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MAYER·BROWN

Mayer Brown LLP
350 South Grand Avenue
25th Floor
Los Angeles, California 90071-1503

Main Tel (213) 229-9500
Main Fax (213) 625-0248
www.mayerbrown.com

Philip R. Recht
Direct Tel (213) 229-9512
Direct Fax (213) 576-8140
prechl@mayerbrown.com

April 17, 2009

Los Angeles City Council
Planning and Land Use Committee
200 North Spring Street
Los Angeles, CA 90012

Re: CPC 2009-0008 CA/Proposed Sign Ordinance

Dear Honorable Members of the PLUM Committee:

Our firm represents Summit Media LLC ("Summit"), an outdoor advertising company that operates conventional outdoor advertising signs (i.e., billboards) in the City of Los Angeles. Summit has a long and positive history doing business in the City, and supports efforts to enact a rational and evenhanded sign policy in the City.

Summit respectfully submits this letter to address two important concerns. First, the City Planning Commission ("CPC") failed to entertain public comment at its most recent hearing, in violation of the Brown Act. Second, the sign ordinance proposal fails to fully address the settlement agreements between the City and the largest outdoor advertising companies. Both of these issues are critical to the City's efforts to revise the sign ordinance, and must be addressed and resolved now.

I. Lack of Public Comment on the Amended Proposed Ordinance in Violation of the Brown Act. On March 26, 2009, the CPC held a public hearing to consider a number of new amendments to the draft sign ordinance. Even though the amendments were numerous and substantial, the CPC did not permit the public to speak either when considering the sign ordinance or during the general public comment period.

The CPC evidently believed that it could forego public comment because there had been time for comments on the draft ordinance at prior CPC meetings. This is incorrect and ignores the plain language of the Brown Act. Government Code Section 54954.3(a) states:

> Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item . . . . However, the agenda need not provide an opportunity for members of the public to address the legislative body on any item that has already been considered by a committee, composed exclusively of members of the legislative body, at a public meeting wherein all interested members of the public were afforded the

> opportunity to address the committee on the item . . . ***unless the item has been substantially changed since the committee heard the item.*** (Emphasis added.)

The draft sign ordinance ***was*** substantially changed at the March 26 CPC meeting, as acknowledged in the April 6, 2009 letter transmitting the proposed ordinance to the PLUM Committee. The CPC adopted nine separate amendments to the draft ordinance. The CPC also approved three recommendations to the City Council for related actions separate from the ordinance itself.

The nine amendments and three recommendations were substantial, and none of them was presented to the public prior to the March 26 meeting. They dealt with such important subjects as the standards for comprehensive sign programs, appeals of civil penalties, rights of private action, mandatory sign reduction in sign districts, requirements to establish sign districts, grandfathering of proposed sign districts, prohibiting roof signs, the impact of the ordinance's limitations on digital displays falling within the scope of the settlement agreements, and more. The recommendations also included a proposal that the City Council enact a regulation permitting the revocation of licenses of businesses that repeatedly violate the ordinance.

The amendments and recommendations substantially changed the draft ordinance. The public clearly had a right to comment on the amendments and recommendations and related issues at the hearing. Failure to permit public comment was a violation of the Brown Act and could result in the voiding of the CPC's March 26 vote. *See* Cal. Gov't Code 54960.1; *Galbiso v. Orosi Pub. Util. Dist.*, 167 Cal. App. 4th 1063, 1081-81 (2008) (similar actions by water board violated Brown Act). The PLUM Committee should send the ordinance back to the CPC for reconsideration and order the CPC to hear and consider public comment regarding, at minimum, the proposed amendments and recommendations.

II. Failure to Fully Address the Settlement Agreements with the Major Sign Companies. The draft sign ordinance still fails to solve the problems created by the City's settlement agreements with the four largest outdoor advertising companies operating in Los Angeles. The latest proposal ostensibly eliminates ***future*** digital conversions, including conversions of signs that would otherwise be allowed under the settlement agreements. However, it does not address or fix the existing situation—i.e., the scores of digital signs that the dominant sign companies already have erected under illegal and unfair contracts with the City. As such, the proposed ordinance ignores the problem that already has outraged the public—i.e., the existing stock of digital signs that, because they violate state and local laws, should never have been permitted by the City and erected in the first place. Compounding the problem, and in spite of the public outcry, the City continues to actively defend in court the settlement agreements and the special entitlements they created for the four preferred companies. These matters are discussed in detail below.

A. The Settlement Agreements and the Preferential Rights They Grant. Between 2005 and 2007, the City entered into settlement agreements with the four largest

outdoor advertising companies operating in the City i.e., Clear Channel Outdoor, CBS Outdoor, Regency Outdoor, and Vista (now owned by Lamar). These companies own the vast majority of off-site signs in the City.[1] In these agreements, these companies were given exclusive, special privileges that made them immune to the City's planning, zoning and building codes and their attendant civil and criminal penalties. The City promised to issue permits to these companies to "modernize" hundreds of existing signs with digital faces and second faces despite the fact that such "modernizations" clearly violate numerous City and state laws, including the City's 2002 sign ordinance. The City also promised to issue upon demand an unlimited number of new permits for these companies' other existing signs even though those signs may never have been permitted under, or otherwise violated, City sign regulations. These rights were granted in complete disregard of the City's planning and zoning laws and without regard to enormous competitive advantage they provided the large companies over their smaller competitors. Indeed, the agreements expressly exempted the four favored companies from a broad swath of regulations that continue to apply to everyone else, including smaller competitors like Summit and the advertisers, landlords, and other persons with whom they do business.

1. **Preferential "Modernization" Rights.** The City's 2002 sign ordinance explicitly bans alterations (including "modernization") of existing signs and provides for enforcement against and removal of illegally modified signs. Exceptions may be allowed only by way of a site-specific variance. Obtaining a variance requires first proper notice to neighbors, public hearing, and certain findings.

Despite these laws, the settlement agreements grant Clear Channel Outdoor, CBS Outdoor, and Regency Outdoor the exclusive right collectively to "modernize" up to about 900 of their existing signs (25% of their inventory) by replacing static wood and vinyl signs with electronic, digital signs.[2] Each digital conversion costs about $500,000 and is, in effect, the rebuilding of a sign. Digital signs generate many thousands more dollars in advertising revenue for the sign companies than traditional static signs. The major companies may use these 900 "modernization credits" to convert to digital any of their existing signs. They may undertake conversions without regard to where the signs are located and without notice to the neighbors and any opportunity for the public to be heard. The companies are granted explicit exemptions not only from the City's 2002 sign ordinance, but from any other City zoning or municipal code provision that might prohibit the conversions. Indeed, under the settlement agreements, the City

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[1] It is estimated that Clear Channel Outdoor, CBS Outdoor, Regency Outdoor, and Vista operate over 90% of the pole signs in the City. The smaller companies like Summit collectively operate less than 10% of those signs. Vista operates the largest number of signs of any company. Its signs tend to be relatively small in size.

[2] Vista, which operates smaller sized billboards, was not granted such digital conversion rights in its settlement agreement. However, it was granted various other special rights that effectively exempt it from the City's 2002 sign ordinance.

is explicitly prohibited from denying work approvals or new permits for the converted signs based on any such City law.[3]

About 100 digital signs have been erected by the large companies in the City since the settlement agreements took effect. Contrary to state and City laws, the City exempted the dominant sign companies from having to obtain a zoning variance for each digital conversion, and thus the people and businesses affected by the conversions were not given notice or provided with any opportunity to comment or object. Rather, the City granted new permits for each of these digital conversions, viewing itself as bound to do so under the settlement agreements. Meanwhile, all other companies and individuals in the City have to live with these "modernizations" and abide by the City laws without exception..

It is these digital conversions that sparked the public firestorm that has led to the City's effort to draft and enact a new sign ordinance. However, as discussed below, the new proposed ordinance does not address these existing signs.

2. Preferential Second Face Rights. The settlement agreements provide the large companies various other extraordinary benefits. For example, despite the 2002 sign ordinance's prohibition on new off-site signs or alterations to existing signs, the City agreed to issue permits to the large companies to add over 200 new off-site signs by putting second faces on the companies' existing single-face structures. No other company or individual has been granted permission by the City to add any such second face to an existing one-face structure in the City.

3. Preferential Permit and Grandfathering Rights. The settlement agreements also exempt the large companies from the City's billboard permitting requirements, granting blanket amnesty for virtually the entire stock of billboards owned by the large companies. As noted above, the settlement agreements obligate the City to provide new permits for each of the companies' signs that are converted to digital notwithstanding that the conversions each violate a host of City and state zoning laws.

In addition to issuing permits for digital conversion and new second face signs, the City agreed (contrary to its laws) to issue new permits for any of the large companies' other existing signs that were built before 1986 regardless whether those signs were lawfully erected, have

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[3] In a November 21, 2008 report concerning these large companies' digital signs, the General Manager of the City's Building and Safety Department (LADBS) acknowledged that the "settlement agreements specifically limit the scope of LADBS' review and approval only to 'structural and electrical safety'. Based on the legal settlement agreements, LADBS has no choice but issuing these permits once structural and electrical safety requirements are met."

permits, comply with their permits, or otherwise violate City building and zoning ordinances. Existing signs erected after 1986 that comply with building and zoning requirements but for which permits do not exist are forgiven from these permit defects regardless whether a permit was ever sought or obtained by the companies. Post-1986 signs that have permits but that do not comply with their permits are allowed so long as the noncompliances are within certain limits. In spite of the affected neighbors and its own laws, the City agreed to issue new permits for all of these signs—making legal countless signs belonging to the dominant companies that were illegal when erected or modified over the years in a way that made them illegal.

No other sign company has been granted any similar permit rights. Rather, as discussed below, all such companies are subject to the City's rigorous new permit inspection and enforcement program.

4. The Apparent Permanent Nature of the Preferential Rights. The settlement agreements contain provisions that were intended to ensure that these special contractual rights would remain in place even when City laws changed over time. Indeed, the agreements anticipated and addressed the circumstance that we now face, namely that a new ordinance might conflict with the rights purportedly granted under the agreements. Specifically, the agreements include language that explicitly preserve the rights in spite of any conflicting law – present, past or future. For example, Section 5(B)(iv) of the settlement agreement between the City and CBS Outdoor and Clear Channel Outdoor states:

> It is the intent of the parties that permits and work approvals for Modernizations will not be denied or withheld, and the use of Modernizations will not be restricted, ***based on any other prohibition or restriction of the Los Angeles Municipal Code***, which, like those listed in Section 5.B.ii and 5.B.iii, is not directly and predominantly related to "Structural or Electrical Safety" . . . (Emphasis added).

In the same vein, Section 5(B)(iii) provides that, "with the exception of construction of new second faces pursuant to Section 5(B)(iv), ***no Modernization or re-permitting for an existing structure shall be denied based on zoning regulations***." (Emphasis added.)

The language above and other similar exemption provisions make no distinction between present and future zoning laws and, as such, appear to indicate that the rights granted under the settlement agreements cannot be affected by future laws. That necessarily would include the proposed sign ordinance now under consideration.[4]

B. The Lack of Policy Justification for, and the Clear Illegality of, the Settlement Agreements. None of the special rights granted by the settlement agreements to the

[4] Neither CBS Outdoor nor Clear Channel Outdoor has conceded that their settlement agreements will be superseded by a new ordinance.

major sign companies are available to any other individual or business in the City. There is nothing to justify the extraordinary, favorable set of rules that the large companies enjoy. The City has placed these companies above the law, literally untouchable by state and local law, with rights unavailable to any other citizen or business in the City. The City has never offered any policy rationale for this disparate treatment, most likely because there is no logical justification.

California law prohibits any city (including Los Angeles) from exempting any person or business (including the major sign companies) from building and zoning regulations. Clearly, the City may not contract away its police powers by promising to exempt the large companies from future zoning ordinances. In *Avco Community* Developers, *Inc. v. South Coast Regional Commission*, 17 Cal. 3d 785 (1976), the California Supreme Court categorically stated that any "promise by the government that zoning laws thereafter enacted would not be applicable . . . would be invalid and unenforceable as contrary to public policy." *See also Trancas Prop. Owners Ass'n v. City of Malibu*, 138 Cal. App. 4th 172 (2006) ("[R]egulatory regimes such as zoning may not be deviated from solely on bilateral agreement.").

Equally, and as the City knows from a very similar recent experience, the City may not exempt any party from current zoning ordinances. In *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052 (9th Cir. 2007), the City entered into a settlement agreement that allowed a congregation to operate a synagogue in a residential zone without first obtaining a conditional use permit as required by the City's zoning ordinance. Neighbors of the synagogue filed suit, alleging that the settlement agreement was void for violating state law and their right to due process. The U.S. Ninth Circuit Court of Appeals agreed, holding the settlement agreement to be invalid. The court reiterated that:

> Municipalities may not waive or consent to a violation of their zoning laws, which are enacted for the benefit of the public. Any such agreement to circumvent applicable zoning laws is invalid and unenforceable.

The illegality of the settlement agreements has not gone unnoticed, including by the PLUM Committee. On October 10, 2008, the PLUM Committee passed a motion that "the City Attorney's office provide an update on recent lawsuits against the City challenging the settlements, and explain the current case law, including *Trancas Property Owners Association v. City of Malibu*, which raises questions about whether the billboard settlements were an unlawful surrender of city police power."

In November 2008, the City Planning Commission President included the following language in the draft ICO in an attempt to limit the impact of the settlement agreements:

> WHEREAS, in 2006 and 2007, the City entered into settlement agreements regarding several of said legal challenges. The settlement agreements, which authorized the significant alteration of existing signs, did not apply either the California Environmental Quality Act or the prohibitions on contracting away

municipal zoning and police powers as more fully set forth in the case *Trancas Property Owners Association v. City of Malibu*;.

Despite their patent unfairness and illegality, not to mention the public controversy they have stirred, the settlement agreements remain in full force and effect today.

C. The Proposed Ordinance's Failure to Fully Address the Settlement Agreement Issues. Given the public outcry over the settlement agreements, one would expect the new ordinance to squarely address the issues the agreements present. Yet, the new ordinance at most only seeks to prevent **future** digital conversions. It ignores the **existing** digital signs, as well as the other unfair benefits accorded under the agreements. In doing so, the proposed ordinance perpetuates the current situation. The preferred sign companies are still allowed to maintain and operate all of the digital signs that violated applicable laws when erected and should never have been allowed in the first place. The City will continue to allow the companies to operate their other inventory as well, notwithstanding permit violations and noncompliances.. Neighbors of the signs that have been "modernized" or re-permitted continue to have their rights to be heard ignored.

1. The Failure of the Initial Version of the Proposed Ordinance to Address the Settlement Agreements at All. While the current version of the proposed ordinance at least attempts to address future digital conversions, neither the initial draft of the sign ordinance nor the initial Planning Department Recommendation Report made any mention whatsoever of the settlement agreements. Nothing in those documents indicated (1) whether the proposed ordinance was meant to apply equally to all companies and individuals alike, and (2) if not, how the City could justify, on a policy and legal basis, adopting a new ordinance that would perpetuate this egregious double standard.

Further, no mention was made in the initial Recommendation Report of an important related matter—the City's recently enacted sign inspection program and the inequalities it presents. Under that new program, the City will inspect all billboards and then take enforcement action to the extent the signs are not properly permitted or do not comply with relevant laws. However, as noted above, the major companies already have had their signs re-permitted and grandfathered under the settlement agreements; thus, they face no enforcement risk under this new program.[5] Nothing in the initial Recommendation Report explained how the City can justify, on the one hand, requiring that the smaller companies and the rest of the public comply with existing and future zoning laws and face significant enforcement risks if they do not – while, on the other hand, exempting the large companies from the zoning and inspection laws and immunizing them from enforcement risk for permitting violations.

[5] The settlement agreements were designed to protect the large companies from virtually any enforcement action arising out of an inspection. Indeed, the agreements explicitly provide that the large companies shall not be subject to any future inspection program (like the City's newly enacted program) unless they choose to do so.

2. The Failure of the Current Proposal to Address Anything Other than Future Digital Conversions. Summit raised the issues noted above in various stakeholder meetings with officials of the City Planning Department and the City Attorney's Office. These officials repeatedly stated that the new ordinance was meant to apply to all companies alike. However, since the ordinance did not say so explicitly, Summit again raised these issues before the CPC at its public hearing on March 18. In response, one of the proposed amendments approved at the March 26 CPC meeting was to amend the ordinance to add a short statement indicating that the ordinance's prohibition on digital displays applies regardless of any contrary provisions in the settlement agreements. *See* Recommendation Report at page 2-5, new draft ordinance at C-48.

Summit supports a level playing field. The City must either prohibit all modernizations or allow all companies to equally modernize their existing signs. There simply cannot be dual set of laws. In the proposed ordinance, it appears that the City will not allow any future digital conversions for any company. If this is to be the case, the proposed ordinance does not go far enough. The proposed ordinance simply fails to address the existing digital signs. Unless this is changed, the large companies will retain the approximately 100 digital billboards in the City which were permitted and erected under unfair and unlawful agreements. Moreover, based on their illegal agreements, the dominant companies will wind up with a monopoly on digital signs in the City. Unless the City disavows the settlement agreements and exercises its legislative and regulatory powers to revoke the permits and to compel removal, these signs will remain operating and generating profits far into the future. The biggest, dominant companies will have obtained and kept illegal benefits. And the affected public will remain harmed without any recourse.

Similarly, the proposed ordinance does not address any of the other special rights granted under the settlement agreement. Nothing in the proposed ordinance forbids the large companies from adding new, second faces to more than 200 of their billboards. Nor does anything explain how City can justify continuing the bizarre double regulatory scheme which allows some companies continue to alter their signs and erect new faces while the smaller companies do not have the right to substantially alter even a single billboard, let alone add second sides.

Equally, nothing addresses the broad exemption granted to the large companies, and thereby to more than 90% of all billboards in the City, from the permit requirements and enforcement risks under the the City's new sign inspection ordinance. Nor does anything explain how a double standard on this issue can be justified.

This is a country of laws that all must respect, and the City must ensure that the right to erect and maintain signs is granted – or, if appropriate, restricted – equally. There simply must not be a few privileged companies that are above the law.

3. The Failure to Explain the City's Ongoing Defense of the Settlement Agreements in Court. Finally, nothing in any document related to the proposed sign ordinance

explains how the City can justify spending taxpayer money to continue to defend the unlawful settlement agreements in court in concert with CBS Outdoor and Clear Channel Outdoor. Summit has been questioning the fairness of these agreements since 2007. When Summit was unable to informally resolve the level playing field problems created by the agreements, it filed suit in Superior Court. *Summit Media LLC vs. City of Los Angeles, CBS Outdoor Inc., and Clear Channel Outdoor Inc.*, Case No. BS116611. CBS, Clear Channel Outdoor, and the City have responded by vigorously litigating in defense of the settlement agreements, arguing that they are legal and that the major companies are entitled to all the benefits of the agreements.

Summit readily understands the self-interest that motivates the large companies to take this position. However, it is unclear why the City is equally determined to defend the agreements alongside CBS and Clear Channel, particularly when taxpayer resources are so limited and the public so universally (and correctly) blames the settlement agreements for the problems that have led to the ICO and the effort to craft a new sign ordinance. It also is unclear how the City can take the contradictory legal position that the settlement agreements must give way to a new sign ordinance – which, among other things, will forbid erection of digital signs – while arguing simultaneously in court that the City's current (2002) sign ordinance is superseded by the settlement agreements. If the law provides and the City agrees that no one is above the law and the City can never bargain away its police powers, then the settlement agreements are as illegal today as they will be after a new sign ordinance is enacted.

III. Conclusion. First, the PLUM Committee should send the ordinance back to the CPC for reconsideration and order the CPC to hear and consider public comment regarding, at minimum, the proposed amendments and recommendations. This is the only way to satisfy the requirements under the Brown Act.

Second, the PLUM Committee should take advantage of the opportunity presented by the proposed sign ordinance to right the numerous wrongs represented by the settlement agreements. Those agreements grant the four largest companies extraordinary rights to the detriment of their smaller competitors and the public both. The law could not be clearer—these settlement agreements are not only egregiously unfair but invalid and unenforceable as well. The people of Los Angeles deserve nothing less than for the City to find the quickest way to get out of these unlawful agreements without further delay. The City needs confront this major problem head on.

Summit urges the PLUM Committee to remedy the situation not simply in part, but in whole, by making clear that, going forward, any new City sign ordinance applies fully and equally to all companies notwithstanding any contrary provisions in the settlement agreements. The same clarification must be made with respect to the City's new sign inspection program--it must apply equally to all companies alike. Unless the City is prepared to address the existing unfairness by granting equal digital conversion, alteration, and permit grandfathering rights to the small companies without settlement agreements, the PLUM Committee should immediately explore the possibility of disavowing the settlement agreements and revoking the digital conversion and other permits already issued under the agreements. Indeed, unless the City finds

a way to undo the countless permits that have been issued under the "modernization" or re-permitting provisions of the settlement agreements, the playing field will remain permanently tilted in favor of the large companies and more than 90% of the billboards in the City (including numerous unpermitted or illegally modified signs and 100% of the existing digital signs) will forever remain comfortably out of reach of the City's inspection and enforcement codes. The public and Summit have been fighting these agreements for more than two years. At the very least, the City should stop opposing Summit's efforts to invalidate the settlement agreements in court.

Only by directly and explicitly addressing these settlement agreements in their entirety will the City be able to right all the wrongs these agreements have created, and to enact a new sign ordinance that applies equally to everyone in Los Angeles.

Sincerely,

Philip R. Recht