Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: July 20, 2011

TO: Brad Richter, Centre City Development Corporation, Assistant Vice President – Planning

FROM: City Attorney

SUBJECT: Off-Premises Advertising in Proposed Downtown Entertainment District

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The Centre City Development Corporation (CCDC) and City of San Diego have been approached with a proposal for the establishment of an "Entertainment District" within the downtown area (District). As we understand, part of the proposal includes off-premises advertising signs that would be placed on buildings within the designated District. The funds generated from the off-premises advertising signs would be used to place art on buildings and support other arts activities within the District. You have provided what appears to be a PowerPoint presentation entitled "Light, Art and Activity . . . San Diego Entertainment District" and a sheet entitled "Downtown San Diego Entertainment District FAQ."

You have asked this Office to determine whether the San Diego Municipal Code (Municipal Code) could be amended to allow for a limited exception to the City's overall sign regulations, which generally ban off-premises advertising. This memorandum will briefly highlight the sign regulations in the Municipal Code, prior opinions from this Office regarding the City's sign regulations, and some relevant case law. It should not be relied upon as a legal opinion or advice from this Office, but is provided as preliminary guidance only. Once there is a specific proposal, this office will provide the necessary in-depth legal review and analysis. Any specific proposal will require additional review by this Office.

This Office has issued several opinions in the past regarding 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 (off-premises advertising). *See, e.g.*, 1999 City Att'y MOL 122 (99-12; Nov. 23, 1999); City Att'y MOL No. 2001-7 (May 3, 2001); 2002 City Att'y Report 265 (2002-19; Oct. 16, 2002); City Att'y MOL No. 2011-4 (May 19, 2011).

In general, the Municipal Code requires that all signs only contain either on-premises or public interest messages. SDMC § 142.1210(a)(1). On-premises messages include those "identifying or advertising an establishment, person, activity, goods, products, or services located on the premises where the sign is installed." SDMC § 142.1210(a)(1)(A). Public interest messages include official signs and notices, service club and religious signs related to nonprofit service

clubs, religious organizations, and charitable associations, and political or ideological signs. SDMC § 142.1210(a)(1)(B).The heart of the sign regulations is the distinction between signs that contain "off-site" or "off-premises" advertising and those that contain "onsite" or "on-premises" advertising. City Att'y MOL No. 2011-4. The sign regulations value onsite advertising over offsite advertising and generally prohibit offsite advertising. *Metromedia Inc. v. City of San Diego*, 453 U.S. 490, 511-12 (1981).

Any exception to the general rule that off-premises advertising is prohibited 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 at 265. 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.* The constitutionality of the City's sign ordinance was upheld by the United States Supreme Court in *Metromedia*. Since then, more recent cases involving sign regulations have upheld exceptions to an agency's sign regulations where the exceptions have not so undermined the purpose of the regulations that they would fail to achieve its end. *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 914 (9th Cir. 2009); *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94 (2d Cir. 2010).

In *Metro Lights*, the City of Los Angeles adopted a sign ordinance that restricted off-site advertising but allowed off-site advertising on "'work located primarily in the public way'" such as bus benches and shelters. 551 F.3d at 902 (citation omitted). The City of Los Angeles entered into a contract with a vendor for the placement of advertising on public street furniture (bus shelters, public restrooms, trash cans, etc.). Under the contract, the vendor paid for new street furniture and made payments to the City from its advertising receipts. *Id.* at 901. The vendor was responsible for coordinating the advertising and ensuring the attainment of the City's objectives to upgrade the appearance of street furniture on the streets, and to improve 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, 910. In deferring to the city's legislative decision to value controlled signage on public property over an uncontrolled proliferation of signage, the Court found that the exception for the street furniture did not weaken the direct link between the City's objectives and the general prohibition of off-site advertising because the ordinance still resulted in decreased visual clutter. *Id.* at 910. Perhaps more importantly, the court recognized that an advertising program that controls the look and feel of advertising plays a role in reducing visual clutter. *Id.*

Courts have struck down other ordinances that contained exemptions that overtook the purpose of the ordinance where exceptions resulted in the regulations having minimal impact. *See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) (striking 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); *Greater New Orleans Broadcasting Ass'n. Inc. v. United States*, 527 U.S. 173, 190 (1999) striking down a federal law prohibiting advertising about privately operated commercial casino gambling but allowing advertisements for tribal casino gambling authorized by state compacts and government-operated, nonprofit, and occasional and ancillary commercial casinos because the regulation is "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418-19 (1993)

(striking down a city's law banning commercial newsracks dispensing "'commercial handbills'" but allowing newsracks dispensing other materials because the regulation would have "minimal impact" because of the exception). Therefore, there is a risk that overuse of an exemption may "'diminish the credibility of the government's rationale for restricting speech in the first place.'" City Att'y MOL No. 2011-4 at 10 (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994)).

To allow the various forms of off-premises advertising signage including LEDs, banners and flags proposed as part of the District, the City would need to amend its sign regulations to create an exception for the allowance of off-premises advertising within the District. The issue is whether such an exception would so undermine the purpose of the regulations that they would fail to achieve their end and whether their purpose is stronger and more important than the City's interest in safety and aesthetics or does not affect those interests. The stated purpose of the sign ordinance is to provide "a comprehensive system of regulations for *signs* that are visible from the *public right-of-way*," and "to provide a set of standards that are designed to optimize communication and quality of *signs* while protecting the public and the aesthetic character of the City." SDMC § 142.1201. Another stated purpose has been traffic safety. City Att'y MOL No. 2001-7 at 6.

As discussed above, there are inherent risks in creating new exceptions to an ordinance that maintains a delicate balance between furthering important governmental interests and restricting speech. If an exception to the City's sign regulations is made to allow for off-premises advertising signs in the District, the City must ensure that it demonstrates that the exception does not so undermine the purpose of the regulations that the regulations would fail to achieve their end. Any specific proposals with regard to the District will require further analysis by this Office.

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By Heidi Vonblum

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