



City of Minneapolis

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March 25, 2002

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Council Member Gary Schiff, Chair
Zoning & Planning Committee
Room 307 City Hall
250 South Fifth Street
Minneapolis, MN 55402

Re: Inclusion of Web Addresses on Neighborhood Identification Signs

Dear Council Member Schiff
and Members of the Zoning & Planning Committee:

The Zoning & Planning Committee has before it questions arising from the request of the Loring Business Association (LBA) and Citizen's for a Loring Park Community (CLPC) for permission to install approximately 200 "neighborhood identification signs" on poles in the public right-of-way along streets in the Loring Neighborhood. The proposed design for these signs includes an Internet website address for the LBA. The Committee has asked for an opinion from the City Attorney's Office whether the inclusion of the web address is a form of advertising and, if so, whether such advertising is permissible in the public right-of-way and if it is subject to the off-premise sign regulations of the Zoning Code. In addition, the Committee has raised questions regarding the City's ability to control the contents of the referenced website.

It is my opinion that inclusion of a web address on a sign is a form of advertising. Further, it is my opinion that the proposed signs are off-premise advertising signs that must comply with the City's zoning regulations. The City's authority to allow advertising in the right-of-way is limited and can only be allowed if it serves a public purpose and is authorized by specific legislative authority. The proposed LBA signs do not fall within the type of signs currently authorized to be in the public right-of-way. If the City Council wishes to consider means by which signs like those proposed by LBA may be lawfully placed in the right-of-way, careful consideration must be given not only to the public purpose to be served by the signs, but also to how distinctions between signs that are or are not allowed can be made consistent with the First Amendment.

FACTS

LBA and CLPC are jointly engaged in a "Loring Community Signage Project." The purpose of the project is to design, produce and install unique, high quality metal signs throughout the Loring Park neighborhood identifying and promoting the community to residents, employees, visitors and business patrons. The design of the proposed sign includes the word "Loring" in large letters in the center of the sign, the word "Downtown" in smaller text immediately below, and the web address "www.LoringDowntown.com" along the bottom of the sign. The LoringDowntown.com website is operated by the Loring Business Association as a non-profit enterprise. The website includes a directory of businesses in the Loring area, as well as information about cultural, religious and educational institutions, events, and neighborhood information and history. The LBA has requested permission from the City to have these signs placed on street signs and light poles located in the public right-of-way. The Department of Public Works, upon consultation with the Zoning Office, denied the requested encroachment permits, among other reasons, because the signs were felt to be a form of "off-premise advertising" that would require zoning approval and that, regardless of zoning issues, would not be an authorized use of the City's right-of-way. The LBA appealed the denial of the encroachment permits to the Transportation and Public Works Committee, which referred to the Zoning & Planning Committee the questions of whether the proposed signs should be considered a form of "advertising" and whether they are subject to zoning regulations.

ANALYSIS

Inclusion of a website address on signs is a form of advertising.

The Department of Public Works has granted encroachment permits for placement of what have been referred to as "neighborhood identification signs" on poles in the right-of-way. The metal "Lyn-Lake" sign that is included as an illustration in LBA's informational materials is considered by Public Works to be a form of neighborhood identification, as are signs that carry messages like "Welcome to Kenny Neighborhood." The question is whether the addition of LBA's website address converts what could be considered a neighborhood identification sign into a form of "advertising." It is my opinion that the inclusion of a website address is a form of advertising.

The Zoning Code's definition of an "off-premise advertising sign" as one which "directs attention to a business, establishment, product, service, interest, activity or entertainment not exclusively related to the premises where such sign is located" offers some guidance. See Minneapolis City Ordinance (MCO) §520.160. Unlike a sign that simply tells passersby "where they are," the addition of a website address is clearly intended to "direct the attention" of those passersby to the Internet to get more information about the businesses, services or interests, etc. represented on the website.

The position taken by the Federal Highway Administration (FHWA) prohibiting the inclusion of web addresses on Adopt-A-Highway ("AAH") signs is persuasive. The FHWA "considers the use of any commercial message, including trade logos, slogans, telephone numbers, and Internet addresses, on an Adopt-A-Highway sign to be advertising" and does not allow them. FHWA Policy Memorandum, April 27, 2001. AAH signs are intended to acknowledge the litter pick up services of the identified person or organization, but not to promote that person or organization. Id. Although the FHWA memorandum framed its concerns in terms of "commercial" messages, it's reasoning and effect is not limited to "for profit" organizations. Similarly, Minnesota's AAH Guidelines prohibit the inclusion of any stated or implied message, whether political, social, or advertising, including addresses. Minnesota Department of Transportation AAH Guidelines, November 1998.

The proposed signs would be subject to Zoning Code regulations for "off-premise" advertising signs.

An "off-premise advertising sign" is defined as a "sign which directs attention to a business, establishment, product, service, interest, activity or entertainment not exclusively related to the premises where such sign is located." MCO §520.160. As stated above, the purpose of including a website address is clearly intended to "direct the attention" of passersby to the website and, thereby, to information about the specific businesses, services, entertainment, activities and places of interest in the Loring area. It has been suggested that the LBA signs could be considered "on-premise" signs because they would be located in the neighborhood or "area" served by the LBA.¹ This interpretation is contrary to the apparent and reasonable meaning of the word "premises" for purposes of distinguishing on- and off-premises signs as the property on which the subject business operates, or the "business premises." The proposed signs would be off-premise advertising because they would direct attention to businesses and activities that are not located or conducted on the particular site on which the sign is located.

Off-premise advertising signs are regulated in Chapter 544 of the Zoning Code. Pursuant to that chapter, off-premise advertising signs would have to conform to the following requirements:

- shall be located within at least 1,320 feet of continuous, parallel, commercial zoning fronting along both sides of the road(s) from which the sign is intended to be read,
- shall not be located within 600 feet of any residence or office residence district,
- shall not be located within 300 feet of a parkway or a public park of 3 acres or more;
- shall not be located in a historic district;² and
- shall be 1000 feet from all other off-premises signs or billboards.

¹ An "on-premise sign" is a "sign which directs attention to or promotes a business, establishment or activity conducted, or a product, service, interest or entertainment sold or offered, on the premises where such sign is located." MCO §520.160.

² The current LBA proposal would place signs throughout the newly-designated Harmon Place Historic District.

It appears that most, if not all, of the sign locations proposed by LBA would be prohibited by these zoning regulations.

In contrast, neighborhood identification signs like the "Lyn-Lake" example have not been considered to be subject to the City's zoning regulations. A sign that simply identifies an area of the City would not generally be considered to be "direct[ing] attention to a business, establishment, product, service, interest, activity or entertainment," which are the types of signs regulated by the Zoning Code. Instead, these types of signs have been considered to be substantially similar to "governmental signs," which are defined as "including but not limited to traffic control and other regulatory purpose signs, street signs, informational signs, danger signs and railroad crossing signs," and which are exempt from the zoning regulations. See MCO §543.40(2). Thus, if the signs proposed for the Loring Park area simply contained the words "Loring" and "Downtown," and did not include the web address for "LoringDowntown.com," they could be determined to be the type of "neighborhood identification signs" that are not subject to zoning restrictions.

Control and use of the public streets for advertising.

In addition to the limitations imposed by the City's zoning regulations, the LBA proposal raises important questions about the City's authority to allow use of the right-of-way by private entities for signage and the manner in which that authority can be exercised.

The City's authority to grant privileges to use the right-of-way for advertising limited.

The Minneapolis Charter, Chapter 8, §1, vests in the City Council responsibility for "the care, supervision and control of all highways, streets, alleys, public squares and grounds within the limits of the city" The City derives its authority to control the public streets from the State, and holds this responsibility on behalf of the general public.

It is elementary law that a municipal corporation has no proprietary rights in the streets, levees, or other public grounds within its limits. Whatever rights it has it holds merely in trust for the public. It is equally elementary that all its powers over such public grounds are derived from the legislature. It can exercise no power over them, except such as is given it by the legislature, either expressly or by necessary implication. It is also well settled that a grant of power to a city to grant any privileges or rights in streets or other public grounds is to be strictly construed, and not enlarged by construction; and, if there is a fair or reasonable doubt as to the existence of its power, it will be resolved against the municipality.

City of St. Paul v. Chicago, Mpls. & St. Paul Ry. Co., 65 N.W. 649, 650 (Minn. 1896).

It is a long-standing principle that it is generally improper for the City to authorize use of the public right-of-way for private purposes, absent specific legislative authority. "It is universally held that, in the absence of express legislative authority, a city has no power to grant to a private individual a privilege to use any portion of its streets or sidewalks for a special private purpose." *Smith v. Bus Stops of Greater Miami*, 89 So.2d 221 (Fla. 1956)(citations omitted).

The City Attorney's Office has issued several opinions regarding the authority of the City to allow the placement of commercial advertising in the right-of-way. The question has most often been raised in relation to proposals to place private-interest, commercial advertisements on parking meters or waste receptacles. This Office has consistently advised that such commercial advertising could not be allowed in the public right-of-way absent specific legislative authority.³

This approach is consistent with the manner in which the State regulates use of its right-of-way. Minnesota Statutes §160.27 generally prohibits placement of any advertisement within the limits of any highway, except as specifically provided by that section. Minn. Stat. §160.27, subd. 5(9). Violation of that statute is a misdemeanor. Minn. Stat. §160.27, subd. 5. The specific exceptions provide that cities may allow bus shelters, outdoor telephone booths and bicycle storage facilities to be located in the right-of-way and may allow advertisements to be placed upon them.⁴ This statutory prohibition does not apply to those streets that are within the complete jurisdiction of the City. Minn. Stat. §160.01, subd. 2. It is our understanding, however, that the county or state has jurisdiction over a large portion of the more heavily-traveled streets in the City. The statutory prohibition on advertising would apply on those streets.

Another example of explicit legislative authority for the placement of advertising in the right-of-way is found in Minn. Stat. §160.80 ("Sign Franchise Program"). This statute establishes guidelines under which the Commissioner of Transportation may allow signs on the right-of-way of interstate and controlled-access trunk highways that provide specific information on gas, food, camping, and lodging businesses within a fixed distance from an interchange.

There is also explicit City ordinance authority allowing certain types of "community" promotions in the right-of-way. The ordinances that regulate some of the City's special service districts include a provision allowing the installation of "banners and other decorative items for promotion of the commercial area of the district." See, e.g. MCO §438.20(c)

³ This opinion does not apply to permits that are issued to abutting landowners for on-premise signs that encroach on the right-of-way. Municipalities may regulate such encroachments, but the law recognizes that such private use is not necessarily unlawful or inconsistent with the public purpose of the streets due to the unique interests of abutting owners, who typically own fee title to the center of the adjacent street, subject to the public easement. See *Kooreny v. Dampier-Baird Mortuary*, 291 N.W. 611, 612 (Minn. 1940); *Oscar P. Gustafson Co. v. City of Minneapolis*, 42 N.W.2d 809 (Minn. 1950).

⁴ In accordance with Minn. Stat. §160.27, Minneapolis has granted a franchise for the maintenance of transit shelters in the City that provides for advertising on the shelters. MCO Appendix G, §24.

(Uptown Special Service District).⁵ In addition, MCO Chapter 449 authorizes the placement of temporary banners in the right-of-way for the purpose of providing seasonal decoration and information about convention and community events. MCO §449.10. These ordinances do not specifically address the content allowed on the banners. It is my understanding that websites have been included on some banners or signs in special service districts without approval by the Department of Public Works. The question of whether websites should or may be included on these promotional banners raises additional issues, as described below.

There is no existing statute or ordinance that specifically authorizes use of the right-of-way for advertising messages promoting either neighborhood organizations, business associations or commercial areas in the Loring Park area or in the particular manner (inclusion of web address) proposed by LBA. The question then becomes whether it is within the City's authority for control of the streets to enact ordinances authorizing placement of such signs on the streets.

A court decision from Kansas explored the circumstances in which private advertising use of the right-of-way could serve a public purpose related to a municipality's general authority for supervision and control of the streets. In *Stauber v. City of Elwood*, 594 P.2d 1115 (Kan. Ct. App. 1979), the court held that the city exceeded its police power in permitting a private business firm to erect a sign in the right-of-way that advertised the business, and gave directions to both its business location and to the city business district. The court recognized the rule that a city generally may not allow private individuals to post advertisements on city streets. *Id.* at 1118. However, the court also noted that exceptions existed and held that a city may authorize the use of the public right-of way for private purposes where there is "a clear showing that the primary use of the right-of-way will benefit the public and any private use [is] incidental to the public purpose." *Id.* at 1119. In the matter before it, the court ruled that the public purpose served by including directions to the city's business district did not overcome the primary purpose of the signs, which was "to benefit private advertisers and not the public who use the roadway in the vicinity of the signs." *Id.*

A public purpose would have to be identified for allowing website addresses on signs or banners in the right-of-way. It has been argued that the signs proposed by LBA are intended to serve the public interest by promoting the vitality of the Loring community and commercial area "as a whole," not for the benefit of any single business. The authorization by the Minnesota Legislature for the use of banners and other decorative items for "promotion of the commercial area" in some special services districts suggests that there is a public purpose in

⁵ Some, but not all, of the area in which LBA proposes to install its signs is included in the Downtown Special Service District ("DSSD"). See MCO §442.10. However, the legislative purpose of the DSSD is narrower than that for the City's other special service districts. The purpose of the DSSD is to provide part of the capital cost of constructing a new pedestrian mall in the area of Nicollet Avenue. MCO §442.10 – §442.20. The services authorized to be performed relate to installation and care of landscaping and similar decorative material, information and signs relating to parking and vehicle and pedestrian movement on the streets and skyways, and design of the pedestrian mall, but do not include installation of banners or signs for promotion of the commercial area. See MCO §442.20.

allowing at least generic advertisement of commercial activity in an area, e.g. banners that say "Eat Street" or "Lyn-Lake." It could be argued that the inclusion of a web address for a recognized neighborhood or business association on signs or banners identifying residential and/or commercial areas outside of those special service districts serves a similar public purpose. Should the City Council direct staff to draft an ordinance to expand the types of "community signage" that is permissible in the right-of-way, these and other questions relating to the public vs. private purpose of the signs must be carefully considered.⁶

First Amendment concerns related to access to public property for speech purposes.

Another difficulty in creating and administering ordinances that allow private use of public fixtures or other placement of signage in the right-of-way relates to the question of which organizations will be allowed to promote themselves on signs in the right-of-way. When government property is used by the public for "speech" purposes, the First Amendment is implicated. A thorough discussion of the constitutional limitations on how the City can allow or regulate the use of public property for speech is beyond the scope of this memorandum. Generally stated, however, any distinctions that the City would make regarding which private entities are or are not allowed to place signs in the right-of-way must be reasonable and viewpoint-neutral. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 103 S. Ct. 948, 955 (1983).

It is possible that a reasonable, viewpoint-neutral distinction about which neighborhood organizations may place promotional signs in the right-of-way can be made based on the City's existing process for identifying official "neighborhood groups" for purposes of the Neighborhood Revitalization Program. However, I am aware of no sanctioned processes for identifying "official" neighborhood or area business associations. Businesses may associate based on geographical location, but may also associate based on type of commercial activity (e.g. restaurants, bars, adult entertainment, auto service uses, rental property owners). It is conceivable that multiple business associations or individual businesses could apply to place promotional signage in the same areas of the City. Distinctions between who is or is not eligible for a permit must be based on established, viewpoint-neutral standards. This task is likely to be difficult due to the tendency to impermissibly value the speech of some individuals or groups over others.

If a decision is made to permit this type of advertising, standards should also be adopted to guide the City in determining what information may be included on the signs, including whether web addresses or individual sponsor names are permissible. However, if the door is opened to allow use of web addresses, it could be difficult to place limitations that would pass constitutional muster on what websites may be referenced. Concern has also been expressed regarding the potential for a web address on a sign to be "taken over" by an entity

⁶ Additional matters that may need to be addressed include the appropriate size, spacing and number of signs that will be allowed. Too many signs, or signs that are too big, could clutter the streets and interfere with the public's use of the streets for their intended purpose.

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other than the one for which the use of the right-of-way was approved or for the website to be shut down while the signs remain. While some administrative mechanism could be created to monitor the status of web addresses, any such requirement will carry with it additional administrative burdens. To the extent that people are also concerned about the content or the web links included on the advertised website, any meaningful attempt by the City to exercise control over those aspects could be difficult achieve in light of the constitutional limits on the ability of a government agency to regulate speech.

CONCLUSION

As proposed, the LBA signs constitute off-premise advertising that is not currently allowed by the City's zoning regulations and that is not currently authorized in the right-of-way. If the City Council believes that the LBA signs or similar signs promoting neighborhood and commercial areas throughout the City serve a public purpose that is consistent with the City's responsibility for control and supervision of the streets, it should direct staff to draft ordinances that authorize and regulate the signs in a manner that is consistent with the City's zoning and heritage preservation regulations and with the First Amendment.

Very truly yours,

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by



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Approved

c: Dennis Morris, Public Works
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