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REPORT TO LAND USE & HOUSING COMMITTEE

SAN DIEGO DOWNTOWN ENTERTAINMENT DISTRICT CONCEPT

**INTRODUCTION**

The City Council's Land Use and Housing Committee heard a presentation on August 1, 2012, from Jeff Marston of Marston+Marston, Inc. and David Erlich of FinWater Advisors regarding the creation of a downtown entertainment district. Additional information about the proposed district was provided in an August 25, 2012 letter from FinWater Advisors and Marston+Marston accompanied by a sample ordinance and other draft documents (the August proposal), and in a letter to the City Attorney from the Hecht Solberg law firm on behalf of Capital Outdoor, Inc. (collectively, the Proponents).

As envisioned by the Proponents, signs would be permitted within a defined area of downtown by means of an approved sign plan administered by a nonprofit corporation. The signs would, in number, size, and type, be unlike anything currently permitted in the City. They would include the installation of large new signs carrying off-premises advertising messages using traditional and new modes for displaying messages including sculptural signs, supergraphic wall signs, light projection, video and animation, and using electronically controlled lights, including cathode ray, LED display, plasma screen, liquid crystal display (LCD), fiber optic, and other technology. A certain percentage of income from the signs would be used to promote or fund arts and entertainment activities.

A number of questions and legal issues were raised before, at, and after the Committee meeting regarding the August proposal. This Office has met a number of times with Council staff to discuss those issues. At the same time, Council staff and others have been working to more fully develop the concept in ways that may help to address aesthetic issues, emphasize downtown revitalization, and involve nonprofit entities like the San Diego Downtown Partnership and Civic San Diego whose mission it is to improve the downtown area.

Given that development of the concept for a downtown arts and entertainment district is ongoing, rather than analyzing a specific program, this memorandum will set out some of the legal issues that should be considered for a program of this type, and address the questions raised at the August 1 meeting.

## ANALYSIS

### I. THE CITY'S SIGN RESTRICTIONS

The City's sign restrictions, contained in the San Diego Municipal Code (SDMC), regulate the size, location, and type of signs permitted in the City (the Sign Ordinance). New billboards, that is, signs visible from the public right of way that carry off-premises messages (whether commercial or noncommercial), are not permitted. On-premises signs, for example, signs identifying a business or the goods or services provided at that location, are subject to restrictions on their size and placement. The Sign Ordinance controls the use of lights and animation on signs to minimize their ability to distract and take away from the City's natural beauty or create traffic distractions. For example, the Sign Ordinance does not permit signs with flashing copy or flashing, strobe, or chasing lights, or messages that alternate, and limits the size of animated copy to ten square feet. SDMC § 142.1210(a)(2).

These regulations were enacted by the City "to optimize communication and quality of signs while protecting the public and the aesthetic character of the City." SDMC § 142.1201. Those goals, often referred to as "traffic safety and aesthetics" in caselaw, are the City's "important governmental interest[s]" that justify its regulations. *See Get Outdoors II, LLC v. City of San Diego*, 381 F. Supp. 2d 1250 (S.D. Cal. 2005) (affirmed on appeal, 506 F.3d 886 (9th Cir. 2007)) and *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981) (citations and internal quotation marks omitted). These governmental interests have been consistently upheld as valid bases for restricting signs. *Id.* The City has essentially determined that "billboards are traffic hazards and are unattractive," and for those reasons, prohibits them. *Get Outdoors*, 381 F. Supp. 2d at 1264; *Metromedia*, 453 U.S. at 508.<sup>1</sup>

The City's Sign Ordinance values on-site advertising over off-site advertising and generally prohibits off-site advertising. *Metromedia*, 453 U.S. at 511-12. This Office has issued a number of opinions discussing the inherent risks in creating new exceptions to an ordinance that maintains a delicate balance between furthering important governmental interests (safety and community aesthetics) and restricting speech (prohibiting off-site advertising). *See, e.g.*, 1999 City Att'y MOL 122 (99-12; Nov. 23, 1999); City Att'y MOL No. 2001-7 (May 3, 2001); 2002 City Att'y Report 265 (2002-19; Oct. 16, 2002); City Att'y MOL No. 2011-4 (May 19, 2011). Any exception to the general rule that off-site advertising is prohibited must further an interest that is stronger and more important than the City's interest in safety and aesthetics, or must not affect those interests. 2002 City Att'y Report 265.

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<sup>1</sup> In the appeal of the *Get Outdoors* case, the Ninth Circuit Court noted that the City's size and height restrictions for signs that include billboards are "calibrated . . . to the width of the adjacent public rights-of-way and the speed limit" and specifically found that they are "valid, content-neutral, time, place and manner restrictions" that directly advance the City's interests in traffic safety and aesthetics. 506 F.3d at 894.

## II. RECENT CASES

Recent cases provide additional guidance on the ability of cities to permit off-site advertising signs in certain circumstances, while reaffirming the basic principles discussed above. See *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 914 (9th Cir. 2009); *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94 (2d Cir. 2010); *World Wide Rush, LLC v. City of Los Angeles*, 606 F.3d 676 (9th Cir. 2010).<sup>2</sup>

In *World Wide Rush*, the Ninth Circuit Court of Appeals upheld two exceptions to the city's ban on freeway facing signs: several freeway facing billboards constructed in conjunction with the Staples Center; and four freeway facing signs relocated as part of the renovation of Santa Monica Boulevard in exchange for the removal of sixteen billboards. 606 F.3d 676. Although the sign ordinances adopted by the city in 2002 generally ban all billboards and supergraphics, they included exceptions for Hollywood, the area surrounding Staples Center, and for special use districts (SUDs) with specific plans for regulating signs within those areas. *Id.*

The question raised in *World Wide Rush* is directly on point: "whether the City 'denigrates its interest in . . . safety and beauty and defeats its own case by permitting' freeway facing billboards at the Staples Center and in the Fifteenth Street SUD while forbidding other freeway facing billboards." *Id.* at 685 (quoting *Metromedia*, 453 U.S. at 510-11). The court found for the city because the exceptions at issue in *World Wide Rush* were made for the purpose of advancing the goals of aesthetics and safety. The Staples Center was a redevelopment project aimed at eliminating blight; allowing billboards "was an important element of a project to remove blight and dangerous conditions . . . ." 606 F.3d at 685.

The Fifteenth Street SUD allowing the signs near Santa Monica Boulevard was implemented as "an outgrowth of the [c]ity's efforts to improve traffic flow, and thereby safety, on Santa Monica Boulevard" and "resulted in a *net reduction* of billboards in the [c]ity." *Id.* (emphasis added). In reaching its conclusion and overruling the District Court, the Court of Appeals counseled that the exceptions must be viewed in the context of the entire regulatory scheme, with "some judicial 'deference for a municipality's reasonably graduated response to different aspects of a problem.'" *Id.* (quoting *Metro Lights*, 551 F.3d at 910). The Court's decision that the exceptions "do[] not break the link" between the sign ban and the city's traffic safety and aesthetics objectives is carefully tied to the facts. *World Wide Rush*, 606 F.3d at 687.

The City reasonably may have concluded that, on balance, safer and more attractive thoroughfares would result from renovations to Santa Monica Boulevard and a reduction in the City's total number of billboards, even if this required installation of some freeway facing billboards along Fifteenth Street. The City also reasonably

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<sup>2</sup> This office discussed the *Metro Lights* and *Clear Channel Outdoor* cases in a July 20, 2011 memorandum included in the materials for the August 1, 2012 Land Use and Housing Committee meeting. See City Att'y Memo., *Off-Premises Advertising in Proposed Downtown Entertainment District* (July 20, 2011), attached hereto.

may have concluded that the benefits of redeveloping and attracting people to an otherwise dangerous and blighted downtown area outweighed the harm of additional freeway facing billboards restricted to that area.

*Id.* at 686.

### III. CONSIDERATIONS FOR THE CITY COUNCIL

Based on the caselaw to date, to protect and maintain the integrity and legal defensibility of the City's Sign Ordinance, the Council should ensure that any proposed exception to the Sign Ordinance complies with the following principles:

(a) An exception to the City's existing sign restrictions must be consistent with and further or be for a more important governmental interest than the traffic safety and aesthetics objectives. For example, the following exceptions have been upheld:

- Freeway facing billboards with flashing displays and frequently changing digital content permitted as part of a redevelopment project (the Staples Center) aimed at eliminating blight. These signs were an exception to the city's ban on freeway facing signs. (*World Wide Rush*, 606 F.3d 676.)
- Freeway-facing signs permitted as part of a traffic improvement project that resulted in a net decrease in the number of signs and improved traffic safety (reducing the number of billboards from 16 to 4). (*Id.*)
- Signs on public street furniture in the public right of way (*e.g.*, bus shelters, public restrooms, trash cans, etc.) where, in exchange for the exclusive right to advertise on the street furniture, the contractor pays for the new street furniture and pays the city a percentage of the gross advertising receipts. By not allowing other signs, controlling the look and feel of the advertising, and upgrading the street furniture, the program reduced physical and visual clutter on the sidewalks and was consistent with the city's objectives for generally restricting off-site advertising. (*Metro Lights*, 551 F.3d 898, *Clear Channel Outdoor*, 594 F.3d 94.)

In contrast, billboards that were not consistent with existing sign restrictions could not be permitted as part of an agreement to settle litigation over the city's sign restrictions. *Summit Media LLC v. City of Los Angeles*, No. B220198 (Cal. App. 2d Dec. 10, 2012).

(b) If the goal of the program that includes new signs is economic revitalization, then the signs should be a necessary and important part of a "bona fide" project to remove blight and

create economic growth. (*World Wide Rush*, 606 F.3d 676.) A program that is a trojan horse for new commercial signs will not withstand judicial scrutiny.

(c) The current distinction in the Sign Ordinance between on-site and off-site signs is constitutionally permissible.<sup>3</sup> City-imposed or sponsored regulation of sign content beyond the on-site/off-site distinction raises First Amendment issues that need to be carefully analyzed and considered.

(d) Courts will defer to the judgment of a city's legislative body, if that judgment is reasonable and consistent with the objective supporting the city's sign restrictions. (*World Wide Rush*, 606 F.3d 676.)

#### IV. COMMITTEE DIRECTION

The hearing of the "Downtown Entertainment District Concept" item at the August 1 Land Use and Housing Committee meeting was noticed as an information item only with no action taken. However, the Committee requested that the City Attorney's Office analyze and report back to the Committee on eight items, based upon the "specific plan proposal" provided by the Proponents after the meeting. See Actions of August 1, 2012 Land Use & Housing Committee Meeting (Actions), Item 4. Several of the requested items are not legal issues or questions, and are more appropriately addressed by the Mayor's Office or a specific department as determined by the Mayor's Office. Some of the items are premature as the concept itself is in flux. To the extent possible, however, responses are provided below, following the items as quoted from the Actions.

- **Initially start with appropriate district footprint size matching the area's need for revitalization, with emphasis along 'C' Street corridor (with potential to expand boundaries in the future).**

The "appropriate district footprint size" depends upon the program being adopted and its purpose and is a determination that would need to be developed by staff and made by the City Council. Staff would need to develop information supporting "the area's need for revitalization" including identifying the boundaries of the area and the extent and nature of the need. If the City Council decides to create an arts and entertainment district to address the need, the City Council will need to make value judgments regarding the desired look and feel of the new district, whether the new district will conflict in some areas with an existing character, aesthetic, or use that should be preserved, and whether buffer zones leading into adjacent neighborhoods are necessary. For the purpose of maximizing sign revenue, which is an important aspect of the August proposal, the boundaries of the proposed district cover 65 city blocks and include heavily traveled streets such as Ash, A and B. These currently tree-lined streets with no off-site

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<sup>3</sup> *Get Outdoors*, 381 F. Supp. 2d at 1264-65 & 1267-68 (citing *Metromedia*, 543 U.S. at 508, *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 814 (9th Cir. 2003), *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993), and *Ackerley Commc'ns of the N w. v. Krochalis*, 108 F.3d 1095, 1099-1100 (9th Cir. 1997)).

advertising meet the aesthetic and traffic safety objectives sought by the City's current Sign Ordinance.

Whatever area is used, the City would need to establish a solid factual basis that supports a strong governmental interest (*e.g.*, economic revitalization) and a causal nexus between the program and the governmental interest (*e.g.*, facts demonstrating how the creation of an arts and entertainment district that adds a significant number of signs carrying primarily commercial advertising will economically revitalize the targeted area) without undermining the aesthetic and safety objectives of the Sign Ordinance.

- **Which City Department or Agency will have the lead processing oversight?**

The assignment of staff to carry out the program is within the Mayor's purview. Whether or not other agencies such as the San Diego Downtown Partnership or Civic San Diego have a role in the program (a decision to be made by the Mayor and Council), City staff hours will be required to formulate, support, process approvals for, and implement the program.

- **Identify the required process to create this sign overlay district for a specific downtown area – how will citywide sign regulations be affected or amended?**

New sign regulations and amendments to existing sign regulations are enacted by ordinance adopted by the City Council. As discussed above, the effect on the existing Sign Ordinance depends on the program that is implemented.

- **Include a measured ratio of artwork to commercial displays with quality aesthetic standards.**

No such ratio has been established by case law. Rather, this could be a value judgment made by the City Council as it determines the best way to address the problem it is seeking to solve while staying true to the aesthetics and traffic safety objectives of the Sign Ordinance. To avoid constitutional equal protection claims, noncommercial content should be permitted wherever commercial content is permitted. *See Get Outdoors*, 381 F. Supp. 2d at 1267 (finding for the City on constitutional equal protection claims because the Sign Ordinance does not include a preference for commercial content over noncommercial content).

- **Review non-profit revenue sharing model for any conflicts with Propositions 26 or 218.**

This analysis should be conducted when the particulars of the program are better developed and understood. In addition to Propositions 26 and 218, a program that includes the addition of light emitting signs throughout the downtown area will likely trigger the need for a review of the environmental impacts of the program per CEQA.

- **Can revenues directly benefit/be invested back within the District's specific footprint area?**

Reinvestment would be an important feature of a program that has economic revitalization as its purpose. How and whether that takes place depends upon the structure of the program.

- **Identify any potential revenue benefit for City facilities (such as the Civic Theater).**

Without a doubt, if the City erected signs on its buildings and sold commercial advertising space, the City would receive revenue from the sale of that advertising. When considering potential revenue benefits, the City should also consider the inherent costs and risks of litigation, like those encountered by the City of Los Angeles over the past decade.

- **What are the legal issues in selecting certain buildings to display artwork vs. commercial signage – is a Request for Proposals process necessary to contract for the signage locations?**

Currently, the Sign Ordinance permits signs based on the type of sign, the zoning, the size of the building, and other factors. In the plan put forward by the Proponents, a sign plan would be created to determine the location and size of signs permitted. There are many different kinds of claims that could be alleged depending on how the sign plan is created and carried out. By way of example, legal claims could be brought based on the manner in which signs are allocated, commercial sign and advertising business is awarded, district boundaries are set, or fees are structured. Conversely, a building or business owner or tenant adversely affected by the new signs, may allege damage claims. For example, a residential building owner could claim a loss of tenants because of the light emitted at night from the signs.<sup>4</sup> In addition, claims could arise based upon the City's sponsorship and/or facilitation of a program that seeks to control the content of the signs.

Commercial advertising signs have provided fertile ground for litigation over the past decade in Southern California. Outdoor advertising companies have repeatedly demonstrated that they are willing to expend significant amounts of money to litigate the right to erect and maintain commercial advertising signs. The cases brought often assert First Amendment and civil rights type claims against which a city, even if it prevails, cannot recover attorneys' fees. If the plaintiffs prevail, however, they can seek recovery of their attorneys' fees on a private attorney general theory.

The most recent published case involving a challenge to the City's Sign Ordinance, *Get Outdoors*, is a roadmap of the types of constitutional claims that might be raised in a challenge to the Sign Ordinance. 381 F. Supp. 2d 1250. Some of the claims raised in *Get Outdoors* include: the sign regulations violate the First Amendment because they grant City officials an

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<sup>4</sup> For an example of claims of negative effects caused by lighted signs, see the *Amici Curiae* Brief of the Westwood South of Santa Monica Blvd. and Westwood Homeowners Associations filed April 4, 2012, in *Summit Media*.

impermissible level of discretion to grant or deny signs; the sign regulations unduly burden and restrict the First Amendment right to speech of citizens and property owners; the sign regulations are invalid because they favor commercial over noncommercial speech and grant priority to commercial messages; the sign regulations are invalid because they regulate the content of noncommercial speech; and the sign restrictions are invalid because the City cannot provide rationale findings or evidence to support them. Defending the current Sign Ordinance, the City prevailed in this case in the trial court and on appeal.

### CONCLUSION

The concept, purpose, and overall program for a downtown arts and entertainment district should be further developed to better define the problem being addressed, the important governmental interests that support the program, and the manner in which those interests will be furthered through the program. For the protection of the City, risk mitigation measures should also be explored. For example, the City could begin with a limited and temporary pilot program, including strong defense and indemnity provisions in contracts and permits and comprehensive insurance coverage. As the program is developed, this Office will be able to better analyze the legal issues, assess the risks posed, and provide input regarding the legal structure of the program.

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