OPINION NUMBER 99-3

DATE: November 3, 1999

SUBJECT: Restrictions on Advertising on Bus-Stop Shelters

REQUESTED BY: The San Diego Metropolitan Transit Development Board

PREPARED BY: City Attorney

INTRODUCTION

The San Diego Metropolitan Transit Development Board [MTDB] sells advertising space on shelters provided at bus stops, including those within the City of San Diego, pursuant to an agreement between MTDB and the City. MTDB regulated the content of the advertising placed on the bus-stop shelters according to its Policies and Procedures No. 22. That policy prohibited various types of advertising based on content, including advertising containing religious or political messages.

Based on its policy, MTDB directed the removal of religious advertisements from bus-stop shelters. Advertisers questioned the legality of the policy. Because some shelters are located in public rights-of-way owned by the City, the City Attorney was asked to analyze the constitutionality of MTDB's policy. The City Attorney preliminarily advised MTDB that the policy is unconstitutional. Based on that advice, MTDB allowed the religious advertisements. In the interest of drafting a new policy, MTDB has requested that the City Attorney provide an analysis and review of the constitutional limits on regulating advertising, and recommendations for a constitutional policy.

QUESTION PRESENTED

What restrictions can MTDB place on advertisements posted on bus-stop shelters?

SHORT ANSWER

The advertising space made available by MTDB on bus-stop shelters has historically been offered to the public for both commercial and noncommercial messages. As such, under the United States and California Constitutions, any restrictions on noncommercial messages must promote a compelling governmental interest and must be narrowly tailored to promote that interest. MTDB cannot, therefore, prohibit political, religious, or other noncommercial messages on the bus-stop shelters, but may be able to restrict messages harmful to minors, such as messages including profanity or promoting the use of alcohol, tobacco, and firearms. MTDB can also prohibit unprotected speech, i.e., messages that are false, defamatory, obscene, or incite unlawful activity.

BACKGROUND

The City entered into a Memorandum of Understanding with MTDB, adopted July 25, 1988, and amended February 25, 1991 and June 21, 1999, authorizing MTDB to install bus-stop shelters and bus benches in public rights-of-way in the City. Pursuant to the Memorandum of Understanding, MTDB contracted with a third party for the construction, installation, and maintenance of the bus-stop shelters. In exchange, MTDB's contractor receives the proceeds from the sale of advertising space on the shelters.

On June 11, 1998, MTDB adopted Policies and Procedures Number 22 regulating MTDB display advertising, including advertising on bus-stop shelters and bus benches. The policy sets forth standards for regulating the content of such advertising and MTDB has the discretion to reject any advertisement that does not meet policy standards. Under the policy, "safety, aesthetic considerations, rider convenience, and information needs will take precedence over revenue generation"; MTDB controls the "quantity, quality, and placement" of advertisements; and advertisements should promote public transportation. The policy specifically prohibits advertisements that are false or defamatory or "appear" to personally attack an individual, company, product, or institution. The policy also prohibits advertisements that "might be interpreted to be offensive to any religious, ethnic, racial, or political group," that "might be interpreted as" condoning or soliciting criminal conduct, that portray violence, or that depict nudity "that would be considered as offensive." The policy specifically prohibits all "liquor, tobacco, religious, political, or firearms advertisements."

MTDB regulated the content of the advertising placed on the bus-stop shelters according to its policy, allowing many different kinds of noncommercial messages. After the religious messages were removed pursuant to the policy, valid concerns were raised that the policy may violate due process and first amendment rights governing public speech.

ANALYSIS

I

CONSTITUTIONAL RESTRICTIONS ON LIMITING ADVERTISING IN A PUBLIC FORUM

Advertising on bus-stop shelters in public rights-of-way is governed by the free speech protections found in both the First Amendment to the United States Constitution and Article 1, section 2 of the California Constitution. Under both constitutions, government's ability to restrict speech depends on whether the forum is viewed as open or closed to the public. Once a forum is open to the public for speech, government is limited in its ability to limit or abridge that speech.

A. Advertising Restrictions under the United States Constitution

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. The First Amendment applies to state legislatures through the Fourteenth Amendment, and has been held to apply to local ordinances. *See* U.S. Const. amend. XIV, 1; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Lovell v. City of Griffin,* 303 U.S. 444, 450 (1938). The extent to which government can restrict speech depends on the public nature of the forum in which the speech occurs, whether the restrictions are based on the content of the speech, and the basis for the restrictions.

For the purpose of reviewing restrictions on advertising on government property, the United States Supreme Court has identified three types of forums: (1) "traditional public forums," (2) "designated public forums," and (3) "nonpublic forums." *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983)*; Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *see also Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-03 (1974). Traditional public forums are those that "by long tradition or by government fiat ha[ve] been devoted to assembly and debate," such as parks, streets, and public sidewalks. *Perry*, 460 U.S. at 45–46. "Designated public forums" result when government allows the public to use government property for expressive activity. *Id.* For example, meeting rooms at a university that are made available to registered student groups are a designated public forum. *Widmar v. Vincent*, 454 U.S. 263, 267-69 (1981). If the property is neither a traditional public forum nor a designated public forum, then it is considered a nonpublic forum. Government establishes a nonpublic forum "when it does no more than reserve eligibility for access to the forum to a particular class of speakers" who must then obtain permission to use the property. *Arkansas Educ. Television Com'n v. Forbes,* 523 U.S. 666, 670 (1998). For example, a school district's internal mail system is a nonpublic forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. at 45.

In both traditional public forums and designated public forums, *content-based* regulations restricting protected speech are presumed invalid and will be upheld only when the government can prove that the restrictions are necessary to directly advance a compelling state interest and that the restrictions are narrowly drawn to achieve that interest [the compelling interest test]. *Cornelius,* 473 U.S. at 800. In nonpublic forums, the government can impose reasonable *content-based* restrictions that preserve the forum for its intended purpose as long as the restrictions are viewpoint neutral, that is, they do not prefer one viewpoint over another. *Id.*

Based on the location of the bus-stop shelters in the public rights-of-way, and the history of allowing both commercial and noncommercial messages, it is likely that a court analyzing the issue would find that MTDB's bus-stop shelters are either traditional or designated public forums. The bus-stop shelters are stationary structures located on sidewalks and within public rights-of-way. As such, they are akin to newsracks. When courts have analyzed restrictions on newsracks, they have concluded that the property at issue is the public sidewalk and have thus defined newsracks as traditional public forums because they are located in public rights-of-way. *See Gold Coast Publications, Inc. v. Corrigan*, 42 F.3d 1336, 1344 (11th Cir. 1994); *Chicago Newspaper Publishers Ass'n v. City of Wheaton*, 697 F. Supp. 1464, 1466 (N.D. Ill. 1988). *See also Metro Display Advertising, Inc. v. City of Victorville,* 143 F.3d 1191, 1195 (9th Cir. 1998) (bus-stop shelters could be traditional public forums because they are on the street, and streets are held in trust for the use of the public and for purposes of assembly and public speech).

Some courts, however, conclude that a forum is a designated public forum by narrowly defining the property at issue and limiting the forum to the actual advertising space. *See Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania. Transp. Authority (SEPTA),* 148 F.3d 242, 248 (3d Cir. 1998), *cert. denied*, 119 S.Ct. 797 (Jan. 11, 1999) (finding that the advertising space, and not the exterior of the bus was the property at issue); *Air Line Pilots Ass'n, Int'l v. Dep't of Aviation*, 45 F.3d 1144, 1151–52 (7th Cir. 1995) (holding that where one sought access to advertising display cases in an airport terminal, the display case and *not* the airport was the relevant forum). This approach is not likely in MTDB's case, where the structure holding the advertising is within a public right-of-way. If a court *were* to narrowly define the forum as the advertising space, however, then it would examine whether the advertising space is a designated public forum or a nonpublic forum.

If, however, a government opens its advertising space to "public-service, public-issue, and political ads," the space is a designated public forum, not a nonpublic forum. *Planned Parenthood Ass'n/Chicago Area v. Chicago Trans. Auth'y*, 767 F.2d 1225 (7th Cir. 1985); *New York Magazine v. Metropolitan Transp. Authority,* 136 F.3d 123 (2d Cir. 1998); *see also Christ's Brides Ministries,* 148 F.3d 242 (3d Cir. 1998). For example, in *New York Magazine*, the court concluded that the advertising space on the exterior of buses was a designated public forum because the transportation authority permitted political and other noncommercial advertising. Thus, the transportation authority could not disallow an advertisement caricaturing the mayor. *New York Magazine,* 136 F.3d at 130. The court stated that, if the advertising space had been limited to commercial advertisements, such a limitation would indicate that making money was the primary goal served by opening the property. But when a transportation authority opens its advertising space for general public discourse, the transportation authority accepts the possibility of clashes of opinion and controversy, and puts public discourse before sound commercial practice. *Id.*

In contrast, the Ninth Circuit Court of Appeals in *Children of the Rosary v. City of Phoenix,* 154 F.3d 972, 983 (9th Cir. 1998), held that the city did *not* create a designated public forum because it "consistently promulgate[d] and enforce[d] policies restricting advertising on its buses to commercial advertising." *Id.* at 978. The court concluded that because the city had not opened the advertising space on buses as a medium for general discourse, the advertising space was a nonpublic forum and upheld the regulation. *Id.*

Like the transportation authority in *New York Magazine,* MTDB allows public interest advertising. Further, MTDB states that revenue production is *not* one of its primary goals. Accordingly, a court would classify the advertising spaces on bus-stop shelters as designated public forums. Again, government may not impose content-based regulations restricting the right to free speech in designated public forums, unless the regulations satisfy the compelling interest test.

B. Advertising Restrictions under the California Constitution

The California Constitution provides that every person "may speak, write and publish his or her sentiments on all subjects," and laws "may not restrain or abridge liberty of speech or press." Cal. Const. art. I, 2. California courts have consistently applied federal precedent when reviewing regulations of speech. The California Constitution, however, provides *greater* protection for expressive activity than does the First Amendment of the United States Constitution. *Wilson v. Superior Court*, 13 Cal. 3d 652, 658 (1975). One of the reasons for the greater free speech protection is that California has a more expansive "public forum" doctrine.

Under the California Constitution, public forums are not limited to streets, sidewalks, and parks (traditional public forums) or sites dedicated to expressive activities (designated public forums). Under California law, if a facility is open to the public, it will be treated as a public forum, unless the communicative activity is "basically incompatible with the normal activity of a particular place at a particular time." *Prisoners Union v. California Department of Corrections*, 135 Cal. App. 3d 930, 935 (1982). Under California's public forum doctrine, property is either a public forum or a nonpublic forum.

The only case in which the California Supreme Court has reviewed a policy regulating advertising space in a transit facility is *Wirta v. Alameda-Contra Costa Transit District*, 68 Cal. 2d 51 (1967). In *Wirta,* the transit district provided advertising space in its motor coaches and then leased the space to advertisers through its contractor, Metro Corporation. The agreement between the district and Metro required the district to approve any advertisement of a political or controversial nature. The district's policy permitted only commercial advertising and political advertising in connection with an election. A group offered an advertisement on ending the Vietnam War and when the advertisement was refused, brought an action for injunctive relief. The trial court granted the injunction. In upholding the injunction, the California Supreme Court held that because the district had "opened the forum" for expression of ideas by allowing commercial and some noncommercial protected speech, in that particular case political speech, it could not refuse to accept other advertisements that contained protected speech. Under *Wirta*, once a government opens a forum and allows protected speech, it is severely limited in its ability to regulate speech at that forum.

The California Supreme Court applied *Wirta* in *Dulaney v. Municipal Court for the San Francisco Judicial District,* 11 Cal. 3d 77 (1974). In *Dulaney,* the plaintiffs challenged a municipal ordinance that prohibited posting any notice or sign on utility poles without first obtaining permission from the person who owned the poles and from the City's Department of Public Works. *Id.* at 80. The court stated that because the ordinance made utility poles accessible for posting notices when a person obtained the requisite consent, the city had opened the forum.

Id. at 82 (citing *Wirta,* 68 Cal. 2d at 54–55).

The Fifth District Court of Appeal recognized *Wirta* as controlling under the California Liberty of Speech Clause. *Women's International League for Peace and Freedom v. City of Fresno,* 186 Cal. App. 3d 30 (1986). In reviewing the city's policy in *League for Peace,* the court first distinguished between the policies at issue in *Wirta* and the policy in *League for Peace.* In *Wirta*, the transit district allowed both commercial and political speech, whereas in *League for Peace*, the city allowed *only* commercial speech. The court then cited *Lehman* for the proposition that government should be allowed to prohibit noncommercial speech inside buses because bus passengers are a captive audience. The court concluded that the privacy rights of a captive audience of transit bus riders justified the city's exclusion within transit buses of all forms of expression, including political advertising. The court relied heavily on the fact that "public transportation exposes passengers to increasingly unpleasant experiences." In finding that the buses were not public forums, the court held that "[s]ensitivity to the safety and personal feelings of passengers may permit reasonable restrictions against forms of activity and expression." *League for Peace,* 186 Cal. App. 3d at 41.

League for Peace is a very narrow holding which turned on the fact that patrons riding in buses are a captive audience. It is not authority for the proposition that MTDB could regulate advertising on bus-stop shelters. There are several reasons why a court applying California law would likely find that neither *Lehman* nor *League for Peace* is controlling in the case of MTDB's bus-stop shelters.

The policies and facts at issue in *Lehman* and *League for Peace* are significantly different from the policies and facts implicated by advertising at MTDB's bus-stop shelters. In *Lehman* and *League for Peace,* the government entities allowed only commercial advertising. MTDB allows a wide variety of noncommercial advertising. And in both *Lehman* and *League for Peace*, the courts were dealing with bus *passengers,* a captive audience. The advertising on bus-stop shelters, however, is directed principally to a non-captive audience of mere passers by. Because in *League for Peace,* the court relied heavily on the "captive audience" reasoning in *Lehman* and the privacy rights of bus passengers, it is extremely unlikely a court would view the rationale in *League for Peace* as relevant to the issues presented in the case of MTDB's content-based regulations of advertising on bus-stop shelters.

Even if a court were to apply the rationale of *Lehman* and *League for Peace*, the bus-stop shelters would be considered public forums because, unlike the policies at issue in *Lehman* and *League for Peace*, MTDB's policy allows noncommercial advertising. Having opened the forum to advertising, MTDB concedes that advertising on bus-stop shelters is not incompatible with bus-stop shelters' primary use.

C. Restrictions on Protected Speech

In examining restrictions on speech, courts distinguish between commercial and noncommercial speech, as well as whether the restriction is based on the content or the placement of the speech. Courts allow restrictions on commercial speech that directly advance a substantial governmental interest. Restrictions on noncommercial speech, however, must be

narrowly tailored to serve a compelling governmental interest.

1. Commercial Speech

Commercial speech does *no more than* propose a commercial transaction. *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973). MTDB can impose content-based restrictions on commercial speech if the restrictions (1) promote a substantial governmental interest, (2) directly advance the interest, and (3) sweep no further than necessary to achieve the interest. *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563–66 (1980). MTDB would bear the burden of establishing that its regulations satisfy each of these three requirements. *See Bolger v. Youngs Drug Prods. Corp*., 463 U.S. 60, 71 n.20 (1983). In order to regulate commercial speech based on its content, MTDB must prove that the advertisement has an *actual* effect on the interest served by the regulation. *United Food & Commercial Workers Union, Local 1909 v. Southwest Ohio Regional Transit Authority,* 163 F.3d 341, 354 (6th Cir. 1998).

MTDB may also be able to restrict where some advertisements are displayed based on their secondary effects. The United States Supreme Court has upheld regulations on speech when the purpose of the regulation was not to restrict "offensive" speech but served the limited purpose of decreasing the "secondary effects" of such speech. *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 71 (1976). The harmful secondary effects of alcohol, tobacco, and firearm advertising include promoting: (1) the sale and use of alcohol to minors; (2) the sale and use of tobacco to minors; and, (3) the unlawful sale and use of firearms. The secondary effects of alcohol, tobacco, and firearms advertising may support restrictions, for example, banning such advertisements near schools and places where children are likely to be found. If MTDB's stated purpose in restricting alcohol, tobacco, and firearm advertisements is to limit the illegal activity that often flows from such advertisements, then courts might uphold the restrictions as valid regulations aimed at the secondary effects of advertising such products. Also, a court could find that MTDB's interest in providing a safe environment and enhancing and promoting public transportation justifies a ban on firearm and liquor advertising.

2. Noncommercial Speech

"[A]n ordinance is invalid if it . . . regulates noncommercial billboards based on their content." *National Advertising Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir.1988) (citing *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 513, 516 (1980)). A regulation is content-based when the government regulates speech because it disagrees with the message it conveys. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Regulations that serve purposes unrelated to the content of the speech are content neutral. *Id.* at 791. Courts will, however, invalidate regulations restricting speech when they find that government's stated purpose for the regulations is merely a pretext for censorship. *See e.g., Gerritsen v. City of Los Angeles*, 994 F.2d 570, 575 (9th Cir. 1993). In both traditional public forums and designated public forums, government's ability to regulate noncommercial speech is strictly limited and any regulation of protected noncommercial speech in a traditional public forum or a designated public forum must satisfy the compelling interest test.

In *National Advertising*, the Ninth Circuit invalidated an ordinance that regulated noncommercial billboards based on their content. *National Advertising,* 861 F.2d at 248. The city's ordinance banned all "general or billboard advertising signs." *Id.* at 247. The city defined general or billboard signs as those "sign[s] which direct attention to a business, commodity, industry or other activity which is sold, offered or conducted elsewhere than on the premises upon which such sign is located, and which may be sold, offered or conducted on such premises only incidentally, if at all." *Id.* The city allowed, however, governmental signs and flags, memorial tablets, recreational signs, and temporary political, real estate, construction and advertising signs. *Id.* at 247, 248 n.2. The court noted that the exemptions required examination of the content of signs because "[i]n most instances, whether offsite noncommercial signs are exempted or prohibited turns on whether or not they convey messages approved by the ordinance." *Id.* at 248.

Content-based restrictions on protected speech in either a traditional public forum or a designated public forum are subject to the compelling interest test. Therefore, content-based restrictions on protected speech are unconstitutional unless MTDB establishes that the restrictions are *necessary* to serve a compelling state interest and are *narrowl*y drawn to achieve that interest. *National Advertising*, 861 F.2d at 249 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983)). In order to be narrowly drawn, the regulations must be the least restrictive means available for serving MTDB's compelling interest. *Id.*

E. Regulating Unprotected Speech

Government may prohibit unprotected speech, such as false advertising, speech intended to incite unlawful activity, defamatory speech, "fighting words," and obscene speech. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942). Government retains the authority to regulate unprotected speech in any forum; that is, government may prohibit unprotected speech in traditional public forums, designated public forums, and nonpublic forums, as such speech is defined by the courts.

1. False Advertising

Government may prohibit commercial advertising of illegal activities (e.g., prostitution) or advertising that is untruthful, misleading, or deceptive. *See Pittsburgh Press Co. v Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973). MTDB's policy prohibits advertisements that "appear to make personal attacks on any individual, company, product, or institution, or that falsely disparage any service or product." In a traditional or designated public forum, MTDB may prohibit only that speech which is untruthful, misleading, or deceptive. If MTDB were to apply its policy to prohibit *truthful* "attacks" on individuals, companies, products, and institutions, such an application of the policy would be unconstitutional as prohibiting more than *false* advertising.

2. Speech Inciting Unlawful Activity

Government may prohibit speech that is directed toward inciting or producing *imminent* lawless action and is likely to incite or produce such action. *Brandenburg v. Ohio*, 395 U.S. 444

(1969). Several of MTDB's policy provisions clearly prohibit speech beyond that which is likely to produce *imminent* lawless action or is likely to incite or produce such action. MTDB's policy prohibits advertising that (1) "might be interpreted as condoning any type of criminal act, or which might be considered as derogatory toward any aspect of the law enforcement profession"; (2) "might be interpreted as condoning or soliciting any unlawful act or conduct"; or (3) "portray acts of violence, murder, sedition, terror, vandalism or other acts of violence against persons or institutions." Because such regulations prohibit protected speech, if MTDB cannot meet the compelling interest test, they would be held unconstitutional.

3. Defamatory Speech

Government may prohibit advertisements that are defamatory. *New York Times v. Sullivan,* 376 U.S. 254 (1964). A defamatory statement is a false statement of or concerning a person, product or company that is likely to cause injury to the person's, product's, or company's reputation. *Id.* MTDB's Policy regulates speech that is "defamatory in any respect." If MTDB were to apply this provision to prohibit "defamatory" speech as it has been defined by the courts, then this provision would likely survive a constitutional challenge.

4. "Fighting Words"

Government may ban the use of "fighting words," that is, those personally abusive epithets that when addressed to the ordinary citizen, are *inherently* likely to incite *immediate* physical retaliation. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942). Most regulations restricting such speech are invalid because they are vague or overbroad. For example, a regulation that defines the prohibited speech as "annoying conduct," and "abusive language" will not survive constitutional review because the imprecise terms could be applied to protected speech. *Gooding v. Wilson*, 405 U.S. 518 (1972) (holding that a statute prohibiting such terms could not be used to punish a person who says to a police officer, "white son of a bitch, I'll kill you.") Courts will also invalidate regulations that apply only to "hate speech," those fighting words that insult or provoke violence on the basis of race, religion, or gender. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). MTDB's Policy prohibits any advertisement that "appears to make a personal attack on any individual," "might be interpreted as condoning any type of discrimination," or any advertisement that "might be interpreted to be offensive to any religious, ethnic, racial, or political group." Because the regulations prohibit protected speech, they are unconstitutional.

5. Obscene Speech

Government may prohibit speech that depicts or describes sexual conduct in a patently offensive way, appeals to the prurient interest in sex, and has no serious literary, political, artistic, or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973). The United States Supreme Court has said that, in evaluating the free speech rights of adults, sexual expression that is indecent but not obscene is protected by the First Amendment. *Reno v. ACLU*, 521 U.S. 844 (1998). MTDB's Policy prohibits advertisements that "depict nudity, or portions of nudity that would be considered offensive, distasteful, pornographic, or erotic, [or that] is obscene or advertises adult entertainment." This provision is overbroad, banning speech that is not obscene

according to the *Miller* test of obscenity, and is therefore unconstitutional.

II

DUE PROCESS REQUIREMENTS

Due process requires that any MTDB regulations that restrict speech must not be vague or overbroad nor confer on the Board unbridled discretion to approve or disapprove an advertisement. *See United Food & Commercial Workers Union, Local 1909 v. Southwest Ohio Regional Transit Authority,* 163 F.3d at 354. *See also Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969) (due process requires narrow, objective, and definite standards to guide the decision-making body). Vague or overbroad terms can lead officials to exercise discretion to over-censor protected First Amendment activities. *City of Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750, 770 (1988); *Grayned v. City of Rockford*, 408 U.S. 104 (1972). The Court demands definite and certain terms because "the danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). To satisfy due process, MTDB's regulations must be objective and prevent speech only to the degree necessary to further the legitimate commercial interests of the advertising program.

A. Vagueness Doctrine

When a regulation is so indefinite that the line between permissible and impermissible conduct is unclear, and the legislative body could have drafted the ordinance more precisely, the regulation is vulnerable to a void-for-vagueness challenge. *See United States v. Petrillo*, 332 U.S. 1, 7–8 (1947). A person of ordinary intelligence must be able to readily identify the rules that determine whether an advertisement is allowed. When freedom of speech is involved, the vagueness doctrine will be applied strictly to avoid the chilling effect vague laws have on speech. *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). Government regulations are subject to a void-for-vagueness challenge when the regulations contain *either* confusing enforcement standards, or *imprecise requirements* for permissible communicative expression or conduct. *See City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750, 770 (1988).

B. Overbreadth

Even if a regulation is not vague, that is, the enforcement standards are neither confusing nor imprecise, the regulation will be invalid if it is overbroad. A regulation is overbroad when it restricts both protected and unprotected speech. *National Ass'n for Advancement of Colored People v. Alabama*, 377 U.S. 288, 307, 309 (1964). Courts will strike down regulations as overbroad when the regulations prohibit constitutionally protected activity or create opportunities for enforcement officials to exercise content-based discretion. *Plain Dealer*, 486 U.S. at 755. A regulation cannot condition the free exercise of First Amendment rights on the "unbridled discretion" of government officials. *Gaudiya Vaishnava Soc. v. City and County of San Francisco*, 952 F.2d 1059, 1065 (9th Cir. 1990) citing *Plain Dealer,* 486 U.S. at 755.

MTDB's past policy is both vague and overbroad. The policy contains vague and ambiguous terms that fail to provide definite criteria to limit the Board's discretion. The policy prohibits advertisements that "might be interpreted" to be "offensive to any religious, ethnic,

racial or political group." The phrase "might be interpreted" is vague because it is an imprecise limitation that fails to check the Board's discretion. The policy is overbroad because the regulation prohibits advertising that might be interpreted as being "offensive." *Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977) (stating that the fact protected speech may be offensive to some does not justify its suppression).

III

RECOMMENDED POLICY

Based on our analysis, we recommend the following Proposed Policy. The Proposed Policy addresses the constitutional and due process concerns generated by MTDB's current policy and restricts only certain narrow areas of speech. First, the Proposed Policy prohibits unprotected speech, i.e., defamatory advertising, advertising condoning criminal conduct, and false advertising. Government can clearly prohibit these types of speech.

Second, the Proposed Policy contains a narrower prohibition of obscene material, adopting the definitions of "obscene" and "harmful matter" to minors that are contained in the Penal Code. This narrower definition eliminates the First Amendment and Due Process concerns raised by the current policy.

Third, the Proposed Policy maintains the prohibition against advertising promoting the sale of alcohol, tobacco, and firearms that is contained in the current policy. Because this restriction would apply only to commercial transactions, the restriction need only be supported by a substantial government interest. That interest is not to encourage minors to purchase or use these products. *See Young v. American Mini Theatres*, 427 U.S. 50, 71 (1976). Many public transit patrons are minors, possession of these products by minors is illegal and dangerous, and advertising is a persuasive medium for encouraging the use of these products by minors. Note also, that tobacco advertising is strictly limited within the City of San Diego pursuant to Municipal Code sections 58.0301 to 58.0312.

Based on similar interests, MTDB may prohibit advertising on bus-stop shelters that contains obscene matter or matter harmful to minors, as defined in the California Penal Code, or that includes obscene or profane language.

Fourth, to accommodate First Amendment concerns, the proposed policy does not restrict religious or political messages.

PROPOSED POLICY
Advertising on Bus-Stop Shelters

1. In its agreement with its advertising contractor, MTDB reserves the right to reject any advertisement, commercial or noncommercial, which does not meet the standards set forth in this policy.

2. All advertising posted on bus-stop shelters must conform to the following criteria.

   A. Defamatory Advertising. No advertising will be permitted that falsely disparages any person, product, or company, and that is likely to damage the reputation of any person, product, or company.

   B. Advertising Condoning Criminal Conduct. No advertising will be permitted that is likely to incite or produce imminent unlawful activity.

   C. Obscene Advertising. No advertising will be permitted that contains obscene matter or matter harmful to minors, as defined in California Penal Code sections 311 and 313.

   D. Profanity. No advertising will be permitted that includes language that is obscene, vulgar, profane, or scatological.

   E. False Advertising. No advertisement will be permitted that contains false or grossly misleading information.

   F. Alcohol, Tobacco, and Firearms. No advertisement will be permitted that promotes the sale of alcoholic beverages, tobacco or tobacco products, or firearms.

   G. Existing Laws. All advertisements must conform with applicable federal, state, and local laws.

3. The City may make demand upon the General Manager of MTDB for the removal of any advertisement, commercial or noncommercial, that does not conform to this policy. Such demand shall be in writing and shall state reasonable grounds for the demand. MTDB shall consider and act upon the demand in accordance with this policy.

CONCLUSION

Under federal law, a court would likely conclude that MTDB's bus-stop shelters are either traditional or designated public forums because MTDB allows a wide range of noncommercial advertising, such as public issue and public interest advertising. California's Liberty of Speech Clause found in the California Constitution protects speech to a greater extent than the First Amendment of the United States Constitution. Under the California Constitution, a

facility is treated as a public forum if it is open to the public.

In traditional and designated public forums, a regulation that restricts noncommercial protected speech based on the content of the speech must serve a compelling governmental interest and be narrowly drawn to achieve that interest. MTDB may restrict commercial advertising, such as advertising of alcoholic beverages, tobacco products, and firearms, to directly advance a substantial governmental interest, or to decrease the secondary effects of such advertising. MTDB can prohibit unprotected speech.

Any restrictions imposed by MTDB must meet due process requirements. Restrictions must be stated in narrow, definite, and certain terms so that officials do not have unbridled discretion to prohibit protected speech.

The recommended policy contained in this Opinion meets these requirements. Any additional restrictions contemplated by MTDB should be considered in light of the compelling interest test for noncommercial speech, or the substantial interest test for commercial speech.

Respectfully submitted,

CASEY GWINN
City Attorney

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LO-99-3