ESLIE E. DEVANEY
ANITA M. NOONE
ESLIE J. GIRARD
USAN M. HEATH
AUEL B. STRACK
ASSISTANT CITY ATTORNEYS
ARRIE L. GLEESON
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4199
TELEPHONE (619) 236-6220
FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: November 23, 1999

TO: Casey Gwinn, City Attorney

FROM: Carrie L. Gleeson, Deputy City Attorney

SUBJECT: Use of Offsite Advertising in the Public Rights-of-Way to Fund Public Automatic Self-Cleaning Toilets

QUESTION PRESENTED

Could the use of advertising kiosks to fund the installation of automatic self-cleaning toilets affect the validity of the City's sign ordinance?

SHORT ANSWER

Yes. Historically, the City has justified its restrictions on offsite advertising visible from the public rights-of-way based on the need to preserve the beauty of the City and to promote traffic safety. Whatever its rationale, the City must have a substantial and compelling reason for restricting signs, and must do so in a consistent and credible manner. The proposed advertising kiosks would undermine the City's stated purpose for regulating signs, because the kiosks would place highly visible offsite advertising in the very places where the City has claimed they should not be. This exception would call into question the legitimacy of the reasons used to justify the original restrictions. The City's economic interest in the advertising kiosks is unrelated to and would not justify ignoring its long-held aesthetic objectives.

DISCUSSION

I

BACKGROUND

A. History of the City of San Diego's Prohibition on Off-Site Advertising

1. 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San Diego Municipal Code § 101.0700(A) (repealed 1-17-84). 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. SDMC § 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. SDMC § 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." SDMC § 101.0700(B)(3); 453 U.S. at 494.

In addition to onsite advertising, the ordinance excepted 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.

2. 1972 Sign Ordinance Litigation

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 Court's opinion is discussed in more detail below.

In remanding the case to the California Supreme Court, the United States Supreme Court noted that if appropriate, the California courts could sustain the ordinance by limiting it to commercial speech. 453 U.S. at 823-824, n. 26. On review, however, the California Supreme Court held that the ordinance could not be severed without being rewritten. *Metromedia Inc. v. City of San Diego*, 32 Cal.3d 180 (1982).

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

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 purpose of the ordinance now emphasizes that the City's objective in enacting the regulations is the preservation of aesthetics 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 continues to allow onsite and prohibit offsite advertising, but excludes non-commercial messages from the prohibition. Thus, "permanent or changeable copy" on ground signs (§ 101.1112(F)), wall signs (§ 101.1113(G)), roof signs (§ 101.1114(J)), and projecting signs (101.1115(G)), "may include only on-premises or public interest messages." 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) are by definition limited in their use. The ordinance specifically limits the number and type of each sign permitted, with some signs requiring a conditional use permit. *See, e.g.,* § 101.1117.1 (rotating signs).

The ordinance includes exceptions for Planned Districts, Special Sign Districts, Architectural Control Districts, and Comprehensive Sign Plans, all of which incorporate comprehensive sign regulations. § 101.1110(A-C, E). Signs permitted by Conditional Use Permit are excepted if the permit contains comprehensive conditions regulating the signs. § 101.1110(D). Signs within a zone that has more restrictive sign regulations are also exempt. § 101.1110(F).

The ordinance contains 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 are allowed on any otherwise permitted sign. See, e.g., § 101.1101.1112(F).

Section 95.0102(a) specifically prohibits 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)." The exceptions pertain to clocks and banners.

Sections 62.1001 to 62.1013 govern the placement of newsracks. Those regulations 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. 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. With one exception, 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).

The 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 Ord. No. O-17121 N.S. (July 25, 1988) and attached agreement. The agreement contained regulations for the size and number of signs allowed on the shelters, and provided 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.

The agreement provided for a one-year pilot program to allow for evaluation of the program and public input. Part of the evaluation done at the end of the one-year pilot included a survey of bus patrons. The survey found that 97 percent of the respondents wanted more bus shelters and wanted advertising to pay for them. San Diego Resolution No. R-277415 (Feb. 25, 1991). Based on the success of the pilot program, the City continued the bus bench and shelter program. *Id.*

B. The Latest Proposal for Offsite Advertising: Automatic Self-Cleaning Toilets Funded by Advertising Kiosks

The most recent proposal presented to City Council involving offsite advertising is for the installation of automatic self-cleaning toilets. Unlike the bus shelters that limited the advertising to the bus shelter structure, the toilet proposals require the installation of large kiosks covered by advertising panels in the public rights-of-way in order to fund the installation of the toilets. The proposal recommended by the Manager's office and put forward by the Chancellor Municipal Group envisions a "Victorian Style" kiosk with a "typical elevation" of 18 feet and 9 inches, more than three times the height of the average person. This three-sided kiosk would contain six poster cases, each one measuring 4 feet by 5 feet 8½ inches each. The proposal states that four to five kiosks would be installed for each toilet (twenty-four to thirty poster cases per toilet; forty-eight to ninety kiosks for twelve to eighteen toilets).

Alternative designs offered by Chancellor include a "short elevation" (10 to 12 feet tall) with one poster case per side, and four-sided kiosks in both the typical and short elevations. Chancellor does not indicate how use of the short elevation kiosks would impact the number of kiosks to be installed. Based on the drawings submitted with the proposal, it appears that the four-sided kiosks would have a footprint of approximately 8 feet by 8 feet. Chancellor's proposal does not include any advertising on the toilet housing. Chancellor does not propose where its kiosks would be located.

Adshel, Inc. proposes eight two-sided advertising kiosks per toilet, plus two advertising faces on each toilet unit (eighteen advertising spaces per toilet; eighty kiosks for ten toilets). The Adshel kiosk is less than 10 feet tall and is 4 feet 9 inches wide. Adshel also has a three-sided design, the third side to be used for public service messages. Adshel proposes that twenty-six kiosks would be installed in the Gaslamp Quarter, twenty-one in the surrounding downtown area, six near the convention center, six near Lindbergh field, six near Seaport Village, and fifteen at trolley stops.

The third proposer, STI, Inc., has not released its proposal information for general use, and for that reason, the specifics of its proposal are not discussed here. STI's proposal necessarily includes, however, the installation of advertising kiosks to fund the installation of the toilets.

II

LEGAL ANALYSIS

A. Would the Use of Advertising Kiosks to Fund the Installation of Automatic Self-Cleaning Toilets Threaten the Validity of the City's Sign Ordinance?

At least one Memorandum of Law issued by this office in the past has suggested that the City is not subject to its own zoning ordinances, including sign restrictions. 92 MOL 571, 572 *citing Sunny Slope Water Co. v. City of Pasadena*, 1 Cal.2d 87 (1934) *and Kubach Co. v. McGuire*, 199 Cal.215 (1926). The question here, however, is not whether the City would be in violation of its own sign ordinance, but what the effect would be on the sign ordinance if the City were to allow advertising kiosks in the public rights-of-way. To understand how this action would undermine the rationale supporting the City's sign ordinance, it is necessary to review the decisions of the United States Supreme Court sanctioning the restriction of offsite advertising, and in particular, offsite advertising in San Diego.

1. *Metromedia, Inc. v. City of San Diego*: The Regulation of Offsite Advertising Based on Aesthetics

In *Metromedia*, 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.
>
> 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.[1]

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[1] 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.

In *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the United States Supreme 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 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.[2] 466 U.S. at 817.

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[2] 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.

2. The Exception That Breaks the Rule

After *Metromedia*, the City amended its sign ordinance to permit noncommercial messages wherever commercial messages were allowed. The City retained aesthetics as the primary stated reason for the sign regulations. If the City makes exceptions to the sign ordinance that are not consistent with preserving the beauty of the City, 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. 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.

The United States Supreme Court touched on this possibility in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). Citing *Metromedia* and *Vincent*, the Supreme Court struck down an ordinance that prohibited outdoor signs, including noncommercial signs in the windows of residential property, on the grounds it foreclosed too much speech. The ordinance was based primarily on aesthetic concerns. 512 U.S. at 47. The ordinance contained the usual exceptions permitting commercial establishments, churches, and nonprofit organizations to erect signs, but in this case, the same kinds of signs were not permitted at residences. 512 U.S. at 45. In discussing the city's justifications for the prohibitions and exemptions in the ordinance, the Court raised the argument that exceptions made to an otherwise valid ordinance may call into question the legitimacy of the reasons used to justify the original restrictions.

> 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.

512 U.S. at 52 (citation omitted). Instead of pursuing this avenue, however, the Court addressed the issue of whether the city "may properly *prohibit* Gilleo from displaying her [antiwar] sign." 512 U.S. at 53. The Court held that the city could not do so without violating Gilleo's First Amendment rights. 512 U.S. at 58-59.

The Ninth Circuit Court of Appeals quoted the above-language from *City of Ladue v. Gilleo* in *Foti v. City of Menlo Park*, 146 F.3d 629 (9th Cir. 1998). In that case, the Ninth Circuit Court examined sign restrictions imposed by the City of Menlo Park in reaction to the picketing activities of two anti-abortion activists. The Menlo Park ordinance prohibited the posting of signs on public property or the displaying of signs in the public right-of-way with a couple of

interesting exceptions. 146 F.3d at 634. One of those exceptions permitted signs on vehicles unless the vehicle is parked in order to attract the attention of the public. 146 F.3d at 638. The Court held that the prohibition on signs on vehicles parked to attract attention was: (1) unconstitutionally vague and (2) unconstitutional because it bans purposeful speech and permits incidental speech. It is the second basis that is somewhat analogous to creating an exception for government sanctioned commercial advertising.

By prohibiting the placement of signs on cars parked to facilitate public viewing of the signs, but not other signs on cars, the Menlo Park ordinance prohibited purposeful speech while allowing incidental speech. "Government can assert no substantial interest in suppressing speech when the speaker intends to communicate but permitting the same speech if incidental to another activity." 146 F.3d at 639. Accordingly, the Court found the Menlo Park ordinance unconstitutional.

> Here, the exemption from Menlo Park's ban on signs on parked cars demonstrates that the City has concluded that its interest in allowing signs on cars that are not parked to attract attention outweighs its aesthetic and traffic safety interests. It is difficult to understand why signs on parked cars will create hazards and cause visual blight only if the driver subjectively intends to communicate when parking the vehicle. Thus, the ordinance is facially unconstitutional because it targets those persons engaged in the core of First Amendment activity and is not supported by any valid government interest.

146 F.3d at 640.

Under each of the toilet proposals, the City would, through the installation of advertising kiosks, allow speech incidental to the funding of the public toilets while continuing to prohibit anyone else from erecting signs in the public rights-of-way, even if it were for the sole purpose of conveying a noncommercial message. A court could conclude, as did the Ninth Circuit in *Foti* on less dramatic facts, that 60 to 90 advertising kiosks placed in highly visible locations in the public rights-of-way, will do no less to create traffic hazards and cause visual blight than other signs that are currently prohibited. "[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.

Moreover, in *Foti*, the Ninth Circuit Court sounded its growing skepticism at hearing aesthetics and traffic safety cited as a basis for sign regulations. "The City's asserted interests in

the ordinance are the oft-invoked and well-worn interests of preventing visual blight and promoting traffic and pedestrian safety." 146 F.3d at 637. In a footnote, the court listed cases that had cited aesthetics and traffic safety as justifications, and quoted the dissenting opinion in *Vincent*, that "aesthetics may only be a facade for content-based suppression." 146 F.3d at 637 n.8, quoting *Vincent*, 466 U.S. at 822 (Brennan, J., dissenting).

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 has an economic justification for allowing the advertising kiosks, 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.) (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.

If the City's sign ordinance is challenged, the City would be required to present evidence establishing its interests in regulating offsite advertising. By allowing the installation of kiosks designed to place offsite 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.

B. What Options Are Available to the City Council That Will Not Threaten the Validity of the Sign Ordinance?

1. Special Sign Districts, Conditional Use Permits, and Other Exceptions

As discussed above, San Diego's Sign Ordinance includes exceptions for Planned Districts, Special Sign Districts, Comprehensive Sign Plans, and some signs permitted by Conditional Use Permits. §§ 101.1110 (A-E). It appears, however, that each of these exceptions is conditioned upon the incorporation of comprehensive sign regulations that are equally or more restrictive than the Municipal Code. Nonetheless, the City could further explore the idea of establishing a special sign district for the proposed kiosks.

2. Other Funding Methods

The City could use the sale of advertising space inside the toilets to generate funding. Advertising displayed inside rather than outside the toilets would not impact the City's sign ordinance.

Of course, the City is not limited to advertising revenues to fund the toilets. The City of San Jose has installed the automated self-cleaning toilets through a leasing program, paying $61,500 per toilet per year. Todd Henneman, *San Jose Follows S.F.'s Example With High-Tech Outdoor Toilets*, S.F.Chron., Dec. 8, 1998, at A21. Chancellor Municipal Group, for example, states in its proposal that both leasing and purchase programs are available.

The City could seek funding sources outside of the City to pay for the toilets. For example, the toilets could be funded through paid sponsors, much like park benches. Under the existing sign ordinance, signs could be placed on the outside of the toilet identifying its sponsors.

The City could also explore the use of special assessments on property owners or businesses who want or would benefit from installation of the toilets. Any such assessments if imposed on property owners, would of course have to comply with Proposition 218.

CONCLUSION

The installation of advertising kiosks in the public rights-of-way could dramatically affect the ability of the City to defend its existing sign and other regulations that are based on aesthetics. Those regulations do not permit the offsite advertising that would be posted on the kiosks. In any court challenge to the City's sign regulations, the City would bear the burden of establishing its substantial interest in aesthetics. If the City permits the installation of advertising

kiosks in the public rights-of-way, it will be difficult to credibly establish the City's continuing interest in preserving the beauty of San Diego.

CASEY GWINN, City Attorney

By
Carrie L. Gleeson
Deputy City Attorney

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