



# CPED STAFF REPORT

Prepared for the Board of Adjustment

BOA Agenda Item #4  
 May 15, 2014  
 BZZ-6529

## LAND USE APPLICATION SUMMARY

*Property Location:* 701 Hennepin Ave  
*Prepared By:* [Joseph.Giant@minneapolismn.gov](mailto:Joseph.Giant@minneapolismn.gov), City Planner, (612) 673-3489  
*Applicant:* Pearl Media, LLC  
*Project Contact:* Josh Cohen  
*Required Applications:*

<b>Appeal of Zoning Administrator</b>	<ul style="list-style-type: none"> <li>Appeal of a decision of the Zoning Administrator that the signage in the windows at 701 Hennepin Ave constitutes unpermitted off-premise advertising.</li> </ul>
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## SITE DATA

<b>Existing Zoning</b>	B4-2 Downtown Business District DP Downtown Parking Overlay District
<b>Lot Area</b>	7,500 Square Feet / .17 Acres
<b>Ward(s)</b>	7
<b>Neighborhood(s)</b>	Downtown West
<b>Designated Future Land Use</b>	Commercial
<b>Land Use Features</b>	Commercial Corridor, Activity Center
<b>Small Area Plan(s)</b>	NA

## BACKGROUND

**REASON FOR APPEAL.** The Appellant, Pearl Media, LLC, contests a decision of the Zoning Administrator that the stickers in the first-floor windows of the building at 701 Hennepin Ave are unpermitted off-premise advertising and must be removed.

**BACKGROUND.** On March 21, 2014, a Zoning Enforcement Complaint was issued at 701 Hennepin Ave stating that the stickers in the windows of the property were in violation of the Minneapolis Code of Ordinances and must be removed. The stickers are located in the windows of an empty storefront (formerly Chevy's) on the southeast corner of Hennepin Ave and 7th St in downtown Minneapolis. The stickers contain advertisements for Milk and occupy the entirety of the storefront windows as well as the transom on both the Hennepin Ave and 7th St frontages. Photos of the advertising can be seen in Appendix A. The City of Minneapolis asserts that the stickers are off-premise advertising and do not comply with the provisions of the Code regulating that type of signage.

<b>Date Application Deemed Complete</b>	April 22, 2014	<b>Date Extension Letter Sent</b>	NA
<b>End of 60-Day Decision Period</b>	June 22, 2014	<b>End of 120-Day Decision Period</b>	NA

The appellant asserts that the stickers in the windows should be regarded as temporary signage and that they were placed “in conjunction with a potential pop-up store<sup>1</sup>” to be located at the subject address in the future. They refute the claims of noncompliance on the grounds that the zoning code does not contain any provisions pertaining specifically to pop-up stores or pop-up store signage.

In addition to this claim, the appellant alleges that the forced removal of the signs constitutes a violation of their First Amendment rights. They indirectly reference a Supreme Court decision tying freedom of speech to commercial information stating, “The First Amendment applies to advertising because of the importance of commercial information to consumers and the overall marketplace.”

**PUBLIC COMMENTS.** Any additional correspondence received prior to the public meeting will be forwarded on to the Board of Adjustment for consideration.

## ANALYSIS

### Appeal of Decision of Zoning Administrator

In accordance with Chapter 525, Article IV Appeals, Section 525.170(1) “Appeals of decisions of the zoning administrator,” the Department of Community Planning and Economic Development has analyzed the application for variance based on the following findings:

#### **Response to appeal of off-premise advertising:**

The Minneapolis Code of Ordinances divides signage into two primary categories: On-Premise Signs (Chapter 543) and Off-Premise Signs (Chapter 544). The unifying characteristic among all types of on-premise signage is that, unless specifically referenced in Chapter 543.40, all on-premises signage must “*direct attention to or promote a business, establishment or activity conducted, or a product, service, interest or entertainment sold or offered, on the premises where such sign is located*” (520.160). In contrast, off-premise signs contain subject matter “*not exclusively related to the premises where such sign is located*” (520.160). Thus, if a sign contains information about a business, activity, service, or product that is not exclusively tied to the location of the sign, it is, by definition, considered off-premises advertising.

The signs in the windows of 701 Hennepin Ave advertise a product that is not sold on the premises and has no connection to the premises. Therefore, by definition, the advertisements are off-premises advertising and should be regulated as such.

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<sup>1</sup> A pop-up store is a temporary store located in an existing space that “pops up” one day and then leaves shortly thereafter. Although pop-up stores are often associated with Halloween or holiday stores, the concept has spread to a wide variety of store types.

In order for a new off-premise sign to be erected it must meet the requirements of Chapter 544 of the Minneapolis Code of Ordinances. The signage at 701 Hennepin does not comply with several of these provisions. Most notably, according to 544.60(c), in order to construct a new billboard the applicant must remove nonconforming billboards from “qualifying locations”<sup>2</sup> whose advertising area is equal to twice the area of the sign to be erected. For example, to construct a new 500 square foot billboard downtown, the applicant must remove 1,000 square feet of nonconforming billboard surface area from other locations in the city.

In addition, the signs do not meet the required spacing from other off-premise signs. According to Table 544-2, downtown billboards must be at least 1,000 feet from other billboards on the same side of the roadway. There are several billboards across Hennepin Ave on the same side of the roadway from the subject site that are closer than 1,000 feet.

The advertisements in the windows of 701 Hennepin Ave are clearly off-premises advertising and are clearly in violation of the ordinance provisions governing this type of signage. Regardless of whether or not a location is an appropriate place for off-premise advertising, it is extremely important for the City to have the ability to regulate this type of signage. The regulations were put in place to “minimize that blighting effects caused by off-premise advertising (544.10).” Condoning blatant violations of the ordinance could establish the precedent that some unpermitted billboards are acceptable. This would substantially prevent the City from pursuing its legally established goals relating to off-premise advertising.

### **Response to claim of “temporary signage”**

The appellant claims that the signs should be regulated as “temporary” because of their limited 60-day duration. The City of Minneapolis categorizes “temporary signage” as a specific type of *on-premises* sign and has specific regulations for it. Paramount among those regulations is that temporary signage is limited to on-premise signage; there exists no category for temporary off-premises signage. The signage at the subject property is off-premises advertising so it cannot be considered temporary signage.

Interpreting the ordinance to allow temporary off-premises signage would be in direct conflict with the City’s stated goals pertaining to on and off-premise signage. A stated goal of the City is to “*minimize the visual blighting effects caused by off-premise advertising signs and billboards by regulating their location, size, height and spacing; to encourage the removal of signs and billboards that do not conform to the regulations of [Chapter 544]; and to protect the public health, safety and welfare*” (544.10). Allowing temporary off-premises signs to circumvent the ordinance because of their ephemeral nature would render this goal untenable.

The blighting effects caused by off-premises advertising are borne primarily by the properties closest to the advertising rather than the entity responsible for it. Because the negative effects are felt elsewhere,

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<sup>2</sup> “Qualifying locations” are described in Chapter 544.80. Generally, qualifying locations are areas outside of downtown or further than 660 feet from an Interstate highway.

there exists little incentive for a sign owner to remove or maintain an off-premises sign after the temporary period has elapsed. The only recourse that effected parties may have is through the City, so it is important that the City regulate the placement of off-premises signage. A system that held temporary off-premises signage to more permissive standards than permanent off-premise signage would lead to a preponderance of billboards in marginalized locations, and could eventually lead to a landscape of unpermitted or expired billboards. This is in direct contrast with the goals of the ordinance.

The claim that the signage at 701 Hennepin Ave is temporary cannot be honored because temporary signs are limited to on-premise signs. As explained above, it is essential that the scope of temporary signs not be expanded to cover off-premise advertising.

### **Response to claim of “Pop-Up Store” location**

The appellant contends that the advertisements are not off-premise advertising because they were placed in a potential location for a pop-up store. It is understandable and common that a business seek to advertise a new location before opening. However, it is clear from the statement supplied by the appellant as well as records maintained by the City of Minneapolis that the use of the location as a pop-up store was far from certain. The appellant states that the ads were placed “in conjunction with a *potential* pop-up store,” and that the client is “*evaluating* the location” (emphasis added). Neither statement provides any certainty that a business *exclusively related to the advertisement* will ever operate at the subject location. The client may be “evaluating” a handful of storefront locations, and if discussions internal to the company are sufficient to permit rights to signage then it follows that this company could put up signs at other locations it might be considering as well.

The appellant makes no mention of a lease for retail space at the subject property and the City of Minneapolis has no permitting or business licensing data that would suggest that a business is planning to move into the space. In fact, the last permit pulled at the subject address that was not an annual Fire Department protection permit was pulled in 2010. On the date of the violation it was clear that the appellant’s interest in the space for use as a pop-up store was purely speculative.

### **Response to lack of Pop-Up Store language in Zoning Code**

The appellant contests that pop-up store signage is not regulated by the zoning code so any signage relating to the business is permitted *de facto*. Setting aside the fact that no pop-up store is actually located at the subject address, this claim is still baseless. The Code of Ordinances contains commonly used mechanisms to regulate types of businesses that are not explicitly referenced. According to 525.80 of the zoning code, uses not explicitly listed in the use tables contained within each zoning district are prohibited unless the Zoning Administrator deems them substantially similar to an existing use.<sup>3</sup> The

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<sup>3</sup> 525.80. - Whenever an application contains a use not included in the zoning ordinance, the zoning administrator shall issue a statement of clarification, finding that the use either is substantially similar in character and impact to a use regulated herein or that the use is not sufficiently similar to any other use regulated in the zoning ordinance. Such statement of clarification shall include the findings that led to such conclusion and shall be filed in the office of

appellant claims that pop-up stores are exempt from the regulations of the code because their use is not listed. In reality, uses not considered substantially similar to an existing use are explicitly **prohibited** according to 525.80. In the past, retail-oriented pop-up stores have been deemed substantially similar to General Retail Sales and Service. Therefore, they are permitted and held to the same standards as any other General Retail Sales and Service establishment. Therefore, if a pop-up store were to locate at 701 Hennepin Ave they would be required to abide by the sign regulations pertaining to General Retail Sales and Service.

### **Response to violation of First Amendment**

There is extensive precedent in the United States court system that the regulation of off-premise advertising is not a violation of the First Amendment. The leading case is *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) where the Court determined that a municipality could completely ban billboards for reasons of aesthetics and traffic safety. That ruling furthered a determination made in *Berman v. Parker*, 348 U.S. 26, 33 (1954) which established that regulating community appearance was a legitimate government purpose.

In addition to these cases, the Minneapolis ordinance pertaining to off-premise advertising and free speech has been consistently upheld.

The leading case of the opposing view is *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) which held “Commercial speech is not wholly outside the protection of the First and Fourteenth Amendments” and “that the advertiser's interest in a commercial advertisement is purely economic does not disqualify him from protection.” The rationale for this judgment was that banning the advertising regulated the free flow of information. This ruling reversed the Court’s previous stance by stating that commercial advertising was important to consumer decision-making.

The Supreme Court established a four-prong test to determine whether instances of governmental regulation of commercial speech are constitutional in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Each prong of this test is applied to the current appeal.

- 1) *Is there a "substantial interest" government interest achieved through an ordinance pertaining to off-premises advertising?*

The stated goal of Chapter 544 - Off-Premise Advertising is to “minimize the visual blighting effects caused by off-premise advertising signs and billboards by regulating their location, size, height and spacing; to encourage the removal of signs and billboards that do not conform to the regulations of [Chapter 544]; and to protect the public health, safety and welfare (544.10).” Regulating the location of billboards to accomplish these objectives constitutes a substantial government interest.

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the zoning administrator. If said use is not sufficiently similar to any other use regulated in the zoning ordinance, the use shall be prohibited.

2) *Is the regulation in proportion to that government interest?*

As stated above, the purpose of the regulation is to “*minimize the blighting effect caused by off-premise advertising... (544.10).*” Put another way, billboards should be located in places where the blighting effect is minimal. By balancing the blighting effects that can be caused by unregulated off-premises advertising with the right of advertisers to commercial free speech, the City attempts to promote the general welfare by ensuring that billboards are placed in locations that satisfy both objectives.

3) *Does the regulation directly advance the City’s interest?*

Regulating the location of off-premises advertising directly advances the stated goal of the ordinance. Over the past 20 years, billboard advertisers have responded to the provisions of Chapter 544 of the Minneapolis Code of Ordinances by removing nonconforming billboards from residential and neighborhood commercial nodes and replacing them with billboards along heavily trafficked highways or in locations where the blighting effect is minimal. Advertising companies were not forced to remove billboard advertising; they chose to do so because it aligned with their goals of increased exposure and less upkeep. The ordinance provisions have been upheld repeatedly in the court system and have resulted in the removal of 340 nonconforming billboards over the past 20 years.

The appellant states that forcing the removal of the billboard at 701 Hennepin Ave is a violation of the First Amendment. However, history clearly shows that the ordinance provisions relating to off-premise advertising have been used by the billboard industry to operate successfully within Minneapolis. Claiming that free speech has been violated is incongruous with the past application of the ordinance. It is clear that the regulation of off-premise advertising is an effective means of directly advancing the City’s interest.

4) *Is the regulation the most limited means available to achieving the City’s interest?*

Regulations governing advertising, to a large extent, regulation must be “content neutral,” meaning that the regulation must not be based solely on content. The present case does not involve the regulation of content but merely the regulation of location. *Metromedia* established the rule that the government may not favor commercial speech over noncommercial speech and the government may not favor particular types of noncommercial speech over other types of noncommercial speech. The right to free speech was not suppressed in this instance because the regulations the City uses to govern off-premises advertising are content neutral. That is to say, they do not regulate the content of the advertising. The ‘Milk’ advertisement contained on the subject signs was not held to a different standard because of its content.

There are currently about 375 legally established off-premise signs within the borders of Minneapolis where the appellant could advertise. In fact, the appellant has actually placed the same ads as the ones in question on many billboards throughout the city.

In addition to off-premise advertising, the appellant could potentially advertise the product on-premises at any location where the product is sold, subject to compliance with applicable sign regulations of the district in which the signs would be located. The potential number of locations to sell bottled beverages is quite numerous, so it cannot be reasonably stated that the City is limiting the right to commercial free speech because it does not allow the company to advertise wherever it wishes.

## CONCLUSION

In addition to the billboards at the subject site, off-premise advertising identical to the billboards at the subject location has been painted on a brick wall on the corner of Lake St and Lyndale Ave S. A restaurant that does not sell the advertised product currently occupies this location.

It is clear that the advertising in question refers solely to a product that is sold off-premises. It is clear that no formalized efforts have been made to create a venue at the subject location where the products could be sold. Finally, it is clear that no infringement of First Amendment rights have occurred because the same advertisements are currently visible throughout the city.

The Department of Community Planning and Economic Development recommends that the Board of Adjustment uphold the decision of the Zoning Administrator that the signage in the windows of 701 Hennepin Ave is unpermitted off-premise advertising and **deny** the appeal.

## ATTACHMENTS

1. Zoning Map
2. Appellant Statement of Reason for Appeal
3. Property Owner Authorization
4. Photos of Subject Site