



11-1705

February 24, 2016

Hand-Delivered

Los Angeles City Council
Planning and Land Use Management Committee
Los Angeles City Hall
200 North Spring Street, Room 360
Los Angeles, California 90012

Attention: Sharon Dickinson

Office of the City Clerk, Legislative Assistant

**Re: Citywide Sign Ordinance (CPC-2015-3059-CA)
(Council File 11-17051)**

Dear Chair Huizar and Honorable Councilmembers:

My name is J. Keith Stephens, and I am president of Virtual Media Group, Inc. (VMG). I am a long time resident of Los Angeles and have worked in the outdoor advertising business for more than 34 years as an employee and an owner-operator. With all due respect, I am writing to bring to your attention a perspective which seems to have been all but ignored in your considerations in drafting the new proposed Sign Ordinance, that of small, independent companies trying to engage in fair competition and the many thousands of property owners throughout the jurisdiction who have leases with the two or three giant media conglomerates who now control at least ninety (90%) percent of the Los Angeles market. It is understandable that major players in the multibillion dollar advertising industry, who employ endless lobbyists and lawyers, will tend to speak with the loudest voices and try to shape City policy to further their interests. Unfortunately, they are about to do so at the expense of local businesses and property owners who will be deprived of all fair market value of their leases. Therefore, I write to bring to your attention another perspective and raise issues which I believe may have escaped the good faith effort by PLUM to deal equitably with the City's signage concerns.

Los Angeles is one of the two largest media markets in the United States. However, the overwhelming majority of all outdoor advertising signs in the City are controlled by only a very few national companies, who have no doubt helped shape the new proposed Sign Ordinance to serve their interests. Without meaning too, I believe that the proposed Sign Ordinance will, with the stroke of a pen, increase grossly the disproportionate bargaining power of these few companies in relation to the thousands of individual property owners who lease their land for the operation of such signs and in regard to small independents such as VMG who are denied a level playing field.¹ Furthermore, the proposed Sign Ordinance will not only give an undue advantage to the giant sign companies in negotiating their leases, but will drastically reduce the value of the thousands of parcels of real property where the signs are presently located without compensation and without even providing effective notice.²

The City's own Periodic Offsite Sign Inspection Report from 2014 shows approximately 8,500 signs (billboards and supergraphics) currently operating in the City. The vast majority of these signs no doubt received permits and began operation when their construction was lawful and have been transformed by the sign ban adopted by the City in 2002 into legal, nonconforming uses. It is unlikely that when the leases under which these signs were first constructed went into operation that either contracting party envisioned a circumstance where the signs could not be rebuilt if the sign company attempted to remove the fixture. Under the current new sign ban, the removal of any of these signs would constitute the

¹ This entire process of favoring a few wealthy and powerful companies to the detriment of the average citizen and the small, local advertising companies brings to mind the settlement agreement between the City and Clear Channel and CBS Outdoor. That agreement was later ruled to be illegal in the case brought by another small, independent advertising company in *Summit Media v. City of Los Angeles* (2012) 211 Cal.App.4th 921. The undersigned believes that the proposed Sign Ordinance in its current form will likewise be held unconstitutional for the reasons described herein and result in a flood of new litigation.

² Ironically, the "cap and replace" principle embodied in the proposed Sign Ordinance is nothing new. It is very similar to the plan promoted in 2002 by Ken Spiker and Associates, Inc., again on behalf of a few giant billboard companies and soundly rejected by the then City Council.

tort of waste and drastically reduce the value of the underlying real property by forever cutting off the income stream from the signs. However, the sign companies and the property owners can currently bargain lease renewals from positions of relative strength. The result of a failure to arrive at a mutually agreeable lease renewal would result in the potential loss of an asset to both sides. The existence of small, independent advertising companies also helps maintain some degree of competition and keeps pressure on the much larger national companies to treat their lessors fairly. The proposed new sign ordinance completely changes that equation wholly in favor of the giant sign companies.

If this matter goes to court, as it almost certainly will, I believe the City may have difficulty explaining why, if it truly seeks to reduce the number of offsite signs, it has been so highly selective as to which of the signs built in violation of the ban have been subject to enforcement action. Similarly, issues will arise as to how the City is currently characterizing as onsite many signs (*e.g.*, those at the Staples Center) which the average citizen would no doubt view as offsite. To allow only certain wealthy developers to advertise as onsite products and services which are clearly not available on that parcel seems an obvious unequal enforcement of the law. Furthermore, it calls into question the City's true motives and whether the means it has chosen to further its goals are sufficiently related and effective to pass constitutional review.

Under the Fifth Amendment to the U.S. Constitution, the City would have been required to pay compensation if it had compelled the actual removal of these thousands of signs. However, it is within its rights to ban new signs while allowing the continued operation of existing signs without paying compensation. In *Jones v. Los Angeles*, (1930) 211 Cal. 304, the California Supreme Court long ago explained that respecting the value of legally-established, non-conforming uses is the norm and consistent with the constitutional protection of property rights:

As a matter of practice, also, those who have drafted ordinances have usually proceeded with due regard for valuable, vested property interests, and have permitted existing, nonconforming uses to remain. They are very generally agreed

that the destruction of an existing nonconforming use would be a dangerous innovation of doubtful constitutionality, and that a retroactive provision might jeopardize the entire ordinance. "Zoning . . . holds that an ounce of prevention is worth a pound of cure and that it is fairer to all concerned to prevent the establishment in residence districts of objectionable businesses than to drive them out once they were established. Zoning looks to the future, not the past, and it is customary to allow buildings and businesses already in the district to remain, although of a class which cannot be established. [Emphasis added.]

The situation confronting PLUM is not unique to outdoor advertising. It is frequently the case that the government seeks to take private property through eminent domain where more than one individual's property rights are affected. For example, where the government acquires property which is subject to one or more leaseholds such as would be the case with a large commercial building or strip mall. While the property owner would be entitled to fair compensation under the Fifth Amendment and California takings law, so would each of the tenants. One could not imagine a situation where tenants, who have a financial interest in continuing their businesses, would have their property rights stripped away without any recompense. In California, the principles of how the government is required to split compensation in cases of divided property interests is described in *Civil Code*, § 1260.220:

Divided interests in property; Determination of rights of each defendant

(a) Except as provided in subdivision (b), where there are divided interests in property acquired by eminent domain, the value of each interest and the injury, if any, to the remainder of such interest shall be separately assessed and compensation awarded therefor.

(b) The plaintiff may require that the amount of compensation be first determined as between plaintiff and all defendants claiming an interest in the property. Thereafter, in the same proceeding, **the trier of fact shall determine the respective rights of the defendants in and to the amount of compensation awarded and shall apportion the award accordingly.** Nothing in this subdivision limits the right of a defendant to present during the first stage of the proceeding evidence of the value of, or injury to, the property or the defendant's interest in the property; and the right of a defendant to present evidence during the second stage of the proceeding is not affected by the failure to exercise the right to present evidence during the first stage of the proceeding.

Of course, Los Angeles is not instituting thousands of eminent domain proceedings to compensate property owners for the value they are stripping away from their land and gifting to a few giant sign companies. However, where the government adopts zoning regulation that significantly limit the use of real property without initiating eminent domain proceedings, a legal action for inverse condemnation will generally lie. The proposed Sign Ordinance will compensate the advertising companies removing their signs with new signs at more profitable locations. However, it will take assets away from thousands of property owners and give them nothing in return. The fact that the City already routinely allows sign companies to obtain demolition permits without proof of consent by the property owner shows how much the system favors the sign companies. The proposed Sign Ordinance will just make an inequitable system that much worse.

State law is consistent with the principles described above and provides for compensation to be **paid to both** the sign operator and the property owner when a sign is removed. The State Outdoor Advertising Act can be found in *Business & Professions Code* §§ 5300, *et. seq.* Compliance with both the Fifth Amendment takings clause and California eminent domain law is embodied in in § 5412 of the Act which provides:

Displays; **removal or limitation of use; compensation**; application of section; relocation

Notwithstanding any other provision of this chapter, **no advertising display which was lawfully erected anywhere within this state shall be compelled to be removed**, nor shall its customary maintenance or use be limited, whether or not the removal or limitation is **pursuant to** or because of this chapter or **any other law, ordinance, or regulation of any governmental entity, without payment of compensation**, as defined in the Eminent Domain Law (Title 7 (commencing with Section 1230.010) of Part 3 of the *Code of Civil Procedure*), except as provided in Sections 5412.1, 5412.2, and 5412.3. **The compensation shall be paid to the owner or owners of the advertising display and the owner or owners of the land** upon which the display is located. [Emphasis added.]

It is also a fundamental tenant of Due Process that meaningful notice be provided to individuals whose interests may be affected by government action.³ In this case, the City has not provided any meaningful notice to the thousands of property owners who will lose their income from the signs existing on their properties while the rights of a few giant companies will be greatly increased. The lack on notice is evidenced by the nearly complete silence from these property owners and their absence from meetings of PLUM and the City Council. It is beyond doubt that if theses thousands of people realized that PLUM was considering with one legislative act cutting off their rental income stream, interfering with their contracts and forever diminishing the values of these thousands of pieces of real estate, PLUM meetings would certainly be livelier and

³ The Fifth and Fourteenth Amendments to the United States Constitution provide that before an individual can be deprived of “life, liberty or property,” he must receive Due Process, the most fundamental aspect of which is notice. *Federal Communications Commission v. Fox Television Stations, Inc.*, (2012) 132 S. CT. 2307; *Fuentes v. Shevin*, (1972) 407 U.S. 67, 92 S. Ct. 1983.

better attended. At a minimum, the actions of PLUM will work a tremendous injustice and at worst form the foundation of a massive class action lawsuit.⁴

Competition tends to keep market forces efficient and fair. However, by adopting a reduction program which would allow only those handful of sign companies controlling virtually the entire Los Angeles market to move signs to more advantageous locations, thousands of property owners will be in a position of either losing all value outright or being forced to negotiate lease renewals on whatever terms the sign companies desire. Property owners will be unable to consider better rates offered by smaller, independent companies such as VMG. Instead, the City will have created a legislative monopoly.

Finally, it will be unfortunate if the City misses this opportunity to move to what would be a nearly unassailable, content neutral set of time, place and manner restrictions which would not govern signs based on content but focus solely on legitimate factors such as size, height, spacing and zoning. The amount of time and money expended by the City on sign litigation over the last 20 years is immense. While the City may feel confident in continuing to distinguish between on-site and off-site signs and commercial and non-commercial messages, this decision will almost certainly lead to further years of litigation. The City may be comfortable for the moment with this methodology based on its wins in cases such as *Metro Lights, L.L.C. v. City of Los Angeles* (2009) 551 F. 3d 898 and *World Wide Rush, LLC v. City of Los Angeles* (2010) 606 F. 3d 676. However, in only the last few months, a series of cases have been handed down consistent with the continuing evolution of First Amendment rights relating to commercial and non-commercial speech appearing on outdoor signs. Before adopting a set of new laws which will only lead to further litigation, the City should consider the recent

⁴ Giving effective notice now would prevent a huge number of potential damage claims, because the issues could be resolved before sign companies began demolishing structures and “relocating” them. If the City fails to address this problem in advance, it is inviting massive potential liability and endless lawsuits. Clearly, the City knows where the signs are and who owns the properties as it has compiled an inventory. Failure to give notice is unconscionable and a likely illegal act.

decision in *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218 (2015), *Retail Digital Network, LLC v. Applesmith*, No. 13-56069, 2016 U.S. App. LEXIS 140 (9th Cir. Jan. 7, 2016) and *Central Radio Co. v. City of Norfolk*, 2016 U.S. App. LEXIS 1498 (U.S. Jan. 29, 2016).⁵ These cases indicate that laws which do more than merely regulate the physical characteristics of signs will be subjected to strict scrutiny or at heightened scrutiny. They also call into doubt the continuing validity of the decisions in *Metro Lights* and *World Wide Rush*, which subjected the existing Sign Ordinance to the less exacting demands of intermediate scrutiny. This will almost inevitably mean that the current effort will be wasted and the new Sign Ordinance will accomplish nothing but cause new rounds of litigation.

The City should note the case of *Lamar Central Outdoor v. City of Los Angeles*, LASC No. BS142238, in which a Los Angeles Superior Court judge recently held that the City's ban on off-site signs violates the California Constitution. Regardless of how the decision comes out on appeal, the current version of the proposed Sign Ordinance is virtually guaranteed to lead to further lawsuits either now or as case law continues to develop along the path it has been charting since *Metromedia, Inc. v. City of San Diego*, (1981) 453 U.S. 490, initially extended First Amendment protection to billboards more than 35 years ago.

On behalf of my company and the many thousands of property owners whose rights the City is about to destroy, I urge reconsideration. PLUM currently has the opportunity to create an equitable and legally sustainable set of laws. While

⁵ These cases indicate that the Federal Constitution is more demanding where the government seeks to regulate signs in term of their content. However, the City must keep in mind as it seeks to perpetuate in the proposed Sign Ordinance certain content based distinctions that the freedom of expression guarantees of the California Constitution are even more stringent.

Los Angeles City Council
Re: Citywide Sign Ordinance (CPC-2015-3059)
February 24, 2016
Page 9

I do not question the good intentions of PLUM, the debate before the City has been too heavily influenced by a few national media giants and their bankers.⁶ The new proposed Sign Ordinance will not cure the ills the City seeks to address and will cause far more detriment.

Sincerely,



J. Keith Stephens
President

cc: See Attached Service List

⁶This letter does not in any way seek to impugn the good faith of those public servants who seek to revise the current Sign Ordinance. However, cases such as the above-described *Summit Media v. City of Los Angeles, supra*, where the court held that the City's prior attempt to deal with digital billboards by entering into an illegal settlement agreement with CBS Outdoor, Clear Channel, Regency Outdoor and Vista Media tends to undermine public trust. The fact that the City previously sought to allow the construction of 840 illegal digital billboards, combined with the way in which the proposed Sign Ordinance, seems once again designed to serve special interests and hurt the market writ large will do nothing to reassure the public.