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MEMORANDUM OF LAW

DATE: May 19, 2011

TO: Mary Lewis, Chief Financial Officer
Natasha Collura, Director of Strategic Partnerships
Stacey Lomedico, Director, Park and Recreation Department

FROM: City Attorney

SUBJECT: Corporate Sponsorship of Public Property and Naming Rights

INTRODUCTION

The City's Corporate Partnership Program (CPP) was created by the City Council in 1999 for the purpose of generating revenue for the City through corporate partnerships. In its Strategic Marketing and Advertising Plan (Plan) dated June 9, 2010, CPP proposes sponsorship packages that include signs and banners on City property identifying the sponsors, special events with product displays, and naming rights on lifeguard stations and other City property. The Plan proposes to begin with sponsorships at City beaches and later explore parks and other areas. This memorandum reviews the City's sign regulations¹ and other laws regulating the use of public property and recommends steps to implement the Plan while staying within existing law. This memorandum also reviews a proposal presented to the City's Park and Recreation Department to use sponsored signs to provide funding for fire pits.

QUESTIONS PRESENTED

1. Are there existing restrictions that would affect the City's ability to fully implement the Strategic Marketing and Advertising Plan? If so, what can the City implement in light of existing restrictions for each of the following:
 - a. Signage on beaches, parks, and in the public rights-of-way;
 - b. Banners at beaches, parks, and in the public rights-of-way;

¹ San Diego Municipal Code §§ 142.1201-142.1292, referred to herein as the "Sign Ordinance."

- c. Special events including promotional displays at beaches and parks; and
 - d. Naming rights to lifeguard stations and other public facilities?
2. Can the City use sponsored signs on the beaches to provide direct funding for fire pits?

SHORT ANSWERS

1. Yes. There are several existing legal restrictions that affect implementation of the Strategic Marketing and Advertising Plan.

- a. The City's Sign Ordinance restricts the posting of signs on public property or in public rights-of-way, both of which are included in the Plan. However, the Ordinance permits the posting of signs with a public interest message and the identification of sponsors on not more than fifteen percent (15%) of the sign copy area. The City can use, but should not overuse, sponsored public interest messages in implementing the Plan.
- b. The Sign Ordinance restricts the use of banners in the public rights-of-way to banner districts established by resolution of the City Council. Within a banner district, banners can be used to promote cultural or civic events or activities of general public interest with the identification of sponsors on no more than five percent (5%) of the banner. The City can establish a banner district at each of the areas where the City intends to implement the Plan.
- c. Special events are subject to the City's Special Events Ordinance. While temporary promotional displays can be conducted as part of a permitted special event, the City cannot require third party special event organizers to include a particular promotional display or vendor. The City can require such displays at City organized special events and the City's marketing partners can seek to, or may already be planning to, participate in special events organized by third parties.
- d. There are no existing restrictions on the selling of naming rights to the City's public facilities. That said, the City would be well served by adopting a policy governing the selection of sponsors and the use of naming rights. Adoption of such a policy will help the City avoid future legal issues relating to its selection of sponsors and naming rights practices.

2. Yes, the City can use sponsored public interest messages signs on the beaches to raise funds for fire pits provided that the signs carry public interest messages as defined in the

Sign Ordinance and limit sponsor identification to no more than fifteen percent (15%) of the sign copy area.

BACKGROUND

The Plan focuses on the City's beaches as venues for corporate sponsorships. Using permanent structures and space at the beaches, the Plan envisions a sponsorship program that, as stated in the Plan, includes the following:

1. Naming rights to permanent lifeguard stations,² and signage on permanent and seasonal lifeguard stations, as well as other lifeguard assets as deemed appropriate;
2. Visibility on banners hung from light poles on boardwalks and walkways adjacent to the beach, including parking lots;
3. Space for special events such as product displays, tastings, and athletic events;
4. Signage on walkways, beach furniture, equipment recycling, and trash containers in selected areas; and
5. The opportunity to market goods and/or services to City employees and their families.

(Plan at 2-3.) In deference to the City's Sign Ordinance, the Plan proposes that the signs primarily consist of a public service message with fifteen percent of the sign dedicated to identification of the sponsor. (Plan at 3.)

The Plan proposes to market beach sponsorships by location to control the overall look and design of the advertising and avoid a cluttered appearance. (Plan at 3.) The Plan allows for additional partners if the "primary partner" is not interested in using one or more of the available assets. (Plan at 4.)

The Plan anticipates selling corporate sponsorships in exchange for both unrestricted revenue and improvements "such as enhancements to the permanent and seasonal lifeguard stations, new or upgraded trash containers and recycling bins, beach and street furniture and . . . improvements to the boardwalk and parking areas." (Plan at 5.) The Plan would eventually be expanded to other City parks. (*Id.*)

CPP presented the Plan to the Council Committee on Budget and Finance on July 14, 2010. At the same meeting, Councilmember Carl DeMaio presented his Corporate Sponsorship Proposal with seven recommendations for expanding the City's marketing partnerships including

² The nine permanent lifeguard stations included in Plan are located in Torrey Pines, La Jolla Shores, La Jolla (2), Pacific Beach, Mission Beach, Mission Bay (2), and Ocean Beach.

issuing a Request for Information (RFI) to solicit innovative ideas for marketing opportunities, obtaining legal review of ideas generated by the RFI, amending the City's existing restrictions on signs to permit certain signs in public rights-of-way, and implementing a pilot advertising kiosk program.

The Committee unanimously approved Councilmember DeMaio's motion to approve CPP's Plan and forward it to the City Council and, in addition, to issue the RFI with language inviting innovative advertising/marketing ideas, receive quarterly reports from CPP with new ideas and legal review, and amend the Council Policy on Marketing Partnerships to include the Council's wishes on the allocation of funds received from these partnerships.

Separate from the Plan, the City's Park and Recreation Department is considering a proposal for a sponsorship program to secure funding to maintain fire pits on the City's beaches.³ The proposal, presented by the San Diego Convention and Visitors Bureau (ConVis) has three components: (1) signs carrying a unified theme relating to the fire pits and identifying sponsors; (2) a special fundraising event designed to highlight the fire pits as a public amenity and using temporary signs to advertise the event; and (3) a web video seeking online donations.

As mentioned above, the Plan contemplates the use of special events to promote the sponsor including promotional displays on public property. This concept is also being explored as part of an agreement for a marketing partnership for vehicles for the City's lifeguard services. This memorandum reviews use of promotional displays in the context of the City's Special Events Ordinance that will apply in both instances.

This memorandum does not address the application of the Plan to areas beyond the beaches identified. The implementation of the Plan in other areas including parks and rights-of-way will necessarily require the review of restrictions that may apply in those areas. For example, additional restrictions may apply to the use of an area on dedicated parkland and to signs covered by a special zoning district.

ANALYSIS

This Office has issued several opinions in the past discussing the City's sign regulations, the purpose of those regulations, and the inherent risks in creating new exceptions to an ordinance that maintains a delicate balance between furthering important governmental interests (safety and community aesthetics) and restricting speech (commercial advertising in public rights-of-ways and on public property).⁴ Prior memoranda recount the history of the City's Sign Ordinance, past litigation challenging the original ordinance and the United States Supreme Court's decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), subsequent

³ See proposal submitted by the San Diego Foundation and the San Diego Convention and Visitors Bureau (CONVIS), attached.

⁴ These include: "Use of Offsite Advertising in Public Rights-of-Way to Fund Public Automatic Self-Cleaning Toilets," 1999 City Att'y MOL 122 (99-12; Nov. 23, 1999); "Establishment of a Special Sign District (for Advertising Kiosks)," City Att'y MOL No. 2001-7 (May 3, 2001); and "City's Sign Ordinance and Restrictions on Offsite Advertising," 2002 City Att'y Report 265 (2002-19; Oct. 16, 2002).

amendments, and cases following *Metromedia*. That detailed history is not repeated here except to touch on several concepts fundamental to the application of the Sign Ordinance to the facts at hand. We also review more recent cases that may impact the City's proposals.

The City did not always have its Sign Ordinance. There was a time when billboards and other off-premises advertising signs were far more prevalent in the City than they are today. The adoption and successful defense of the Ordinance based on the City's policy decision to promote safety on the City's streets and enhance and protect the beauty of the City for its residents and visitors forced the removal of thousands of signs throughout the City. The entire process spanned decades and continues today.⁵

As it stands today, the City's Sign Ordinance prohibits offsite advertising signs on both public and private property and restricts the posting of any signs on public property and in the public rights-of-way except as specifically provided in the Municipal Code. SDMC § 142.1206. Any exemption to this general rule must further an interest that is stronger and more important than the City's interest in safety and aesthetics, or must not affect those interests. 2002 City Att'y Report 265 (2002-19; Oct. 16, 2002). Otherwise, the exemptions would undermine the City's stated reasons for its Ordinance, "and call into question the constitutionality of the entire regulatory scheme." (*Id.*)

These basic principles have been upheld in recent cases challenging sign regulations in other cities. *Metro Lights, L.L.C. 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 (2d Cir. 2010). These cases involved sign restrictions similar to those in San Diego. In each case, the court deferred to the legislative judgment made by the city in approving legislation that allowed some types of advertising but not others, and found that the exemptions did not so undermine the purpose of the ordinance that it would fail to achieve its end. *Metro Lights*, 551 F.3d at 914; *Clear Channel*, 594 F.3d at 113.

In addition to onsite advertising, the Sign Ordinance allows sponsored public interest messages and banners. Both the Plan and the fire pit sponsorship proposal seek to take advantage of these provisions to raise much needed revenue for the City. These provisions are not without limitations, and both proposals raise the issue of the appropriate use of signs and the potential effect on the overall enforceability of the Ordinance.

⁵ The first sign ordinance was adopted by the City Council on March 14, 1972. After litigation and decisions in the trial and appellate courts, the United States Supreme Court issued its opinion in *Metromedia, Inc. v. City of San Diego* in 1981. The Sign Ordinance was revised and renumbered in 1984. Existing off-premises signs were grandfathered in but must be removed if abandoned or destroyed. In September 2000, the Neighborhood Code Compliance Department reported 632 remaining billboard structures. 2000 City Att'y Report 403 (2000-08; Sept. 7, 2000) at 13.

I. THE SIGN ORDINANCE COPY REGULATIONS

A. The Sign Ordinance Prohibits Offsite Advertising and Advertising on Public Property

The City's Sign Ordinance applies "to all signs within the City unless otherwise specifically regulated." SDMC §142.1205. The purpose of the Sign Ordinance is to provide a standard set of regulations for signs visible to the public. SDMC § 142.1201. By doing so, the City seeks to avoid the visual clutter that affects both safety (*e.g.*, driver distractions) and aesthetics (*e.g.*, billboards and other advertising signs taking away from the City's natural beauty), both of which were recognized by the United States Supreme Court as proper goals to be advanced by the City. 2002 City Att'y Report at 266 and 268; *Metromedia*, 453 U.S. at 510-512.)

At the heart of the Sign Ordinance is the distinction between signs that contain "offsite" or "off-premises" advertising and those that contain "onsite" or "on-premises" advertising. Offsite advertising, typically found on billboards and other signs advertising products or services not available at that site, is not permitted. Onsite advertising, for example identifying a place of business and the goods or services it offers, is permitted. SDMC § 113.0103 (definition of "advertising display sign") and § 142.1210. The Sign Ordinance values onsite advertising over offsite advertising, and generally prohibits offsite advertising. *Metromedia*, 453 U.S. at 511-512.

A second key distinction made in the Sign Ordinance is between signs on private property and signs on public property. The Sign Ordinance seeks to regulate signs from the visual perspective of travel along the public rights-of-way or otherwise available for viewing by the general public, but these signs are all on private property. Thus, "*sign*" is defined as being visible from the public right-of-way, or exposed to the public from private property. SDMC § 113.0103.

Placing advertising signs on public property or within the public right-of-way, on the other hand, is generally prohibited by section 142.1206(a)(1)(2) (Violations of Sign Regulations), which states:

It is unlawful to . . .

Place, post, paint or secure any *sign*, pennant, flag, banner, balloon, or similar attention-seeking device on public property or within the *public right-of-way* unless otherwise provided in the Municipal Code or specific state statute;

Place any lettering, card, poster, or notice of any kind on any curb, sidewalk, *street*, pole, post, utility box, hydrant, bridge, tree, building, or other surface that is located on public property or in the *public right-of-way* unless otherwise provided in the Municipal Code or specific state statute; . . .

And again by section 142.1210(b)(5) (Signs on Public Property and in Public Rights-of-Way), which states:

Signs 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.

Any proposed sign must be viewed in light of these two sometimes overlapping prohibitions, *i.e.*, whether the sign would be prohibited as off-site advertising visible to the public from private property and whether the sign would be prohibited as a sign posted on public property or in the public right-of-way.

B. The City Can Post Public Interest Message Signs on Public Property

The Sign Ordinance permits the posting of public interest messages wherever onsite advertising is permitted. SDMC § 142.1210(a)(1). Since the public interest message does not necessarily pertain to the venue where it is posted, a public interest message is essentially an offsite message that is specifically authorized by the Sign Ordinance.

There are three types of public interest messages: (1) official signs and notices placed by public officials pursuant to law for the purpose of carrying out an official duty or responsibility (official notice); (2) informational signs and notices relating to the meetings, locations, fundraising or other nonprofit activities of nonprofit service clubs, religious organizations, or charitable associations (community notice); and (3) signs and notice related to an election campaign or containing ideological or political views (campaign signs). SDMC § 142.1210(a)(1)(B).⁶

Signs carrying public interest messages, as defined by the Municipal Code, can be posted on public property. SDMC §§ 142.1210(b)(5)(A) and 142.1206 (a)(1). While Municipal Code sections 142.1206(a) and 142.1210(b)(5) both prohibit the posting of signs on public property, each permits signs to the extent the signs are otherwise authorized by the Municipal Code. These include official signs posted by the City.

1. Sponsored Public Interest Signs Should Not Be Overused

In a 2002 Report issued by this Office reviewing in detail the City's Sign Ordinance and restrictions on outdoor advertising, we briefly touched on public interest message signs and cautioned against their overuse especially for the purpose of raising revenue:

The use of public interest signs with sponsorship as an alternative means of generating revenue for the City has the potential for compromising the City's sign regulations as much as any other

⁶ After the general prohibition, the Sign Ordinance is divided into four parts: copy regulations, locational regulations, structural regulations, and maintenance regulations. This section is part of the copy regulations that dictate what kind of copy can be used on signs.

type of exception. For example, introducing additional corporate sponsored safety signs where sufficient signs already exist contributes to the visual clutter and conflicts with the City's aesthetic and safety objectives for the ordinance. Additionally, where such signs are not placed for "the purpose of carrying out an official duty or responsibility," but rather to generate revenue, they violate the City's existing regulations.

2002 City Att'y Report 265 at 277.

In cases decided since that time, however, the courts have upheld sign ordinances that allowed city-sponsored advertising programs intended to fund public amenities. *Metro Lights, L.L.C. 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 (2d Cir. 2010). In each of these cases, the city restricted offsite advertising while at the same time permitting advertising on city-owned public service structures.

In *Metro Lights v. City of Los Angeles*, the City of Los Angeles adopted a sign ordinance restricting offsite advertising. The restrictions do not apply to advertising "on work located primarily in the public way" such as bus benches and shelters. *Metro Lights*, 551 F.3d 898, 902. The city entered into a contract (Street Furniture Agreement) for the placement of advertising not only on bus benches and bus shelters but also on automated self-cleaning public toilets, trash receptacles, public amenity kiosks, and news racks. In exchange for these exclusive advertising rights, the contractor pays for new street furniture and pays the city a percentage of the gross advertising receipts. *Id.* at 901. The city retains ownership of the street furniture and control over its design and installation. *Id.* Los Angeles engaged a single contractor to coordinate the advertising and meet its objectives of (1) having a single point of accountability; (2) upgrading the appearance and quality of the street furniture on the city's streets; and (3) improving the visual character of the streetscape by reducing physical and visual clutter on the sidewalks through a single, controlled series of advertisements. *Id.* at 901 and 910.

Outdoor advertising companies sued arguing that allowing the city's advertising but not other advertising was inconsistent and rendered the ordinance unconstitutional. In its decision confirming the validity of the City of Los Angeles' sign ordinance, the court applied the reasoning from *Metromedia* and found that first, "the specific exception in question here does not weaken the direct link between the City's objectives and its general prohibition of offsite advertising" because even with the street furniture exception, the ordinance still decreases visual clutter; second, a "proliferation of advertising by numerous and disparate private parties creates more distracting ugliness than a single, controlled series of advertisements on city property" and the city can disfavor offsite signs off public property for that reason; and third, "and most importantly," the court deferred to the policy-makers' decision to value controlled signage at transit stops over an uncontrolled proliferation of signage.

In deferring to the city's decision to enter into the Street Furniture Agreement, and referencing the *Metromedia* decision, the court specifically acknowledged that an advertising program that controls the look and feel of the advertising plays a role in reducing visual clutter.

Los Angeles, just like San Diego, "has obviously chosen to value one kind of commercial speech"—controlled offsite advertising on public transit facilities—"more than another kind of commercial speech"—uncontrolled offsite advertising spread willy-nilly about the streets. . . . Just as in *Metromedia*, "[t]he 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 . . . its interests should yield."

Metro Lights, 551 F.3d 898, 910, quoting *Metromedia* at 512. The court was not dissuaded by the fact that the advertising program is a vehicle for generating revenue for the city.

. . . [T]he city has been compensated handsomely for this classically legislative decision, not only in money but in the installation of presumably more attractive public transit facilities and in a veto over the design of advertisements that appear at those facilities. The *Metromedia* Court declined to overrule such a legislative judgment and so do we.

Metro Lights, 551 F.3d 898, 910-911.

Like the *Metro Lights* case, implementation of the Plan would use signs permitted by the Sign Ordinance for the purpose of generating revenue. While the *Metromedia* court did not consider the overlay of sponsorship when discussing the distinction between commercial and noncommercial messages, neither the *Metro Lights* nor the *Clear Channel Outdoor* cases considered the revenue issue to be a major factor in their analysis. Rather, in each case the court focused on the volume of signage permitted and whether the ordinance as a whole would further the city's objectives.

Cases that have struck down ordinances have done so because the exemptions overtook the purpose for the ordinance. For example, in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995), the court struck down a federal law prohibiting labels on beer products from showing alcohol content but permitting beer advertisements containing such information and permitting such information on wine and spirits. (See also, *Greater New Orleans Broadcasting Ass'n. Inc., v. United States*, 527 U.S. 173, 190 (2009) ("The operation of [the regulation] . . . is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it"); and *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418-19 (1993) (noting that the regulation would have "minimal impact" because of the exception)).

There is, therefore, a balance to be maintained and a risk that overuse of an exemption may “diminish the credibility of the government’s rationale for restricting speech in the first place.” *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994). The City can best avoid this result by properly using public interest message signs to carry out the City’s official duties and obligations. The City should avoid signs with unnecessary public interest messages posted primarily for the sake of identifying the sponsor. The City should maintain the restriction limiting sponsorship identification to fifteen percent of the sign copy area as required by the Sign Ordinance. This ensures that the public message is the primary purpose of the sign. The City should also, as discussed in *Metro Lights* and contemplated by the Plan, control the look and feel of the signs to minimize visual clutter in keeping with the objectives of the sign ordinance.

2. Public Interest Message Signs May Be Posted on Beaches and in Parks

The City’s Park and Recreation Department Director (Director) is responsible for the management and control of the City’s parks and beaches. SDMC §§ 22.1502, 63.20, 63.0101, 63.0110. The Director is empowered by the Municipal Code to take actions necessary to properly manage the City’s parks and beaches including adopting rules and regulations for park use, and posting signs communicating rules, restrictions, and other information of interest to the public. *See, e.g.*, SDMC §§ 63.20.14, 63.20.13. Posting both official notice and community notice types of public interest message signs at parks and beaches is a necessary part of carrying out the Director’s official duties.

In many instances, the Municipal Code specifies that signs be posted notifying the public of park rules or regulations. *See, e.g.*, SDMC § 63.05 (“[a]ppropriate signs shall be erected or placed” giving notice of parking regulations and areas closed to vehicles); § 63.20.2(b) (signs used to notify public of changes in water activity areas); § 63.20.9 (signs designating boat beaching or launching areas). Even when not specified, however, the Municipal Code anticipates the posting of signs as part of the management and control of the public’s use of parks and beaches. *See, e.g.*, SDMC § 63.20.13 (posting of rules in beach areas is prerequisite to enforcement).

All of these signs are official notices and, therefore, public interest messages, and can be posted on public property or within the public rights-of-way. To the extent the Director deems it necessary and appropriate for administration and management of park facilities, community notice signs as defined in section 142.1210(a)(1)(B) of the Sign Ordinance can also be posted on public property or within the public rights-of-way. An example of these would be a sign identifying the meeting place or headquarters of a community group using building space in Balboa Park. SDMC §§ 63.04, 63.04.01.

Official notice signs within the definition of public interest messages also include signs used at the beaches for posting weather, surf, tide, and other conditions. SDMC § 142.1210(a)(1) (public interest message signs may have permanent or changeable copy).

3. Sponsor Identification on Public Interest Signs is Limited to Fifteen Percent of the Sign Copy Area

All of the public interest message signs discussed above may include sponsor identification. SDMC §142.1210(a)(1)(C). That identification may not exceed fifteen percent of the total sign copy area. In addition to the name and logo of the sponsor, identification may include a description of the products, services, or activities offered by the sponsor. SDMC § 142.1210(a)(1)(C).

“Sign copy area” is specifically defined in the Municipal Code as “the area of the smallest geometric figure that can enclose the words, symbols, or emblems of a wall sign.” SDMC § 113.0103; *see also* § 113.0255 (calculating sign copy area). Under this definition, the fifteen percent is measured as a percentage of the smaller area on the sign face containing the copy and not of the sign itself.

4. Public Interest Signs May Be Posted on Benches, Trash Receptacles, and Other Street Furniture

The Plan lists the use of signs on “walkways, beach furniture, equipment, recycling and trash containers in selected areas” as one of the marketing assets that could be included in a sponsorship package. Plan at 3 and 4. Like any other sign to be posted on public property, these signs are prohibited unless specifically authorized in the Municipal Code. Thus, for example, a sponsored public interest message encouraging recycling may be permitted, but an advertising sign on a bench or trash container is not. The Plan recognizes the existing limitations and suggests that the signs would carry sponsored public interest messages. Plan at 4.

Currently, for the most part, official notice signs are not located on benches, walls, and trash or recycling containers at the City’s beaches. Most such signs are currently found on sign posts in parking lots, along walkways, or posted on buildings. To the extent that the City uses these already established sign areas in implementing the Plan, the City will not be expanding the use of signs at the beaches and risking over-use. If the City increases the number of signs, under the rationale expressed by the court in *Metro Lights*, use of a coordinated look and feel for the signs will help minimize the visual clutter at the boardwalks. This could include sponsored signs that are part of an official program to, for example, encourage recycling and discourage littering. Placing such signs on trash and recycling receptacles would make sense as a message that the City has determined is appropriate to convey to the beach-using public, would be consistent with the reason for allowing signs carrying public service messages, and would not be primarily for the purpose of obtaining sponsorships.

It is important in considering the court’s reasoning in *Metro Lights* to keep in mind that the court was looking at a sum total reduction, not an increase, in signage. In that case, at the time the law was enacted restricting offsite signs, both the street furniture advertising and the billboards and other offsite advertising existed; the city chose to get rid of one and not the other, reducing but not eliminating the overall clutter. *Metro Lights*, 551 F.3d at 901-902. The court found that because the restrictions still reduced the overall number of signs, they served the

city's purpose to reduce visual clutter on the sidewalks and reduce the overall amount of advertising in the public rights-of-way. *Metro Lights*, 551 F.3d at 910-911, 914. The overall effect, then, was a reduction in signage, not an increase. In addition to that, the court found that the city's control over the advertising program would help minimize visual clutter. *Metro Lights*, 513 F.3d at 910-911. Accordingly, the City should be cautious about substantially increasing the numbers of signs and should control and coordinate the look and feel of the signs it uses.

C. The Use of Banners Requires Establishment of a Banner District

The Plan proposes to include banners as part of the sponsorship package. Specific regulations within the Sign Ordinance address the use of banners in streets and public rights-of-way. SDMC § 142.1210(b)(5)(C). Banners can be used to promote "cultural or civic events or activities of general public interest," but only in areas specifically designated by City Council in a resolution. SDMC § 142.1210(b)(5)(C)(i). Sponsors can be identified on up to five percent of the banner area. SDMC § 142.1210(b)(5)(C)(ii). Otherwise, banners cannot be used for commercial advertising. SDMC § 142.1210(b)(5)(C)(iii).

Over the years, the City Council has adopted resolutions establishing banner districts in neighborhoods throughout the City for "the placement of banners promoting cultural or civic events or activities of general interest in the public right of way." For example, banner districts currently exist in Mira Mesa (R-291407 and R-302952), Point Loma (R-293101), Mission Valley (R-294423), Rancho Peñasquitos (R-296872), Otay Mesa (R-299356), Downtown (R-300208), Clairemont (R-300409), Rancho Bernardo (R-301027), Bird Rock (R-301260), Oak Park (R-303885), Golden Hill (R-304241), Morena (R-304948), and Sherman Heights (R-306167). In each instance, the Council's resolution specifically states the streets or intersections where banners may be placed, indicates the party responsible for funding, installing, and managing the banners (for example, the Downtown San Diego Partnership or the Greater Clairemont Chamber of Commerce), and indicates that the banner district is established pursuant to section 142.1210 of the Sign Ordinance.

To implement a banner district at the City's beaches as part of the Plan, the City Council would need to adopt a resolution establishing a banner district for each beach area and specifying the locations for the placement of banners. While not required, in the past, proposed banner districts have first been approved by the local planning or other community group. (See, e.g., R-304948, "the Morena Business Association sought and received the approval of the Clairemont Community Planning Group and Linda Vista Community Planning Group to install such street banners;" and R-293101, "the Point Loma Association in cooperation with the San Diego Unified Port District, the Peninsula Chamber of Commerce, and other community groups, wish to install banners . . ."). The banners can be used to promote community or other special events, with five percent of the banner carrying the name and logo of the sponsor.

D. Sponsored Public Interest Message Signs May Be Used To Raise Funds for Fire Pits

The proposal before the Park and Recreation Department for sponsorship of fire pits on the City's beaches to raise funds for maintenance would identify the sponsors on signs near the fire pits and on temporary signs advertising a fundraising event. As discussed above, the City could use sponsored public interest message signs for this program and remain in compliance with the Sign Ordinance. The messages carried on the signs should be official notices necessary to the proper management of the beach areas, including the public's use of the fire pits. SDMC § 142.1210(a). The temporary fundraising event signs are a community notice type of public interest message. *Id.*

The ConVis proposal suggests messages for use on sponsored signs encouraging the use of the fire pits and the need for funds to preserve them. These messages are not official notices within the definition of section 142.1210(a)(1)(B). For example, as part of a "Save the Fire Pits" theme, the messages include catchy slogans like: "Ignite a smile," "Warning: Firepits may cause oversmiling," and "Caution: Firepits are relaxing; you might stay longer than expected." Additional signs sponsored by ConVis members have similar fun messages: "Stay warm. Stay happy. Stay in San Diego," and "Firepit? More like smilepit."

Although the fire pits are an amenity provided to the public for its use, posting signs encouraging the use or funding of the fire pits is not an official duty and the signs are not public interest messages within the Sign Ordinance's definition. There are, however, rules pertaining to the safe use of firepits contained within the Municipal Code. SDMC § 63.20.5(c), (d), (f), (h), and (i). Signs containing those rules can be and in some cases are posted at the beaches.

The City could also create an "Adopt a Fire Pit" program and post official notice signs related to that program, similar to the "Adopt a Beach" program and signs currently in place and the "Adopt a Park" program used in the past. The "Adopt a Beach" program, for example, is operated by the nonprofit organization I Love a Clean San Diego and coordinates volunteers for beach clean-ups. The Adopt a Beach signs let the public know that a particular beach is included in the volunteer program and states the name of the sponsor for that beach. The program relates to maintenance of the beach and the City's efforts to keep the beaches clean and fits within the official notice type of public interest message. SDMC § 142.1210(a)(1)(B).

II. SPECIAL EVENTS/SPONSOR PROMOTIONS

In addition to public interest message signs, the Plan would promote sponsors through special events held at the City's beaches and parks. The Plan is not specific as to what the City would be offering its sponsors but generally mentions space for promotional displays at events. Existing regulations limit but do not preclude the City from using events to promote sponsors.

A. Events on Beaches Are Subject to Existing Rules and May Require Permits

Management of the City's parks and beaches is the responsibility of the Director. SDMC §§ 22.1501, 22.1502. Many events taking place on park or beach property require the consent of the Director. SDMC §§ 63.0102, 63.0110, and 63.03. Consent is received by obtaining a permit through the process set forth in the Municipal Code. SDMC § 63.0103. Events requiring permits include any special event consisting of fifty or more persons. SDMC § 63.0102(24). Entertainment, solicitation, and the sale of merchandise are also not allowed without a permit. SDMC § 63.0102(13-15).

A gathering of seventy-five or more persons at a beach or park requires a Special Event Permit. SDMC §§ 22.4003, 22.4004. Generally, permits are granted on a first-come, first-served basis with priority given to local non-profit organizations. SDMC §§ 22.4007, 22.4013(a)(8). Notably, because of the number of people who visit the City's beaches during the summer months, permits are typically not granted for the use of beach areas for new special events from Memorial Day to Labor Day. *See* SDMC § 22.4014(b)(6). The date of a special event is not confirmed until the permit is issued. SDMC § 22.4011.

Special event venues must comply with the Sign Ordinance in the display of any sign or advertising. SDMC § 22.4035.⁷ "Sign" includes any flag, banner, inflatable display, "or other attention-seeking device." SDMC § 22.4003. The organizer of a special event is responsible for traffic control, security, sanitation facilities, emergency medical services plan, clean-up, and insurance. SDMC §§ 22.4012-22.4017. As part of the permit process, the City will look for cost recovery, revenue sharing, or both if City services are needed for a commercial event. SDMC § 22.4006(b).

B. The City Cannot Require Third Party Event Organizers to Include a Particular Promotional Display or Vendor

The City's regulations are designed to oversee the time, place, and manner in which the event takes place, and do not authorize the City to dictate to any event organizer the vendors or sponsors to be used for the event. This is consistent with the stated purpose of the Special Events Ordinance citing the City's role as a government body "to protect the rights of its citizens to engage in protected free speech expression activities and yet allow for the least restrictive and reasonable, time, place and manner regulation of those activities . . ." SDMC § 22.4002. The purpose statement recognizes special events as creating "unique venues for expression and entertainment that are not normally provided as a part of governmental services." *Id.*

This stated purpose incorporates the standard applied to government restrictions on first amendment speech rights taking place in a traditional public forum. Public streets and parks have long been recognized as traditional public forums "opened for use by the public as a place for expressive activity." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

⁷ SDMC § 22.4035 specifically refers to Chapters 9 and 10 of the Municipal code. However, subsequent to the addition of § 22.4035, Ordinance O-18451 reorganized the land development code and moved those regulations from Chapters 9 and 10 to Chapter 14.

The standard for gauging whether a government restriction on speech in a public forum violates the First Amendment is the strict scrutiny standard. *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981). The only acceptable restrictions are those based on time, place, or manner, and content-based restrictions that are narrowly drawn to serve a compelling state interest.⁸ *Id.* The reason for any content-based restriction must be more important than the right to free speech that is being restricted. *Perry*, 460 U.S. at 45.

Restricting the choice of vendors, or requiring a special event organizer to use a particular vendor or sponsor would place the City in the position of regulating the content of the event for the City's monetary gain and potentially infringing on the message sought to be delivered by the organizer because it is inconsistent with the theme of the event (*e.g.*, a health food fair or farmers' market may want nothing to do with a soft drink vendor), or because it takes up space and resources that could be used for a different purpose (*e.g.*, an automobile display or a display requiring electrical hook-ups), or for other reasons. There is nothing preventing a participant in the Plan from seeking opportunities to sponsor or participate in special events organized by third parties at the sponsor's cost or on whatever terms the sponsor negotiates with the event organizer. The City can assist sponsors with information about upcoming special events that may be of interest.

Moreover, if the City is the organizer of a special event, the City can choose the vendors and sponsors it will use for the event. Likewise, if the City is participating in a parade, job fair, or other event, to the extent permitted by the organizer, the City could, for example, choose to use a sponsor-provided vehicle or distribute literature with sponsor information at its booth.

Smaller gatherings or events at the beach that do not require the coordination of City services across more than one City department and are anticipated to attract less than 50 people do not fall within the Special Events Ordinance but may require a park use permit to reserve space and provide the Parks and Recreation Department with notice of the activity. For example, an educational talk by one City department and sponsored by a Plan participant would not require a Special Event permit.

III. THE CITY SHOULD ESTABLISH AND IMPLEMENT A NAMING RIGHTS POLICY

The Plan proposes to include as part of the sponsorship package the naming of lifeguard stations at the beaches. Cities, counties, schools, and other government agencies are increasingly looking to naming rights as a way of generating needed operational income.⁹ The City has used the naming of a public building or facility in the past to recognize a generous donor (*e.g.*, the

⁸ For an example of a content-based restriction that is narrowly drawn to serve a compelling government interest, see the City's Outdoor Alcohol Advertising Ordinance, SDMC §§ 58.0501-58.0504, and 2000 City Att'y Report 403 (2000-8; Sept. 7, 2000). The Outdoor Alcohol Advertising Ordinance bans outdoor advertising of alcohol products based on the City's interest in protecting youth.

⁹ Several City facilities carry the names of corporate or philanthropic sponsors, *e.g.*, Petco Park, Qualcomm Stadium, Hervey Point Loma Library, and the Pacific Beach/Taylor Branch Library.

Hervey Point Loma Library) and to bridge funding gaps (e.g., Qualcomm Stadium).¹⁰ The City does not have a policy addressing the naming of its buildings or facilities and has handled each instance separately, generally with the approval of the City Council.¹¹

The legal issues raised by the naming rights proposal depend in large part on how the proposal is implemented.¹² That said, given that the naming of public buildings and facilities is a fairly recent phenomenon, there are many questions and precious little definitive legal guidance from the courts as to whether applying the name of a commercial entity to a public building is pure advertising, an endorsement or message by the public agency, and whether the communication is taking place in a public forum, or some combination thereof.¹³ The difference matters greatly in determining what right the City has to decline certain types of sponsors and whether the new signage would violate the City's Sign Ordinance.

If a sponsor is chosen pursuant to a policy that sets forth the City's objectives and guidelines, it is more likely that the selection of a sponsor will be viewed as the City's message or "government speech." Under the category of government speech, the City has broad discretion to choose sponsors based on the policy that it wants to promote without being viewpoint neutral. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (government can choose to fund programs that it believes to be in the public interest, and not fund others); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-588 (1998). The City Council can select a sponsor based on the policy that it chooses to advance and elected officials would be accountable to the public for that choice at the next election. *Legal Services Corp. v. Velasquez*, 531 U.S. 533, 541-42 (2001); Blocher, *supra* note 13, at 22.¹⁴ For their part, the sponsors are essentially buying the City's endorsement—they are paying the City to send the message that the City endorses the sponsor. Blocher, *supra* note 13, at 26, 28; *Wells v. City and County of Denver*, 257 F.3d 1132, 1140-1142 (10th Cir. 2001) (sign identifying sponsors displayed within the fenced area of a holiday display on city property was government speech); *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d

¹⁰ See 2003 City Att'y Report 287 (2003-4; Feb. 5, 2003).

¹¹ Park and Recreation Board Policy 1001, "Naming of Parks and Recreation Facilities," generally states that names should reflect the location of the facility but may also be named for individuals of historical significance to the local area or who have made major financial contributions. Policy 1001 does not address the use of names of corporate sponsors. The Policy provides for the local Recreation Council to make its recommendation on the name to the Area Committee and the Park and Recreation Board.

¹² See, generally, Joseph Blocher, *School Naming Rights and the First Amendment's Perfect Storm*, 96 Georgetown Law Journal 1 (2007).

¹³ *Id.* at 4, discussing the practical difficulties in applying existing First Amendment definitions and standards to naming rights arrangements for public facilities, specifically public schools: "When a school sells the naming rights to its facilities, who is the 'speaker'? Is it the school on which the name is emblazoned, or the person or entity to whom the name belongs? . . . [W]hat is the message being delivered? Is it a simple 'thank you' to a benefactor, or a commercial advertising pitch?" See also, Ann Bartow, *Trademarks of Privilege: Naming Rights and the Physical Public Domain*, 40 U.C. Davis L. Rev. 919 (2007); Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 Hastings Const. L. Q. 71 (2004).

¹⁴ Compare license plate cases where the motto printed on the license plate has been determined in some instances to be government speech that is also private speech and must therefore be viewpoint neutral (*Planned Parenthood of South Carolina v. Rose*, 361 F.3d 786, 799-800 (4th Cir. 2004) ("Choose Life" plate violates First Amendment); *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 380 (6th Cir. 2006); ("Choose Life" plate does not violate First Amendment). Unlike the license plate on a car, in naming a public building, we are not faced with the issue of placing the government message on private property.

1085, 1093, cert. den., 531 U.S. 814 (8th Cir. 2000) (sponsorships on public radio station are government speech). The fact that the City was paid for the endorsement does not make it any less of a government message. *Id.*

If, on the other hand, a court were to determine that in selling the name to a public building or space the City had done nothing more than sold advertising space now being used by the sponsor to advance its message, then the speech at issue would be “commercial speech” subject to the same First Amendment protections afforded outdoor advertising. Blocher, *supra* note 13, at 10-11 (naming rights are intended to serve, at least in part, as advertising); *Metro Lights*, 551 F.3d at 903 (commercial speech is afforded less protection than other types of speech) *citing inter alia* *Metromedia*, 453 U.S. at 501, and *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 562-563 (1980). To determine whether the naming rights to a public building or facility are commercial speech, the court would likely examine the sponsor’s reasons for acquiring the right (e.g., name exposure as a marketing strategy), including the placement and use of the name or logo. Blocher *supra* note 13, at 39.

If the naming rights are commercial speech, then the four-prong *Central Hudson* test would apply to determine whether any restrictions used by the City in selecting sponsors are constitutional:

- (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it,
- (2) seeks to implement a substantial government interest,
- (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Central Hudson, 447 U.S. at 563-566, and quoted by, *Metromedia*, 453 U.S. at 507.

The first prong is likely not relevant, as sponsors’ messages should not be illegal or misleading. Blocher, *supra* note 13, at 41. The City would meet the second prong of the test by showing that it, as the government agency that owns and controls the property, has a substantial interest in managing the City’s beaches and parks for the public’s benefit. *Id.* The City would then need to demonstrate that whatever restrictions the City has placed on the naming rights directly advance the City’s interests in managing the beaches and parks for the public’s benefit and that those restrictions are no broader than necessary. Demonstrating these points would be made easier if the Council can point to an established policy used by the City to guide its decisions that sets forth the City’s objectives and the basis for not permitting certain types of sponsors. Blocher, *supra* note 13, at 15 (First Amendment challenges to naming rights will shift the focus back to the government agency to show a legitimate reason for rejecting the sponsor.).

By way of example, the City of Portland, Oregon, has both a naming rights policy and a sponsorship policy.¹⁵ Both policies set forth guiding principles tied to the city's management of city parks including providing a positive message and relating the sponsorship or name to the subject master plan, park, or facility. The naming policy provides threshold amounts for donations to include naming rights; the sponsorship policy lists circumstances under which a sponsorship offer will be rejected, the city's right to terminate a sponsorship, and design standards for sponsor recognition.

A more restrictive standard would apply if the naming rights to a public building or facility were considered a limited or traditional public forum. The City's parks and beaches, open to the public, are traditional public forums. *Perry*, 460 U.S. at 45; 1994 City Att'y MOL 809 (94-90; Nov. 14, 1994). Any content-based restrictions on the use of a traditional public forum must be narrowly drawn to serve a compelling state interest or be limited to time, place, and manner restrictions. *Perry*, 460 U.S. at 46. This is the same standard that applies to the restrictions contained in the Special Events Ordinance. Application of this standard would limit the City's ability to exclude a potential sponsor because that sponsor represents ideas or values that are unappealing to the City or the public as a whole.

Except for bulletin boards or other areas made available for posting flyers, however, the public currently is not permitted to post signs or messages on lifeguard stations or otherwise use them for expressive activity. For that reason, even though it is in a public place, a court may not consider the lifeguard station itself, or the face of the sign identifying the lifeguard station, to be a traditional public forum but would instead look to whether the City intended to open the forum for public discourse or to reserve it for a particular limited purpose. *Dolan*, *supra* note 14, at 77; *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 802-803 (1985). If a court determined that selling naming rights to the building creates a limited public forum, then the City may impose reasonable viewpoint neutral restrictions on the types and sponsors and the subject matter allowed. *Perry*, 460 U.S. at 55. The City of Portland policies, for example, set donation thresholds that a sponsor must meet to obtain naming rights and require that accepting the sponsorship will not conflict with any of the City's existing policies (*e.g.*, prohibiting the promotion of tobacco).

The government speech and public forum standards are not necessarily consistent with each other or consistently applied by the courts. Nonetheless, the single most important factor in determining the type of speech and the application of First Amendment restrictions is the degree of control exerted by the City in selecting the name. *Blocher*, *supra* note 13, at 32. "[A]n active role in sponsor selection—especially when done pursuant to a written policy—is the easiest way" for a government agency to claim ownership over the message being sent by the name used. *Id.* "Boards that actively select sponsors and tightly control the presentation of their names are most likely to be characterized as government speakers." *Id.* Adopting and implementing a well considered policy can assist the City by ensuring that decisions about naming sponsors are made in a consistent viewpoint neutral fashion, and that any types of businesses excluded from

¹⁵ See attached, Portland Parks and Recreation Policy "Naming/Renaming of Parks and /or Recreational Facilities" and "Sponsorship," both adopted May 2, 2007.

the process (e.g., tobacco and alcohol) are excluded based on a compelling government interest.¹⁶ Exercising control over the process by establishing and following a policy will also help the City avoid the inadvertent creation of a public forum. Blocher at 43-44. “Schools and other governments agencies that throw open their doors to sponsors—either in practice or by the terms of their policies—risk finding themselves the managers of a public forum, and thus with little power to choose between sponsors.” *Id.*

The Plan does not specify the manner in which the name of the sponsor would be added to lifeguard stations or any guidelines that might be used in selecting the sponsor. These unknown factors will affect the extent to which the program creates future legal issues for the City. To best protect the City against any unintended consequences, we recommend that the City establish and implement a naming rights policy, and that the Plan incorporate the policy and its guidelines as part of the sponsor selection process.

CONCLUSION

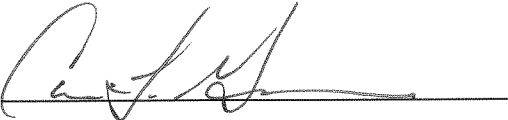
To implement the June 9, 2010, Strategic Marketing and Advertising Plan within existing law the City should do the following:

- a. Limit beach signage to signs carrying official notices such as rules and regulations or other messages necessary to proper use and management of the beaches. Identify sponsors on not more than fifteen percent of the total sign copy area measured as the area within the perimeter of the sign copy. Do not overuse or post an excessive number of sponsored public interest signs, but instead ensure that the signs posted are helpful to the management and administration of the beaches and have a clear purpose separate from the sponsorship program.
- b. Establish banner districts in each area where the City intends to implement the Plan, specifically identifying banner locations in consultation with local community groups. Within a banner district, banners can be used to promote cultural or civic events or activities of general public interest. The banners can include sponsor identification on no more than five percent of the banner.
- c. Invite the City’s marketing partners to contact third party special event organizers to request and negotiate terms for participation in special events not organized by the City. Provide sponsorship opportunities to the City’s marketing partners for any City-organized special events.

¹⁶ “If nothing else, it is clear that schools acting outside of an established policy framework expose themselves to First Amendment challenges.” Blocher, *supra* note 13, at 15-16.

- d. Adopt a City policy for naming rights that establishes guidelines governing the selection of sponsors, facilities available for naming or the process for identifying such facilities, and the type of signage that may be used for that purpose.

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CLG:als

Attachments:

Proposal submitted by the San Diego Foundation and the San Diego Convention and Visitors Bureau (CONVIS)

Portland Parks and Recreation Policy: Naming/Renaming of Parks and /or Recreational Facilities (adopted May 2, 2007)

Portland Parks and Recreation Policy: Sponsorship (adopted May 2, 2007)

ML-2011-4