ITEM NO. 8

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Honorable Councilmembers
Planning and Land Use Management Committee
City of Los Angeles
200 N. Spring Street, Room 430
Los Angeles, CA 90012

Re: Tolling of Penalties under New Sign Ordinance During Good-Faith Appeals

Dear Honorable Chair Harris-Dawson and Honorable Councilmembers:

My client Lamar Central Outdoor, LLC would like to thank the PLUM Committee for its dedication to modernizing the City's sign ordinance. The end result of the new ordinance will be a safer, more aesthetically pleasing city that provides a greatly enhanced environment for businesses, non-profits and the City itself to communicate via outdoor advertising.

Introduction and summary

But for all its likely advantages, the proposed ordinance has a serious defect. It imposes ruinous daily penalties for violations. But to appeal an Order to Comply (OTC), the sign operator must go through a three-stage administrative appeal process. The ordinance stays the accrual of its prohibitive penalties only during the first stage. The new ordinance thus forces a sign company to cease operating its sign or risk prohibitive penalties if its appeal should fail. A penalty scheme that puts affected parties in such a dilemma violates due process. Parties placed in such a dilemma will have no choice but to seek relief from the accrual of penalties during the second and third stages of review in courts. Those that choose to cease operating their signs and prevail on their appeals will be in a position to sue the City for damages. Rather than open the door to such a wave of litigation, the City should amend the ordinance – which can easily be done – to toll the accrual of penalties through *all* levels of administrative appeal. Significantly, the City has already made a good start by proposing an effective tolling provision for the first stage of the appeal process. It simply needs to extend the same tolling protections for the other two stages. The ordinance should also recognize a good faith or sufficient-cause defense, as required by due process, to protect good-faith litigants whose appeals ultimately fail.

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The ordinance's prohibitive penalties

Under section 14.4.26 of the proposed ordinance, the Los Angeles Department of Building and Safety (LADBS) assesses penalties for Code violations by serving and Order to Comply (OTC) on the sign operator and the property owner. The proposed ordinance imposes ruinous penalties for Code violations. For the smallest signs, *daily* penalties begin at $2,500 and reach $8,000 by the third day. For standard bulletins (48 x 14), penalties begin at $10,000 and reach $40,000 on the third day.

The three-stage appeal process

The property owner and the sign operator are authorized to appeal the OTC. The appeal process is a three-step procedure. In the first phase, a Department of Building and Safety (LADBS) administrative hearing officer (AHO) hears and determines the appeal. The AHO's decision is appealable to the Area or City Planning Commission under LAMC section 12.26 K. The third stage in the process is discretionary review by the City Council under City Charter section 245. If the Council does not take jurisdiction over the appeal within five regular meeting days (the Council meets three times a week), the Commission's decision becomes final. Each of the first two stages of the appeal process takes 75 days, but the AHO and the Planning Commission can extend those periods. The City Council's decision takes about two weeks unless the Council chooses to decide the appeal. For a single standard bulletin, over $6.5 million in penalties would accrue in that time frame.

Section 14.4.27 A. 5 of the proposed ordinance provides that "[p]enalties shall stop accruing on the date the appeal is filed. . .." This provision is a major improvement over the former procedure provided in section 12.26 K. 1, which provides only that an appeal stays "all enforcement proceedings and actions. . .." The former provision thus was unclear as to whether penalties continued to accrue during the appeal. But the new ordinance does not stay the accrual of penalties during appeals to the Planning Commission or during the time for Council action.

The sign operator's dilemma

A sign operator served with an OTC can avoid penalties only complying with it, i.e. ceasing operation of the sign or removing it. But compliance means giving up the operator's First Amendment rights. It also means losing months of income from the sign and advertiser good will. Alternatively, the sign owner can refuse to comply and operate the sign while it challenges the OTC in the City's appeal process. But it can do that only at the risk of prohibitive penalties if the challenge should fail. No sign operator can risk even a small chance of multi-million-dollar penalties. So the operator will almost always shut down the sign. It will do so even if it has a solid defense on the merits such as a constitutional challenge to the City's ban on offsite signs or the rebuttable presumption of Bus. & Prof. Code § 5216.1 that a sign was lawfully erected if it was not cited within the previous five years as having been erected unlawfully.

The constitutional tolling principle

The Due Process Clause of the Fourteenth Amendment guarantees the right to challenge a statute or administrative order in quasi-judicial administrative proceedings and in the courts. As the

Supreme Court has noted: "[I]n whatever method enforced, the right to a judicial review must be substantial, adequate, and safely available . . .." *Wadley So. Railway Co. v. Georgia*, 235 U.S. 651, 661 (1915). Noncompliance penalties violate due process where "no adequate opportunity is afforded…for safely testing, in an appropriate judicial proceeding, the validity of the [law] . . . *before any liability for the penalties attaches* . . ." *St. Louis, Iron Mountain & So. Railway Co. v. Williams*, 251 U.S. 63, 64–65 (1919) (italics added).

The two requirements for tolling are (1) a non-frivolous defense; and (2) raising that defense promptly rather than simply sitting back and waiting to be prosecuted. *See Wadley*, 235 U.S. at 668-669 (defendant forfeited immunity from penalties by not seeking relief promptly and awaiting prosecution); *U.S. v. Pacific Coast European Conference*, 451 F.2d 712, 718 (9th Cir. 1971) (plaintiff maintained immunity from penalties by "promptly and vigorously" challenging disputed statute in court); *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 337-338 (1920) (plaintiff entitled to permanent injunction against penalties accrued *pendente lite* "provided . . . plaintiff had reasonable ground[s] to contest" the statute). *See also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) ("[R]espondents were faced with a Hobson's choice: continually violate the Texas law and expose themselves to potentially huge liability; or violate the law once as a test case and suffer the injury of obeying the law during the pendency of the proceedings and any further review."); Douglas Laycock, The Death of the Irreparable Injury Rule, 103 HARV. L. REV. 687, 718–719 (1990); Patrick T. Gillen, Preliminary Injunctive Relief Against Governmental Defendants: Trustworthy Shield or Sword of Damocles? 8 DREXEL L. REV. 269, 302 (2016); General Electric Co. v. Jackson, 610 F.3d 110, 116 (D.C. Cir. 2010); Ex Parte Young, 209 U.S. 123, 146-148, 163-165 (1908).

Significantly, under California law, a party does *not* have to challenge the validity of a law to benefit from the tolling of penalties. It is enough that the party can plausibly assert that a valid statute has been misapplied to it. *Mattice Investments, Inc. v. State of California*, 190 Cal. App. 3d 918, 924–25 (1987) (reversing imposition of penalties for noncompliance with valid administrative subpoena statute as placing an undue burden on access to the courts).

The scofflaw problem

Both government and industry are familiar with scofflaw sign companies that have no reasonable grounds to contest an OTC. These entities erect signs anyway with the expectation that they will make a profit in the time until the City prosecutes them. A tolling provision would not benefit such scofflaws because they would fail both parts of the constitutional tolling test: they have no substantial defense and they wait until they are prosecuted to raise whatever defenses they have.

Adequate tolling provisions

The City has made a good start with tolling. The proposed ordinance has a tolling provision for the first stage of the appeal process. Section 14.4.27 A. 5 provides: "Penalties shall stop accruing on the date that an appeal is filed, and will resume accruing under the circumstances set forth in Subsection E of this Section 14.4. 27." The ordinance need only extend this principle to the other two stages of administrative review.

Subsection E. 4. refers to a situation where the AHO "upholds the civil penalties." It thus implies that the OTC may impose penalties for past violations, even though section 14.4.26.B.5 expressly provides that penalties "shall begin to accrue on the 16th day *after* the effective date shown" on the OTC. It also fails to provide for tolling if the Responsible Party appeals to the Planning Commission. Subsection E. 4. therefore should be amended as follows:

> If the Administrative Hearing Officer upholds the ~~civil penalties~~ *order to comply, absent further appeal* the Responsible Party shall correct the violation(s) (or remove the sign copy in its entirety) within 15 days of the date the decision is mailed to the Responsible Party, or within another *reasonable* time period as determined by the Administrative Hearing Officer. *If the Responsible Party appeals the Administrative Hearing Officer's decision to a Planning Commission, penalties shall stop accruing as provided in subdivision E. 6. of this Section 14.4.27.* (New language in italics.)

The following should be added to section 14.4.27. E. 6. to provide for tolling during a Planning Commission appeal, City Council action (or the period of Council inaction necessary to produce a final order), and judicial review: "*Penalties shall stop accruing on the date an appeal is filed and will not resume until 15 days after issuance of a final decision upholding order to comply.*" The current draft ordinance recognizes 15 days as a reasonable compliance period. Due process guarantees a reasonable compliance period if the appeal fails. *See Schulz v. IRS,* 413 F.3d 297, 302 (2nd Cir. 2005); *Mattice Investments*, 190 Cal.App.3d at 925.

Section 14.4.28 provides for recovery of the City's enforcement costs, including "permit fees, fines, late charges, interest and costs incurred in performing inspections and otherwise enforcing the sign regulations." Such costs are indistinguishable from penalties, which may not be imposed if the Responsible Party had reasonable grounds to contest the OTC. The provision therefore should be amended to provide: "*No costs shall be recoverable against a party that had reasonable grounds to believe that the sign at issue was not in violation of the sign regulations, or that the sign regulations were invalid.*"

Conclusion

The proposed ordinance provides many benefits for the City, business advertisers, the Los Angeles economy, and the outdoor industry itself. But the combination of ruinous penalties and inadequate tolling provisions threatens the ordinance's validity and effectiveness. The City can easily remedy this problem, however, by enacting appropriate amendments to ensure that a party charged with a sign code violation is not forced to choose between its First Amendment rights and its business on the one hand and the risk of ruinous penalties on the other.

Respectfully,

Michael F. Wright

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