

**Office of  
The City Attorney  
City of San Diego**

**MEMORANDUM  
MS 59**

**(619) 236-6620**

**DATE:** June 1, 2023

**TO:** Honorable Mayor and Councilmembers

**FROM:** City Attorney

**SUBJECT:** Legal Issues Related to the Proposed Agreement to Allow the Operation of Digital Wayfinding Kiosks with Advertising Signs in the Right-of-Way

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**INTRODUCTION**

In October 2021, the City of San Diego (City) issued a Request for Sponsorship (RFS) to select a qualified entity interested in partnering with the City to identify wayfinding solutions that would benefit residents, visitors, and local businesses in downtown San Diego. The City proposed granting limited advertising rights to the selected proposer, including the restricted right to generate revenue through third party advertising. City RFS for City Wayfinding Partner, p. 2. The City received two proposals<sup>1</sup> and commenced negotiations with a joint venture consisting of Ike Smart City, LLC and Downtown San Diego Partnership, Inc. (collectively, IKE).

The City is contemplating a corporate partnership agreement with IKE for the purpose of financing, implementing, managing, and operating a digital wayfinding kiosk program (Wayfinding Program) in a portion of downtown San Diego<sup>2</sup> (Agreement). The Agreement requires IKE to pay an annual fee of between \$16,000 and \$22,000 per kiosk depending on the contract year, or 45 percent of annual net revenue, whichever is greater. The City's portion of the fee will go to the City's General Fund.<sup>3</sup> The Agreement allows IKE to initially install up to 50 digital wayfinding kiosks in the public right-of-way or on public property near the public right-of-way. Each kiosk has a two-sided interactive digital touchscreen for users to obtain directions, real-time transit schedules, event information, and social services resources. Agreement, § 4.1. When the public is not actively using the kiosks, the digital screen advances through a series of eight slides; IKE reserves one slide for City use and may sell the remainder for advertising to generate revenue and support the capital and operational costs of the Wayfinding Program. IKE

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<sup>1</sup> The City deemed one proposer nonresponsive because its proposal did not include a wayfinding system that met accessibility requirements under the Americans with Disabilities Act.

<sup>2</sup> The Agreement includes portions of downtown San Diego, including the Civic/Core, Columbia, Marina, Horton Plaza/Gaslamp Quarter, East Village, Cortez, and the Convention Center districts, as defined in Section 6 of the Downtown Community Plan, excluding the areas within the Coastal Zone. Agreement, § 4.1.

<sup>3</sup> The Agreement allocates 65 percent of the annual fee to the City and 35 percent to Downtown San Diego Partnership, Inc.

will use unsold slides for public interest content, like promoting the Wayfinding Program and sharing public safety information. Agreement, § 4.7.

The City can coordinate with IKE to interrupt the slides at any time to disseminate critical information such as public health announcements, inclement weather alerts, earthquake notifications, Amber Alerts, or real-time information on road closures or other interruptions. The City's ability to use the kiosks to communicate critical information will take precedence over any other use.

The City's Economic Development Department staff presented the proposed Agreement to the City Council's Economic Development and Intergovernmental Relations Committee on March 8, 2023. The Committee voted to recommend the City Council (Council) approve staff's proposed actions to authorize the Agreement. The intent of this Memorandum is to address questions the Council and public may have about the City's existing sign restrictions and its Surveillance Technology Ordinance (STO) as related to the Wayfinding Program.

### **QUESTIONS PRESENTED**

1. Does the Council have authority to approve the Agreement, in light of the City's sign regulations?
2. Do the review requirements of the STO apply to the wayfinding kiosks?

### **SHORT ANSWERS**

1. Yes. While the City's sign regulations would generally prohibit installation of the wayfinding kiosks, the Council may approve the Agreement by authorizing an exception. Granting an exception requires the Council to make findings and adopt an ordinance at the time it approves the Agreement.
2. As proposed, the Wayfinding Program is not subject to the STO. However, the Council may wish to direct City staff to review certain aspects of the wayfinding kiosks further under the STO.

### **ANALYSIS**

#### **I. THE CITY COUNCIL MAY AUTHORIZE AN EXCEPTION TO THE SIGN REGULATIONS BY ADOPTING AN UNCODIFIED ORDINANCE.**

The City has adopted sign regulations, codified at San Diego Municipal Code Chapter 14, Article 2, Division 12 (Sign Regulations) that limit the size, location, and type of signs permitted within

City limits.<sup>4</sup> New billboards and other signs containing off-premises advertising are prohibited. SDMC § 142.1210(a)(1). On-premises signs that, for example, identify a business, or the goods or services provided at that location, are restricted by size and placement. SDMC § 142.1210. The Sign Regulations also control the use of lights and animation on signs to protect the City's aesthetic character and minimize distractions to drivers and pedestrians. SDMC § 142.1210(a)(2). Signs with flashing copy or flashing strobe, or chasing lights, or messages that alternate, are not permitted, and the size of animated copy is limited to ten square feet. SDMC § 142.1210(a)(5), (7).

The Sign Regulations are intended to protect the public and the aesthetic character of the City. SDMC § 142.1201. These goals, often referred to as "traffic safety and aesthetics" in case law, are the City's "important governmental interest[s]" that justify its regulations.<sup>5</sup> *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 (9<sup>th</sup> Cir. 2007)), *Architecture Art v. City of San Diego*, 231 F. Supp. 3d 828, 839 (S.D. Cal. 2017), and *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981) (citations and internal quotation marks omitted). In 1981, the Supreme Court in *Metromedia* found that the restrictions the City's Sign Regulations placed on commercial speech were constitutional and justified given the City's stated objectives of increasing traffic safety and improving aesthetics. *Metromedia*, 453 U.S. at 512.<sup>6</sup>

Limited exceptions to sign regulations are supported by *Metromedia* where the government reasonably concludes the interest in the exception is stronger than the interest in applicable regulations. *Metromedia*, 453 U.S. at 511-512. "In the *Metromedia* case and in court decisions following *Metromedia*, the courts have emphasized that when sign regulations are based on interests of safety and aesthetics, *any exceptions to those regulations must further an interest that is even stronger and more important than the City's interest in safety and aesthetics, or must not affect those interests.*" Memorandum from Carrie L. Gleeson, Deputy City Attorney, City of San Diego, to Natasha Collura, Director of Strategic Partnerships, "Bikesharing Advertising Signs" (June 11, 2013) [June 2013 Memo] (on file with the Office of the City Attorney) (emphasis added).

A long-standing exception to the Sign Regulations exists for permitted signs located at public bus stop benches and shelters. Under a 1988 agreement between the City and the San Diego Metropolitan Transit Development Board (now the Metropolitan Transit System (MTS)), the City agreed to allow MTS to sell advertising on bus stop benches and shelters in commercial and industrial zones, with advertising proceeds used to fund the construction and maintenance of lighted shelters in all zones. *See* San Diego Ordinance O-17121 (Jul. 25, 1988) and related agreement. The bus stop shelter advertising program sought to increase public transit ridership. *Id.*; MTDB Doc. No. OO-17121. The program also furthered the important government interests of providing a safe place for patrons to wait and promoting public transportation by more clearly identifying bus stops and providing transit information at those stops. *Id.*

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<sup>4</sup> *See* 2002 City Att'y Report 265 (2002-19; Oct. 16, 2002), for additional background and legal analysis of the Sign Regulations.

<sup>5</sup> Aesthetics generally relate to concerns about visual clutter, appearance, character, and impacts. *See Metro Lights LLC v. City of Los Angeles*, 551 F.3d 898 (9<sup>th</sup> Cir. 2009).

<sup>6</sup> *Metromedia* is discussed in more detail in City Att'y MOL No. 99-12 (Nov. 23, 1999).

Courts have upheld similar limited exceptions allowing government contractors to fund public transit-related improvements through advertisements. *See Metro Lights LLC v. City of Los Angeles*, 551 F.3d 898 (9th Cir. 2009); *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94 (2nd Cir. 2010). This Office has opined these cases could also legally support an exception allowing off-premises advertising to fund bike-sharing if the City Council found the exception furthered a substantial government interest in promoting the use of public transportation and bicycle travel, and that it furthered the City's interest in aesthetics. June 2013 Memo. The bike-sharing exception also included size and quantity limitations to prevent the proliferation of advertising.

City staff has offered the following information in support of a limited exception to the Sign Regulations:

- Public Safety. Wayfinding kiosks further the City's safety interests by including kinetic lighting on the pedestrian side of the kiosks to promote awareness and vibrancy. The kiosks also include a call button to access emergency services or the 24-hour Clean and Safe Hotline, and provide public access to real-time emergency alerts and information on a wide range of topics, in a number of languages, including information on how to access social services and public safety resources. Agreement, § 4.2.
- Aesthetics. IKE will maintain the kiosks in a manner that supports the City's interest in aesthetics. Agreement, § 7.1. The Agreement is also sensitive to the City's aesthetic concerns because it allows the City to control the quantity, location, and type of allowed signage. Agreement, § 4.6. The Agreement limits and controls advertising to an initial batch of up to 50 kiosks located in a portion of downtown San Diego where there is a higher level of pedestrian activity. Agreement, § 4.1. The City also controls the size and features of the kiosk screens. Agreement, §§ 4.3.1, 4.6. For example, the kiosk screens will measure approximately 32 inches by 56 inches, which IKE cannot enlarge without City approval, and in no case will the screen content include flickering or strobe effects. Agreement, Exhibit F; Agreement, §§ 4.2, 4.6. The kiosk screens will be smaller than the standard advertising signs allowed for bus shelters, which already incorporate electronic signs in high-visibility areas. The locations of wayfinding kiosks also require City approval, and the City may deny a proposed location due to a specific safety or aesthetic impact. Agreement, § 5.4.1.
- Navigation Solutions. The Wayfinding Program will improve and promote navigation solutions for a range of travel types, including walking, bicycling, use of mass transit, and other non-vehicular modes of transportation. City RFS for City Wayfinding Partner. The kiosks will provide detailed maps of strategic locations and will make downtown San Diego more visitor-friendly, consistent with the Downtown Community Plan.

- Walkability Under the General Plan and Climate Action Plan. The Agreement furthers the 2015 City of San Diego General Plan by developing a city where walking is a viable travel choice, particularly for trips of less than one-half mile, fostering a safe and comfortable pedestrian environment, creating a complete, functional, and interconnected pedestrian network that is accessible to pedestrians of all abilities, and achieving greater walkability through pedestrian-friendly street, site, and building design. Mobility Element, p. ME-6. Wayfinding kiosks are pedestrian improvements that can help increase walking as a means of transportation and recreation. Mobility Element, p. ME-7. Kiosks also benefit the Climate Action Plan's strategy of increasing walking opportunities by implementing pedestrian improvements to achieve the broader goal of reducing emissions. City of San Diego Climate Action Plan, Strategy 3. Land uses that benefit pedestrians also help promote use of alternatives to automobile travel and contribute to the overall quality, vitality, sense of community, and accessibility of neighborhoods. Mobility Element, p. ME-7.

If the use of limited and controlled advertising proposed by the Wayfinding Program will further the City's interest in mobility, public safety, and aesthetics, then the Council may make findings and adopt an uncodified ordinance to approve an exception to the Sign Regulations at the time it approves the Agreement. In the ordinance, the Council will need to find that the Wayfinding Program promotes a stronger and more important interest than the City's interest in safety and aesthetics or does not affect that interest. If the Council cannot make at least one of those findings, it should reject both the Agreement and the exception to the Sign Regulations for the Wayfinding Program.

## **II. THE WAYFINDING PROGRAM IS NOT CURRENTLY SUBJECT TO THE STO, BUT THE COUNCIL MAY REFER CERTAIN FEATURES OF THE KIOSKS TO CITY STAFF FOR FURTHER REVIEW.**

On August 10, 2022, the Council approved Ordinance No. O-21514 to add Article 10, Division 1 to Chapter 2 of the San Diego Municipal Code, related to the City's use of surveillance technology. Any technology meeting the definition of surveillance technology<sup>7</sup> under the STO requires review by the newly created Privacy Advisory Board and approval for use by the Council, with limited exceptions. SDMC §§ 210.0102, 210.0103. The Agreement prohibits the use of surveillance technology unless the requirements of the STO are met. Agreement, § 4.2.15.

Mayoral departments implement the STO and make factual determinations as to whether new technology falls under the STO. City staff, including staff from the Department of Information Technology, analyzed the Agreement and kiosk features and determined that the kiosks as described in the Agreement do not meet the definition of surveillance technology. While many of

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<sup>7</sup> Under the STO, "surveillance technology" means any software (e.g., scripts, code, application programming interfaces), electronic device, system utilizing an electronic device, or similar device used, designed, or primarily intended to observe, collect, retain, analyze, process, or share audio, electronic, visual, location, thermal, olfactory, biometric, or similar information specifically associated with, or capable of being associated with, any individual or group. SDMC § 210.0101(m).



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