MEMORANDUM OF LAW

DATE: May 3, 2001

TO: The Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Establishment of a Special Sign District

INTRODUCTION

In November of 1999, this office issued an unpublished Memorandum of Law on the use of advertising kiosks in the public right-of-way to fund the installation of automatic self-cleaning toilets. That memorandum extensively discussed the City's general prohibition on off-premises (also referred to as "off-site") signs and the legal history of the San Diego sign regulations. *See* City Att'y MOL No. 99-12 (Nov. 23, 1999) (copy enclosed as Attachment 1). It concluded that the proposal for advertising kiosks would dramatically affect the ability of the City to defend its existing sign regulations, undermining the validity of the City's sign ordinance.

This office was recently requested to analyze whether a special sign district could be established for the proposed advertising kiosks. Our understanding is that the proposed kiosks would be essentially the same as described in the previous memorandum on this issue.

QUESTION PRESENTED

Can the City create a special sign district that would allow advertising kiosks in the public right-of-way to fund self cleaning toilets?

SHORT ANSWER

The City may create a special sign district for the proposed advertising kiosks. However, allowing these kiosks in the public right-of-way would undermine the City's ability to enforce its

off-premises sign regulations within the sign district. When the only distinction between City-owned advertising kiosks and other off-premises signs would be that the City would profit financially from the kiosks, a court would likely find that the original restrictions on off-premises advertising were not legitimate. Even if the City justified allowing the advertising kiosks because they would fund a restroom facility for the benefit of the public, such a justification would still undermine the City's stated purpose of traffic safety and aesthetics for the general ban of off-premises signs. Thus, the analysis of allowing the advertising kiosks in the public right-of-way within a sign district is essentially the same as the analysis of this issue prepared in 1999, except that the off-premises sign regulations may only be affected within the sign district area.

BACKGROUND

A. Sign Regulations

As part of the Land Development Code, the City's sign regulations were revised and renumbered effective January 1, 2000. The purpose of the sign regulations is 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." San Diego Municipal Code 142.1201.[1]

In order 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).

Further, section 95.0102(a) prohibits placing or posting any signs "on public property, including the public rights-of-way, or 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)." Those exceptions are for certain clocks and banners.

Similarly, section 142.1206(a)(1) makes it unlawful to "[p]lace, post, paint or secure any *sign* . . . on public property or within the *public right-of-way* unless otherwise provided in the Municipal Code or specific state statute;" Section 142.1210(b)(5)(A) also 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."

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

B. Special Sign Districts

In 1974, section 104.0101 was added to the Municipal Code which provided for the

establishment of special sign districts. In 1984, a section setting forth the purpose and intent of the special sign district section was added and the special sign district code sections were renumbered to begin at section 104.0100.

Special sign districts were defined as "any single, legally described area within the City of San Diego . . . within the boundaries of a community plan or plans adopted by the City Council . . ." San Diego Municipal Code 104.01000.2 (repealed 1997). The stated purpose and intent of allowing special sign districts was to "accommodate the special and unique sign needs of certain districts within the City" and to "preserve and enhance the cultural, aesthetic, economic and environmental values of certain neighborhoods, communities and business districts within the City" while still complying with the basic philosophic approach of the City wide sign regulations. San Diego Municipal Code 104.0100 (repealed 1997). The City Council was given the authority to approve or deny applications for special sign districts. San Diego Municipal Code 104.0100.10 (repealed 1997). In order for the City Council to approve sign district regulations, 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. San Diego Municipal Code 104.0100.16.

Pursuant to this enabling legislation, a number of special sign districts have been formed. Many of the sign districts were approved by Council resolution, but a few were codified. The La Jolla and Ocean Beach Sign districts were codified and have been incorporated into the Land Development Code. San Diego Municipal Code 142.1290, 142.1291. A review of the sign districts formed pursuant to section 104.0100 indicates that they all regulate on-premises signs and do not affect the City's general off-premises sign regulations. Indeed, most of the sign districts contain regulations even more restrictive than the City wide sign regulations.

Thus, the history of sign districts in San Diego indicates that the general purpose of those 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. Regulations relating to aesthetics, such as design, size and location, were the primary focus of those sign districts. As a result, sign districts created under section 104.0100 all involved changing 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.

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 could, however, still be created by Council ordinance. Indeed, in 1999, a Centre City sign control district was established for the purpose of permitting directional signage on public property and in the public right-of-way. San Diego Ordinance O-18676 (Sept. 4, 1999). 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 signage 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 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 interest in traffic safety.

LEGAL ANALYSIS

I. Would a sign district allowing advertising kiosks in the public right-of-way to fund self cleaning toilets undermine the validity of the City's general prohibition on off-premises signs?

A. The Regulation of Off-premises Signs in Sign Districts

In order to allow advertising kiosks in the public right-of-way within a sign district, the City would need to justify it as an exception to the general ban of off-premises advertising. (See Attachment 1). Initially, as discussed in the attached memorandum, general content-neutral bans on off-premises signs and signs on public property have been determined to be constitutional by the United States Supreme Court based on a city's substantial interests of traffic safety and aesthetics. *Members of the City Council v.Taxpayers for Vincent*, 466 U.S. 789 (1984); *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981).

A general prohibition on off-premises signs only within a certain area of the City designated as a sign district has also been upheld by the courts. In *City and County of San Francisco v. Eller Outdoor Advertising*, 192 Cal. App. 3d 643 (1987), the court upheld a total ban on off-premises signs within a special sign district. The court, recognizing that city-wide bans on off-premises signs had been upheld in *Metromedia* and *Vincent*, stated, "San Francisco's indisputable interests in reducing traffic hazards and beautifying a vital area of the City clearly justify a content-neutral ban on off-premises signs and billboards. Furthermore, because the prohibition is restricted to only certain sections of town deemed to be of special cultural, historic or scenic importance, the City's interests clearly outweigh any incidental infringement on First Amendment rights." *Id*. at 659. (Footnote omitted.)

In *Outdoor Systems Inc. v. City of Atlanta*, 885 F. Supp. 1572 (N.D. Ga. 1995), a district court considered an ordinance which allowed temporary Olympic signs within certain sign

districts of the City. While that ordinance was determined to violate the First Amendment because of its content based restriction which only allowed Olympic signage, the Court recognized that "[r]estricting the commercially zoned areas in which off-premises advertising signs may be posted is, standing alone, not problematic. What is unconstitutional, though, is further limiting the availability of those locations based strictly on the content of the message." *Id*. at 1578.

Therefore, a particular area of the City may be designated as a sign district which would have its own distinct sign regulations. The issue, however, would remain whether the City could still ban all off-premises signs within that sign district other than the designated kiosks which would financially benefit the City.

B. Exceptions to the General Prohibition may be Permissible, but the Necessary Justifications for Exceptions are High

In order to allow an exception for City-owned advertising kiosks from the general prohibition on off-premises signs the exception should meet the test set forth by the Court in *Metromedia*. The Court stated that the city's exception must be substantially related to advancing an important state interest that is at least as important as the interests advanced by the underlying regulation, the exception must be no broader than necessary to advance the special goal, and the exception must be 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 *Metromedi*a the Court further stated, "[T]he exceptions to the general prohibition are of great significance in assessing the strength of the city's interest in prohibiting billboards." *Metromedia*, 453 U.S. at 520.

The Court in *Vincent* also recognized that, "[a]ny 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. The Court stated, "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.

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 advertising signs on kiosks 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 the signs on kiosks and that those interests could not justify a ban on those advertising structures. The City would also have to show that the proposed advertising kiosks 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 kiosks that would be at least as substantial as the traffic safety and aesthetic objectives.

The legal analysis and rationale of our previous Memorandum on this issue would apply equally to the sign district area. Because the City has justified its restrictions on off-premises signs and signs located in the public rights of way based on traffic safety and aesthetics, allowing an exception for City owned advertising kiosks in the public right-of-way within a sign district would undermine the City's stated purpose for regulating signs.

As a result, allowing certain advertising signs within the public right-of-way would most likely leave the remaining off-premises sign regulations for the sign district area susceptible to a legal challenge. 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 kiosks and other off-premises advertising displays would be that the City would profit financially from the kiosks, 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 kiosks because they would fund a restroom facility for the benefit of the public, such a justification would still undermine the City's stated purpose of traffic safety and aesthetics for the general ban of off-premises signs. As stated in the previous Memorandum on this issue, "By allowing the installation of kiosks designed to place off-premises advertising in the public rights-of-way, the City will signal to the court that its interests in aesthetics and traffic safety are not substantial or compelling." Attachment 1 at page 12.

II. Other Alternatives Available to the City

In addition to the other funding methods for the public facilities suggested in the attached Memorandum, the City could create a sign district in which off-premises advertising is allowed. Essentially, it becomes a policy matter of whether the City Council wants to keep the current off-premises sign regulations within the sign district or allow basically all off-premises signs within the sign district, not only the signs on kiosks owned by the City. Thus, the City may want to further research the idea of creating a sign district allowing most off-premises signs within that sign district, subject only to constitutionally permissible restrictions, such as prohibitions on unprotected categories of speech, size restrictions, structural requirements and other restrictions similar to the current regulations for on-premises signs.

CONCLUSION

The analysis of allowing advertising kiosks within a sign district is essentially the same as our previous analysis of this issue prepared in 1999, except that the off-premises sign regulations may only be affected within the sign district area. While a sign district could be established, allowing advertising kiosks in a sign district would most likely undercut the ability of the City to uphold the general ban on off-premises signs within that sign district. Any

exception to the general prohibition on off-premises signs within the sign district would make the regulations difficult, if not impossible, to enforce within the sign district.

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Attachment
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