohibition on off-premises signs, the City was careful to make a narrow and specific exception for directional signs within the Centre City area which would further the City's interest in traffic safety.

D. Pre-Existing Billboards

Despite the City's prohibition on off-premises signs, there are billboards and other sign structures in the City that carry offsite advertising that are legal nonconforming advertising display signs.[7] These signs are addressed in Chapter 12, Article 7, Divisions 2 and 3 of the Land Development Code. These signs were legally constructed but became nonconforming when the regulations changed. § 127.0201.

These nonconforming advertising display signs fall into three general categories. First, signs constructed before April 5, 1973, that did not comply with zoning regulations adopted after that date, were required to be removed or brought into compliance with existing regulations by May 15, 1984, or May 1, 1988, if an extension of time was granted. § 127.0202(d). Any such signs still remaining are in violation of the Land Development Code. *Id*. Second, signs that were in compliance but became nonconforming because of a rezone of the property are considered "previously conforming" for seven years from the date of the rezone. § 127.0202(c). Third, signs constructed after April 5, 1973, that were constructed in compliance with the Code but later became nonconforming are "previously conforming" and stay "previously conforming" until a proposal (such as maintenance, repair, rebuilding, or alteration) is made that requires a sign permit. § 127.0202(a); 127.0303(a). Such repairs may not, in any event, increase the size of the existing sign face or structure. § 127.0303.

Nonconforming uses may be terminated by abandonment, destruction, or at the end of an amortization period. *City of Fontana v. Atkinson*, 212 Cal. App. 2d 499, 507 (1963) (abandonment terminates a nonconforming use); *O'Mara v. Council of the City of Newark*, 238 Cal. App. 2d 836, 838 (1965) (the destruction of a structure extinguishes the nonconforming use); and *United Business Commission v. City of San Diego*, 91 Cal. App. 3d 156, 189 (1979) (a nonconforming use may be eliminated by amortizing the use over a reasonable period of time).

E. Sponsorship

Another exception to the general prohibition for off-premises advertising is for sponsor recognition on certain public interest signs. § 142.1210(a)(1)(C). This limited exception provides that public interest messages for public or private non-profit or charitable organizations may

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[7] "Advertising display sign" is defined in section 113.0103 as a sign that does not pertain to the use of the property where it is located, and includes billboards. Instead of the term "nonconforming", the Land Development Code uses the term "previously conforming". § 127.0101.

identify sponsors and supporters of signs and notices that fall into three limited categories: (1) official signs and notices; (2) service club and religious signs and (3) political and ideological signs and notices. *Id*. These categories are specifically defined. § 142.1210(a)(1)(B)(~~i~~iii). For example, the official signs and notices which may carry sponsor identification are those placed by public officials in accordance with federal, state, or local law for the purpose of carrying out an official duty or responsibility. § 142.1210(a)(1)(B)(i). The sponsorship identification may occupy a maximum of fifteen percent of the total area of the sign.

The use of public interest signs with sponsorship as an alternative means of generating revenue for the City has the potential for compromising the City's sign regulations as much as any other type of exception. For example, introducing additional corporate sponsored safety signs where sufficient signs already exist contributes to the visual clutter and conflicts with the City's aesthetic and safety objectives for the ordinance. Additionally, where such signs are not placed for "the purpose of carrying out an official duty or responsibility," but rather to generate revenue, they violate the City's existing regulations.

IV. Conclusion

Signs contain speech, and speech is protected by the First Amendment of the United States Constitution. Government can restrict speech to promote one or more important governmental interests. In the City of San Diego, signs are restricted to preserve the beauty of the City and to ensure that people traveling the streets can find the information they need to travel safely. To accomplish this in balance with First Amendment protections, the City's sign restrictions (1) prohibit off-premises signs, (2) prohibit the placement of signs in the public rights-of-way and on public property, and (3) allow non-commercial or public interest messages wherever commercial signs are permitted.

The City's sign restrictions are consistent with First Amendment law as long as they are implemented to assist the City in meeting its safety and aesthetic objectives. If exceptions are made for signs that conflict with these objectives and do not serve some other more important governmental interest, then the validity of the original objectives is subject to question and the entire regulatory scheme is at risk. Each exception made puts the sign regulations at additional risk.

For example, an exception by the City to allow certain off-premises advertising signs on public property or within the public right-of-way to generate revenue raises the issue of allowing others to do the same. Private persons or businesses desiring to place signs in the public right-of-way or have off-premises advertising signs within the sign district would have a strong argument that the City's stated reasons for the ban were not legitimate, or that the sign codes were being selectively applied to them, and could potentially have the entire off-premises sign ordinance struck down within the sign district. When the only distinction between City-owned advertising signs and other off-premises advertising displays would be that the City would profit financially from its signs, a court would likely find that the reasons used to justify the original restrictions on off-premises advertising were not legitimate. Even if the City justified allowing the advertising

because such signs would fund a public benefit, such a justification would still undermine the City's stated purpose of traffic safety and aesthetics for the general ban of off-premises signs. By allowing off-premises advertising, the City will signal to the court that its interests in aesthetics and traffic safety are not substantial or compelling.

Respectfully submitted,

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City Attorney

CLG:mm
RC-2002-19
Attachments: City Attorney published Memoranda, Reports, and Legal Memoranda:
RC-88-1 (ALT)
RC-89-2 (ALT)
RC 90-3 (ALT)
MS 92-2 (AYM)
RC 95-8 (LJG)
LO 99-3 (CG)
MOL 2001-7 (KS)
RC 2002-5 (WWW)