Google Groups

CF 11-1705 – Letter on Behalf of Clear Channel Outdoor, LLC

Roopika.Subramanian@lw.com <Roopika.Subramanian@lw.com> Aug 12, 2019 12:56 PM
Posted in group: **Clerk-PLUM-Committee**

Good afternoon,

Attached please find a letter on behalf of Clear Channel Outdoor, LLC regarding the City's Draft Sign Regulations update (Council File 11-1705).

Please let me know if you have any problems opening the document.

Best regards,

Roopika

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August 12, 2019

Honorable Marqueece Harris-Dawson, Chair
Honorable Bob Blumenfield
Honorable Curren D. Price, Jr.
Honorable Gilbert A. Cedillo
Honorable Greig Smith
Planning and Land Use Management Committee
City of Los Angeles
200 N. Spring Street, Room 430
Los Angeles, CA 90012

Dear Honorable Chair Harris-Dawson and Honorable Committee Members:

On behalf of our client, Clear Channel Outdoor, LLC, we appreciate this Committee's ongoing efforts to create meaningful opportunities for the removal of existing off-site signage and provision of public benefits to local communities. Bringing the City's Sign Code into alliance with dozens of other cities across California will allow the City of Los Angeles and its residents to see the benefits of a modern, forward looking ordinance – one that protects residents while modernizing the City's signage infrastructure.

Dozens of California cities have relied on relocation agreements to encourage the outdoor sign industry to remove many hundreds of signs. These cities have exercised legislative discretion and entered into agreements tailored to the individual circumstances of each application. The City should do the same.

During the last decade and more of debates over how best to realize the City's desire to reduce the number of billboards, past statements from the Department of City Planning and the City Attorney's Office have recognized the value of relocation agreements. During this decade, however, the community has not received takedowns or public benefits, though many other California cities have moved forward with implementation in their own cities, as authorized under section 5412 of California's Outdoor Advertising Act. We respectfully disagree with the conclusion of the May 2019 staff report that identifies relocation agreements approved by dozens of California cities but then recommends against use of that state law authority for Los Angeles.

As demonstrated by the examples cited in the staff report, the relocation agreement tool can be used with flexibility by local government. It is not limited to eminent domain and gives discretion to cities for individual agreements under individual circumstances. Section 5412 of California's Outdoor Advertising Act states in relevant part:

> Cities, counties, cities and counties, and all other local entities are ***specifically empowered to enter into relocation agreements on whatever terms are agreeable to the display owner and the city***, county, city and county, or other local entity, ***and to adopt ordinances or resolutions providing for relocation of displays***.

Like many other city councils in other cities, this Council has the opportunity to utilize this state law authority to generate takedowns and public benefits through relocation agreements.

The Department of City Planning has already drafted revisions to the Sign Code which establish many neighborhood protection restrictions and conditions for any proposed exercise of such agreements. We respectfully request that this Committee move the draft forward and refer it to the Planning Commission for review, recognizing that the ordinance will return to the Council before final adoption.

A. Relocation Agreements Can Be Used Without Eminent Domain

Contrary to the statements in the May 22, 2019 staff report, relocation agreements under section 5412 are not limited to situations where sign owners "are mandated to remove an existing display for a public purpose, such as widening a highway." (Staff Report, at p. 9.)

1. *The Staff Report's List of Relocation Agreements Demonstrates Eminent Domain Is Not Required.*

Relocation agreements under section 5412 can be and are used by municipalities across the state where there is no taking of signs. The vast majority of relocation agreements of which we are aware ***do not involve takings for public purposes.***

The Staff Report lists a number of examples of relocation agreements, but states that these agreements are not publicly available for review. (Staff Report, at pp. 5-8.) This is not correct. Relocation agreements are public documents. The vast majority of the agreements listed are readily available on the municipalities' websites and we have independently reviewed them.

Attached at Exhibit A is a table summarizing over 25 relocation agreements entered into under state and local laws from all over California, many of which are listed in the Staff Report. This information was previously provided to City staff, though it is not reflected in the current report. As shown in the attached, the great majority of the agreements do not involve instances where the municipality proposed to take the existing sign for a public purpose.

For example, the City of Berkeley entered into a relocation agreement with CBS Outdoor Inc., in 2007 to remove six existing billboards to enhance the city's appearance and quality of life for its residents. In return, the City granted CBS Outdoor Inc. the right to install a digital display along one of the City's freeways. ***There was no eminent domain.***

The City of Rocklin entered into two relocation agreements with Clear Channel Outdoor, Inc., in 2012, to remove three existing billboards in return for Clear Channel's ability to install

two digital freeway signs and financial payments from Clear Channel to Rocklin. ***There was no eminent domain.***

The City of Fontana entered into a relocation agreement with Lamar Central Outdoor, in 2013, to remove nine existing signs in exchange for the right to install three double-sided digital signs. Lamar also committed to provide space on the digital signs for nonprofit services and emergency messaging. ***There was no eminent domain.***

The City of Corona entered into a relocation agreement with Empire Outdoor Advertising, LLC, in 2012 to remove two existing signs, in exchange for the right to install a new double-sided digital sign. Corona also received the right to display public service announcements on the new digital sign. ***There was no eminent domain.***

These relocation agreements, together with the examples set forth in Exhibit A, demonstrate that relocation agreements are not limited to instances of eminent domain. Numerous jurisdictions in California have utilized the authority under Section 5412 to adopt voluntary relocation agreements. We respectfully submit that the City should do the same.

2. *The Courts, California's Office of Legislative Counsel, and Section 5412's Legislative History Confirm Eminent Domain Is Not Required for Relocation Agreements Under Section 5412.*

It is not surprising that dozens of cities have used relocation agreements under section 5412 to remove billboards and improve their communities without eminent domain because eminent domain is not required under section 5412. In other words, there is absolutely no question that the path the City is on is the right one.

a. The Courts Have Upheld Relocation Agreements

We are aware of no judicial decision setting aside a relocation agreement. In fact, the only two judicial decisions addressing relocation agreements of which we are aware upheld the local government's approval of such agreements. Neither involved eminent domain.

In *City of Corona v. AMG Outdoor Advertising* (2016) 244 Cal.App.4th 291, the Court of Appeal affirmed the use of relocation agreements in a jurisdiction in which off-site signs are generally prohibited. (See Exhibit B.) Where another sign owner challenged the City's decision to approve the Empire signage while denying the challenger's proposal, the courts upheld the City's denial in a published decision; in fact the Los Angeles City Attorney's office requested that the decision be published. (See Exhibit C.) Eminent domain was not involved.

In upholding Corona's approvals of the relocated signs while denying the other application, the Court of Appeal held that Corona's ordinance did not violate federal or state constitutional free speech protections, because the "new" signs in the city had been relocated pursuant to section 5412. Therefore, the signs were not considered to be "new" signs erected in violation Corona's general sign ban.

In explaining the opinion's importance and requesting publication, the Los Angeles City Attorney's Office wrote that the decision's publication was important because the decision "adds certainty in the area of billboard regulation." The City Attorney's Office further explained to the Court that "[t]he City also exempts from its off-site sign ban those signs that are...erected pursuant to a relocation agreement approved by the City Council." Thus, the City Attorney also recognized that the City's current Sign Code allows relocation agreements. There is no reference in the City's current Sign Code to using relocation agreements only where the City is exercising its eminent domain authority.

In the only other relocation litigation case we have located, the Alameda County Superior Court reached a similar conclusion regarding relocation agreements in *Desert Development, LLC v. City of Emeryville*, Case No. RG10499954. (See Exhibit D.)

In *Desert Development*, a property owner (Plaintiff) sued Emeryville and Caltrans for inverse condemnation, violation of equal protection and due process, and declaratory relief after the city entered into a relocation agreement with a sign company that was leasing land for a billboard from the Plaintiff. Among other arguments, the Plaintiff argued that Section 5412 could not be used to relocate the billboard because there were no pending eminent domain proceedings. The Court flatly rejected this argument. The court provided the following cogent reasons in granting Emeryville's and Caltrans demurrers without leave to amend.

- Section 5412 was an exercise of the police power, not the power of eminent domain. Accordingly, a city's authority to enter into a relocation agreement is not dependent on whether there are also eminent domain proceedings.

- The text of the Outdoor Advertising Act does not expressly or impliedly limit the use of relocation agreements to the context of eminent domain.

- The Outdoor Advertising Act expresses a public policy favoring relocation agreements. Limiting relocation agreements to circumstances involving eminent domain would discourage relocation agreements and thus be contrary to public policy.

b. The California Office of Legislative Counsel Confirms That Cities Can Enter Relocation Agreements Under Any Circumstances

In February 2013, the Legislative Counsel issued an opinion explicitly stating that relocation agreements pursuant to Section 5412 are not limited to eminent domain or condemnation proceedings.

In the opinion, enclosed as Exhibit E, the Legislative Counsel concludes, "there is ***no indication that relocation agreements are contingent upon an attempt to compel removal with payment of compensation*** by initiating an eminent domain proceeding. In fact, section 5412 specifically notes that compelled removal with payment of compensation does not apply to billboards that are relocated by mutual agreement between the display owner and the local entity." (Emphasis added.)

c. Section 5412's Legislative History Confirms Eminent Domain Is Not Required Before A Relocation Agreement Can Be Executed

While cities may use relocation agreements to avoid payment of compensation where cities desire to force the removal of billboards, for example to make way for public works projects, the Legislature by no means intended to limit their application to such narrow circumstances. In fact, the Legislature specifically intended to allow local governments to make broad use of relocation agreements as part of their efforts to reduce the number of outdoor advertising displays, and numerous local agencies have taken advantage of this flexibility.

Section 5412's legislative history makes it clear that the State intended for relocation agreements to give local governments flexibility in regulating signage. Prior to the adoption of Assembly Bill 1535, which had amended section 5412 to authorize local governments to enter into relocation agreements, the State Legislature had created a Governor's Outdoor Advertising Advisory Committee to study how local governments could reduce signage in compliance with state and federal laws while satisfying the constitutional prohibition against taking property without providing just compensation. In the course of that analysis, the Outdoor Advertising Advisory Committee recommended allowing local governments to enter into relocation agreements as a way of achieving sign reduction without payment of compensation to the sign owner.

The Legislature's findings in amending Section 5412 state, "[t]he Legislature finds that it is in the public interest that consistent statewide standards be established for laws, ordinances, and regulations governing the removal of lawfully erected outdoor advertising displays. This uniformity will eliminate uncertainty concerning the validity of removal efforts by local entities, [and] provide ***a mechanism for local entities to adopt effective removal and relocation programs.***" (Assembly Bill 1353, Sec. 1, July 11, 1982, emphasis added.)

As illustrated by the relocation agreements adopted across the state, cities have used this flexibility and entered into relocation agreements to further their fiscal, aesthetic, and traffic safety interests.

3. ***The Draft Sign Code Update Establishes Criteria For the City's to Use Relocation Agreements Under Section 5412.***

As the City Attorney's Office noted in its request for publication referenced above, the current Sign Code exempts off-site signs permitted pursuant to relocation agreements from its general ban on off-site signs. (See LAMC, Sec. 14.4.4.B.11 ["Signs are prohibited if they are... Are off-site signs, including off-site digital displays, ***except when off-site signs are specifically permitted pursuant to a relocation agreement entered into pursuant to California Business and Professions Code Section 5412***."].)

The current Sign Code contains no reference to eminent domain proceedings. Thus, the Code, as it exists today, contains no criteria for how relocation agreements are to be used.

By comparison, the current draft revisions to the Sign Code contain clear criteria as to where relocated signs can go and how relocation agreements can be used. Not only do the draft revisions establish strict location standards; they also require that the City Council make specific findings prior to a relocation agreement's approval. If the proposed findings cannot be made, in the City Council's discretion, then the relocation agreement may not be approved. No such criteria exist today.

Clear Channel supports these provisions because they ensure communities are protected from inappropriate off-site signage. We, however, do not support the suggestion that the City create its own process independent of the state law which constrains the discretion of the Council.

* * * *

The City's authority to approve relocation agreements is firmly established by section 5412. There is no reason for the City to "establish its own relocation agreement authority...instead of relying on the State's relocation agreement authority." (Staff Report, at p. 9.) The state's authority was ***not*** "established for a different reason," as the Staff Report states. By section 5412's plain language, local agencies are empowered and encouraged to use relocation agreements to accomplish a variety of signage and land use goals and objectives. Under section 5412, "local entities are specifically empowered to enter into relocation agreements" with display owners "on whatever terms are agreeable" to both parties.

Other California cities have successfully used section 5412 for many years without challenge. We respectfully request that the Committee direct staff to continue to utilize these existing authorizations under state law including the discretion afforded to the City. There is excellent precedent demonstrating that courts will honor the intent of section 5412 and uphold the City's actions based on it.

Thank you again for the opportunity to provide feedback regarding these important issues. We look forward to continuing to work with the City and all stakeholders on devising clear, reasonable, and workable ordinances and principles that recognize the importance of off-site signage in Los Angeles and encourage the benefits it provides.

Very truly yours,

Cindy Starrett /RS

Cindy Starrett
of LATHAM & WATKINS LLP

Benjamin J. Hanelin
of LATHAM & WATKINS LLP

Enclosures

Exhibit A

Relocation Agreements Under the California Outdoor Advertising Act (Bus. & Prof. Code § 5412)[1]

Jurisdiction	Permitting Summary	Public Benefits (Sign Reduction)	Public Benefits (Services)	Public Benefits (Funding)
Baldwin Park	2 double-sided digital - 2013, Clear Channel Outdoor - Private property; no eminent domain proceedings - Includes freeway-facing signs (I-605 and I-10)	4 signs (8 displays)	- Free advertising space for public service announcements equal to two 4-week periods per year	- Annual fees over 30 years totaling approx. $3.1M
Beaumont	3 double-sided digital; 2 traditional - 2014 - Public and private property; no eminent domain proceedings - Includes freeway-facing signs	12 signs	- Construction and maintenance of "Welcome to Beaumont" sign - Restrictions on content (no adult material)	- 20% of gross advertising revenue from signs on City property
Berkeley	1 double-sided digital - 2007, CBS Outdoor Private property; no eminent domain proceedings - Includes freeway-facing signs (I-80/580)	6 signs	- Restricted content (no tobacco or alcohol advertising) - Allow reprogramming for Amber alerts, local emergency notices, release of hazardous materials, or other emergency notice at the City's request	- One-time payment of $2M for athletic fields project - Annual payments to City general fund totaling approx. $1.8M
Carson	1 double-sided digital; and 1 double-sided traditional - 2012, Clear Channel Outdoor - Public and private property; no eminent domain proceedings - Includes freeway-facing signs (I-405)	2 signs	- City use of space-available advertising space on any display within a 10-mile radius of the City - 10% discount for businesses located within the City and in good standing with the Chamber of Commerce	- (Clear Channel) Annual fees totaling approximately $2.2M over 20 years - (Bulletin Displays) $500,000 guaranteed, projected $2M fees over 20 years
Colfax	2 double-sided digital - 2012, Sierra Property Development - Public property; no eminent domain proceedings - Includes freeway-facing signs	2 signs	- Free City use of 1/8 time for emergency and other public service messaging	- Initial payment of $95,000 - Rental income of $24,000 per year
Corona	1 double-sided digital - 2012, Empire Outdoor Advertising, LLC - No eminent domain proceedings	2 signs	- Public Service Announcements, 1 per minute, not to exceed 43,200 showings in a year	- Years 1-3: 300,000 lump sum payment - Years 4+: Annual payments calculated according to pro-rata share

[1] Due to the limited time we have had, we have not been able to collect information on the relocation agreements listed in the May 22, 2019 Staff Report for the following cities: Belmont, Buena Park, Eastvale, Hesperia, Inglewood, Jurupa Valley, Long Beach, Montebello, Ontario, San Bernardino (City), San Jose, Vacaville

Jurisdiction	Permitting Summary	Public Benefits (Sign Reduction)	Public Benefits (Services)	Public Benefits (Funding)
Daly City	1 double-sided digital - 2014, Clear Channel Outdoor - Private property; no eminent domain proceedings - Includes freeway-facing signs (Hwy 80)	6 signs (7 displays) - Used CalTrans credit relocated from Emeryville	- Free City use of space-available advertising - Limited, guaranteed free City use of space on digital sign	N/A
Emeryville	- Relocation in lieu of compensation - Public property, eminent domain proceedings	1 sign	N/A	City relieved of payment of just compensation for taking of original sign.
Fontana	3 double-sided digital - 2013, Lamar Central Outdoor - Public and private property; no eminent domain proceedings Includes freeway-facing signs (I-10)	9 signs (18 displays)	- Free City use of space-available advertising for nonprofit service messaging - Free emergency messaging Restrictions in content (no adult content,	- (Public property sign) Greater of $360,000 in annual fees over 20 years or 20% share of gross receipts
Garden Grove	1 double-sided digital - 2014, Clear Channel Outdoor Private property; no eminent domain proceedings	3 signs (4 displays)	Advertising space, one spot 4 weeks per year	- Annual mitigation fee of $1.57M over 30 years - $15,000 up-front payment
Hayward	1 double-sided digital - 2010, Clear Channel Outdoor - Private property; no eminent domain proceedings Includes freeway-facing signs (Hwy 92)	5 signs (8 displays)	- Provide at least 12.5% time for the promotion of local civic uses and additional time on a space available basis.	N/A
Los Angeles	The 15th Street Supplemental Use District was created in order to accommodate the construction of two double- sided signs (each sign having one digital display) pursuant to an agreement between Clear Channel Outdoor and the L.A. County MTA. Although these signs were permitted through an SUD and not a relocation agreement, it was	14 signs along Santa Monica Blvd.	N/A	N/A

Jurisdiction	Permitting Summary	Public Benefits (Sign Reduction)	Public Benefits (Services)	Public Benefits (Funding)
Martinez	1 double-sided digital - 2011, CBS Outdoor - Private property; no eminent domain proceedings - Includes freeway-facing sign (I-680)	1 sign	Limited free advertising as well as access to the display for emergency alerts	City to receive quarterly revenue share equal to 11% of net receipts (estimated $120,00 to $160,00 annually) up to a max limit of 16.66% of gross receipts.
Newark	3 double-sided digital - 2012, Clear Channel Outdoor - Public and private property; no eminent domain proceedings - Includes freeway-facing signs (I-880 and Hwy 84)	24 displays in Orange, L.A., San Diego, and Alameda Counties	- Guaranteed at least 5% time to advertise City events	- Annual fees over 25 years totaling approx. $4M
Oakland	1 double-sided traditional; 1 digital conversion; and Digital conversion of tri-vision - 2010, Clear Channel Outdoor - Public and private property; no eminent domain proceedings - Includes freeway-facing sign (I-580)	20 signs (37 displays)	- Limited free advertising time	- Pre-payment of 11 years of fees (approx. $1M)
Palmdale	1 new double-sided digital; Relocate 2 other double-sided signs - 2015, Lamar Central Outdoor	13 signs (23 displays)	- Public service announcements	N/A
Perris	6 double-sided digital - 2013, Lamar Central Outdoor - Public and private property; no eminent domain proceedings Includes freeway-facing signs (I-215)	12 signs (24 displays)	- Two free public service announcements on new billboards for duration of CUP term	N/A
Rancho Cucamonga	1 double-sided digital - 2009, San Diego Outdoor Advertising - Private property; no eminent domain proceedings Includes freeway-facing sign (I-15)	2 signs	- 10% free time to City for public service messages; additional time as available	TBD

Jurisdiction	Permitting Summary	Public Benefits (Sign Reduction)	Public Benefits (Services)	Public Benefits (Funding)
Rancho Cordova	1 double-sided digital - 2013, Clear Channel Outdoor - Private property; no eminent domain proceedings Includes freeway-facing signs (Hwy 50)	3 signs (2 traditional, 1 electronic)	- City access to sign for community safety alert messaging	- Annual fee of approx. $50,000 (initial 25 year term plus option for additional 25 year term) $75,000 signing bonus
Riverside County	1 single-sided digital - 2009, Lamar Central Outdoor - Public property; eminent domain proceedings Includes freeway-facing signs (Hwy 80)	- 2 signs	N/A	Relieved of payment of just compensation for taking of original sign,
Rocklin	2 double-sided digital - 2012, Clear Channel Outdoor - Public and private property; no eminent domain proceedings Includes freeway-facing signs (Hwy 65)	3 signs	Free advertising on space-available basis, as well as access to display for emergency alerts	- One-time $25,000 signing bonus paid to City - Annual fees of $54,000 per year, with 12% increase every five years
Roseville	1 double-sided digital - 2013, Clear Channel Outdoor - Public property; no eminent domain proceedings Includes freeway-facing signs (I-80)	1 sign	City use of available sign time for promotion of City events and programs	Guaranteed minimum of $4.4M in general fund revenue over 25- year term of agreement
Sacramento (City)	4 digital and 2 traditional - 2010, 2012, Clear Channel Outdoor - Public property (2010); Private property (2012) ; no eminent domain proceedings Includes freeway-facing signs (I-	- 15 signs (19 displays) - Net reduction of 4,000 s.f. of sign area	N/A	- Initial $330,000 payment - Annual payments of at least $720,000 per year for 25 years
San Carlos	1 double-sided digital - 2014, Clear Channel Outdoor Public property; no eminent domain proceedings	1 display	Advertising space, one 2-week spot four times per year	- lease rent - $100,000 up front payment Greater of $200,000 per year or $30 of gross revenue

Jurisdiction	Permitting Summary	Public Benefits (Sign Reduction)	Public Benefits (Services)	Public Benefits (Funding)
San Francisco	This agreement approved a process for the City's consideration of proposals to relocate larger signs to convert into smaller panel signs. No specific signs or sites were identified.	The process agreed upon was designed to achieve a 75% reduction in existing square footage owned by the sign company.	N/A	- One-time upfront $1.75M payment
South San Francisco	1 double-sided digital - 2015, Clear Channel Outdoor Private property; no eminent domain proceedings	2 signs	Advertising space, four 2-week blocks (1 spot/year)	- $40,000 per display per year (with increases every 5 years) - Up to $280,000 reimbursement for City Gateway Signs Reimbursement of processing fees
South El Monte	1 double-sided digital -2013, Clear Channel Outdoor (through CUP and development agreement/relocation agreement) -Private property; no eminent domain proceedings	2 signs (2 displays)	Advertising space, 1 spot 4 weeks per year	- $15,000 up-front payment - $5,000 per year
Santa Clara	1 new double-sided digital - 2011, Clear Channel Outdoor - Private property; no eminent domain proceedings Includes freeway-facing signs (Hwy 101)	4 signs (6 displays)	- At least 10% time to City and nonprofits (with at least half the messages shown between 6 a.m. and 9 p.m.)	- $140,000 fee payment
Victorville	2 single-sided traditional - 2013, Lamar Central Outdoor - Private property; eminent domain proceedings Includes freeway-facing signs (I-15)	- 2 signs Conversion to digital shall require 2:1 takedown ratio	N/A	N/A

Exhibit B

#2

Date: 4/19/2016
Submitted in PLUM Committee
Council File No: 11-1705
Item No. 2
~~Deputy~~: Comm from Public

Filed 1/7/16; pub. & mod. order 1/26/16 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CITY OF CORONA, Plaintiff and Respondent, v. AMG OUTDOOR ADVERTISING, INC. et al., Defendants and Appellants.	E062869 (Super.Ct.No. RIC1412756) O P I N I O N

APPEAL from the Superior Court of Riverside County. Daniel A. Ottolia, Judge. Affirmed.

Raymond N. Haynes; Cole & Loeterman and Dana M. Cole for Defendants and Appellants.

Dean Derleth, City Attorney, and John D. Higginbotham, Assistant City Attorney, for Plaintiff and Respondent.

City of Corona v. AMG Outdoor Advertising, Inc.

Court of Appeal of California, Fourth Appellate District, Division Two

January 7, 2016, Opinion Filed

E062869

Reporter
244 Cal. App. 4th 291 *; 197 Cal. Rptr. 3d 563 **; 2016 Cal. App. LEXIS 55 ***

CITY OF CORONA, Plaintiff and Respondent, v. AMG OUTDOOR ADVERTISING, INC., et al., Defendants and Appellants.

Subsequent History: [*1]** The Publication Status of this Document has been Changed by the Court from Unpublished to Published January 26, 2016.

Time for Granting or Denying Review Extended *City of Corona v. AMG Outdoor Advertising, Inc., 2016 Cal. LEXIS 4157 (Cal., Mar. 16, 2016)*

Review denied by *City of Corona v. AMG Outdoor Advertising, Inc., 2016 Cal. LEXIS 2012 (Cal., Apr. 13, 2016)*

Decision reached on appeal by *City of Corona v. AMG Outdoor Adver., Inc., 2019 Cal. App. Unpub. LEXIS 1131 (Cal. App. 4th Dist., Feb. 15, 2019)*

Prior History: APPEAL from the Superior Court of Riverside County, No. RIC1412756, Daniel A. Ottolia, Judge.

City of Corona v. AMG Outdoor Advertising, Inc., 2016 Cal. App. Unpub. LEXIS 147 (Cal. App. 4th Dist., Jan. 7, 2016)
Cal. Outdoor Equity Partners v. City of Corona, 2015 U.S. Dist. LEXIS 89454 (C.D. Cal., July 9, 2015)

Disposition: Affirmed.

Counsel: Raymond N. Haynes; Cole & Loeterman and Dana M. Cole for Defendants and Appellants.

Dean Derleth, City Attorney, and John D. Higginbotham, Assistant City Attorney, for Plaintiff and Respondent.

Judges: Opinion by King, J., with McKinster, Acting P. J., and Miller, J., concurring.

Opinion by: King, J.

Opinion

[565] KING, J.—**

I. INTRODUCTION

Defendants and appellants, AMG Outdoor Advertising, Inc. (AMG), and others, appeal from a January 23, 2015 order granting a preliminary injunction in favor of plaintiff and respondent, City of Corona (the City), requiring

defendants to cease using and immediately remove a billboard, or outdoor advertising sign, that AMG erected in the City without a city or state permit.[1]

(1) Defendants principally claim that the City is enforcing ordinance No. 2729 (the 2004 ordinance) against them in an **[***2]** impermissibly discriminatory manner, because the City has allowed another billboard operator, Lamar Advertising Company (Lamar), to erect *new* billboards in the City, after the 2004 ordinance was enacted, while denying them the right to do so. As we explain, this claim is unsupported by any evidence in the record, and belied by the City's evidence. Defendants also claim the 2004 ordinance violates their equal protection rights, is an invalid prior restraint, and violates their free speech rights under the California Constitution. (*Cal. Const., art. I, § 2, **[*295]** subd. (a)*.) We find no constitutional violation or other error, and affirm the order granting the preliminary injunction.

II. BACKGROUND

A. *The 2004 Ordinance and Other Applicable Law*

On September 1, 2004, the City adopted the 2004 ordinance, which amended the Corona Municipal Code (CMC)[2] to prohibit all new off-site billboards, or "outdoor advertising signs," anywhere in the City, except as permitted pursuant to a "relocation agreement" between the City and "a billboard and/or property owner." Section 17.74.160 of the CMC states: "Except as provided in § 17.74.070(H), outdoor advertising signs (billboards) are prohibited in **[**566]** the City of Corona. The city shall comply with all provisions of the California Business & Professions **[***3]** Code regarding amortization and removal of existing off-premise[s] outdoor advertising displays and billboard signs."[3]

The 2004 ordinance allows any off-site billboard erected in the City before the 2004 ordinance went into effect, that is, a "grandfathered" billboard, to be relocated in the City pursuant to a relocation agreement with the City. Section 17.74.070(H) of the CMC states, in part: "[C]onsistent with the California Business & Professions Code Outdoor Advertising provisions, new off-premises advertising **[***4]** displays ... may be considered and constructed as part of a relocation agreement ... entered into between the [C]ity ... and a billboard and/or property owner. Such agreements may be approved by the City Council upon terms that are agreeable to the [C]ity ... in [its] sole and absolute discretion."

The exception to the 2004 ordinance, which allows "grandfathered" billboards to be relocated pursuant to a relocation agreement with the City, is consistent with *Business and Professions Code section 5412*, part of the Outdoor Advertising Act (the OAA). (*Bus. & Prof. Code, § 5200 et seq.*) It provides: "[N]o 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 ... without payment of compensation, as **[*296]** defined in the Eminent Domain Law ... . [¶] ... [¶] It is a policy of this state to encourage local entities and display owners to enter into relocation agreements which allow local entities to continue development in a planned manner without expenditure of public funds while allowing the continued maintenance of private investment and a medium of public communication. Cities, **[***5]** counties, cities and counties, and all other local entities are specifically empowered to enter into relocation agreements on whatever terms are agreeable to the display owner and the city, county, city and county,

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[1] There are five additional defendants and appellants: Alex Garcia, Sid's Carpet Barn, Inc., Curlan, Ltd., Rockefellas, and Pala Casino Resort and Spa. Their connection to AMG is described *post*.

[2] In issuing the preliminary injunction, the trial court took judicial notice of various CMC provisions, including those cited in this opinion.

[3] The 2004 ordinance does not apply to on-site billboards, that is, billboards advertising a business, commodity, or service conducted, sold or offered on the premises where the billboard is located or to which it is affixed. (CMC, § 17.74.030.) "Off-site billboards display messages directing attention to a business or product not located on the same premises as the sign itself. [Citation.] For example, a billboard promoting the latest blockbuster movie, but attached to a furniture store, is an off-site sign. The same billboard, when attached to a theater playing the movie, is an on-site sign." (*World Wide Rush, LLC v. City of Los Angeles (9th Cir. 2010) 606 F.3d 676, 682*.)

or other local entity, and to adopt ordinances or resolutions providing for relocation of displays." (*Bus. & Prof. Code, § 5412*.)

The CMC also prohibits a party from erecting any billboard in the City without first obtaining a building permit. Section 15.02.070 of the CMC provides: "'No person, firm or corporation shall erect, re-erect, construct, enlarge, alter, repair, move, improve, remove, convert or demolish any building or other structure in the city, without obtaining a valid building permit prior to commencement of any work.'"

(2) It is unlawful for any person to violate any provision or to fail to comply with the CMC, and any condition caused or permitted to exist in violation of the CMC is deemed a public nuisance. (CMC, § 1.08.020.) The City may seek to abate any such public nuisance in a civil action. (CMC, §§ 1.08.020, 8.32.210.)

B. *Factual Background*

AMG owns and operates off-site billboards in Southern California. In November **[**567]** 2014, an AMG agent, Jeanelle Heaston, went to the City planning department and asked for an application for a permit to erect an off-site billboard at 3035 **[***6]** Palisades, just south of State Route 91 in the City between Green River Road and Serfas Drive. A planning technician refused to provide Ms. Heaston with a permit application, explaining that billboards were not allowed in the City and all billboards then under construction in the City were being built pursuant to a relocation agreement with the City.

Over the weekend of December 6 and 7, 2014, AMG erected a monopole V-shaped billboard with two 14-foot by 48-foot static displays on the property at 3035 Palisades. Curlan, Ltd., owns the property on which the billboard was erected and leases the property to Sid's Carpet Barn. An advertisement for Rockefellas, a bar located in the City and owned by Alex Garcia, the owner of AMG, was placed on one side of the billboard, and an advertisement for Pala Casino Resort and Spa, located near Fallbrook, was placed on the other side.
[*297]

AMG did not have a City permit (CMC, § 15.02.070) or a permit from the Department of Transportation (Caltrans) (*Bus. & Prof. Code, § 5350*) to erect the billboard. AMG could not have received a building permit from the City to erect the billboard, because it could not have shown that the billboard was traceable to a **[***7]** grandfathered billboard erected in the City before the 2004 ordinance went into effect. (CMC, § 17.74.160.) AMG could not have received a permit from Caltrans because the City had not approved the location of the billboard. (*Bus. & Prof. Code, § 5354*.)

On December 10 and 19, 2014, the City sent cease and desist letters to defendants and their counsel, advising them that the billboard violated the CMC and demanding its prompt removal. On December 23, counsel for AMG advised the City by letter that the 2004 ordinance banning all off-site billboards violated AMG's free speech rights, and was also unconstitutional as applied because the City was allowing another billboard operator, Lamar, to erect multiple billboards in the City despite the 2004 ban. AMG advised the City that it was "prepared to construct multiple" billboards in the City unless AMG and the City reached an agreement. Also on December 23, AMG submitted an application to the City to erect the billboard.

On December 30, 2014, the City filed a verified complaint against defendants seeking temporary, preliminary, and permanent injunctive relief, and other remedies, based on defendants' unauthorized erection and use of the billboard. On January 16, defendants answered the complaint, **[***8]** and AMG and Rockefellas cross-complained against the City for declaratory relief, an injunction prohibiting the City from enforcing the 2004 ordinance, and a writ of mandate ordering the City to issue a building permit for the billboard.

On January 7, 2015, the trial court issued a temporary restraining order directing defendants to stop using the billboard and remove the advertising on it, but not requiring the removal of the billboard.[4] Following a January 23 hearing, the trial court issued a preliminary injunction (1) prohibiting defendants from operating, allowing, using, and advertising on the billboard, (2) ordering defendants to immediately remove the billboard, including the pole, panels, and entire structure, and (3) prohibiting defendants from erecting any additional billboards in the City without first obtaining all required permits.

[568]** In issuing the preliminary injunction, the court rejected defendants' claim that the City was violating defendants' equal protection **[***9]** rights by allowing Lamar to erect new billboards in the City in violation of the 2004 ordinance. **[*298]** The court found that "each Lamar sign is traceable back to a grandfathered billboard, which predate[s] the 2004 ban." The court also found that the City's relocation agreements with Lamar properly allowed Lamar to relocate only "grandfathered" billboards, and Lamar was therefore in a different position than defendants, who did not own, and were not seeking to relocate, a grandfathered billboard. Defendants appealed.[5]

III. DISCUSSION

A. *Standard of Review*

(3) "The general purpose of a preliminary injunction is to preserve the status quo pending a determination on the merits of the action. [Citation.] '"The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or ... should not be restrained from exercising the right claimed by him."' [Citation.]" (*SB Liberty, LLC v. Isla Verde Assn., Inc. (2013) 217 Cal.App.4th 272, 280 [158 Cal. Rptr. 3d 105]*.)

(4) The trial court weighs two interrelated factors in determining whether to issue a preliminary injunction: "[T]he likelihood the moving party ultimately will prevail on the merits, and the relative interim harm to the parties from the issuance or nonissuance of the injunction." (*Hunt v. Superior Court (1999) 21 Cal.4th 984, 999 [90 Cal. Rptr. 2d 236, 987 P.2d 705]*.) Generally, the trial court's ruling on an application for a preliminary injunction rests in its sound discretion and will not be disturbed on appeal absent an abuse of discretion. (*Ibid.*; *SB Liberty, LLC v. Isla Verde Assn., Inc., supra, 217 Cal.App.4th at pp. 280–281*.) On appeal, the party challenging the preliminary injunction has the burden of demonstrating it was improperly granted. (*Costa Mesa City Employees Assn. v. City of Costa Mesa (2012) 209 Cal.App.4th 298, 306 [146 Cal. Rptr. 3d 677]*.)

In reviewing an order granting **[***11]** a preliminary injunction, we do not reweigh conflicting evidence or assess witness credibility, we defer to the trial court's **[*299]** factual findings if substantial evidence supports them, and we view the evidence in the light most favorable to the court's ruling. (*People ex rel. Herrera v. Stender (2012) 212 Cal.App.4th 614, 630 [152 Cal. Rptr. 3d 16]*.) To the extent the plaintiff's likelihood of prevailing on the merits turns on legal rather than factual questions, however, our review is de novo. (*Costa Mesa City Employees Assn. v. City of Costa Mesa, supra, 209 Cal.App.4th at p. 306*.)

(5) When, as here, the preliminary injunction mandates an affirmative act **[**569]** that changes the status quo, it is scrutinized even more closely on appeal: """"The judicial resistance to injunctive relief increases when the attempt is

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[4] On January 26, 2015, in case No. E062662, this court summarily denied defendants' January 9, 2015, petition for an immediate stay and writ of mandate directing the trial court to set aside the temporary restraining order. (*Rockefellas, Inc. v. Superior Court* (Jan. 26, 2015, E062662), petn. den.)

[5] On April 28, 2015, while this appeal was pending, AMG and California Outdoor Equity Partners (COEP) sued the City in the United States District Court for the Central District of California, case No. CV 15-03172 MMM (AGRx), seeking the same relief AMG and Rockefellas seek by their cross-complaint in this action. On May 27, 2015, the district court denied AMG and COEP's ex parte application for a temporary restraining order, prohibiting the City from enforcing the 2004 ordinance prohibiting all new off-site billboards in the City, except grandfathered billboards relocated pursuant to a relocation agreement with the City, on the ground the plaintiffs did not show they were likely to succeed **[***10]** on the merits of their claims.

made to compel the doing of affirmative acts. A preliminary mandatory injunction is rarely granted, and is subject to stricter review on appeal.'" [Citation.] The granting of a mandatory injunction pending trial "'is not permitted except in extreme cases where the right thereto is clearly established.'" [Citation.]' [Citation.]" (*People ex rel. Herrera v. Stender, supra, 212 Cal.App.4th at p. 630*.)

(6) On the other hand, a more deferential standard of review applies when the government is seeking to enjoin the violation of an ordinance: "Where a governmental entity seeking to enjoin the alleged violation of an ordinance which **[***12]** specifically provides for injunctive relief establishes that it is reasonably probable it will prevail on the merits, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant. If the defendant shows that it would suffer grave or irreparable harm from the issuance of the preliminary injunction, the court must then examine the relative actual harms to the parties." (*IT Corp. v. County of Imperial (1983) 35 Cal.3d 63, 72 [196 Cal. Rptr. 715, 672 P.2d 121]*, fn. omitted; see also *IT Corp., supra, at pp. 69–71, 73*; *City of Claremont v. Kruse (2009) 177 Cal.App.4th 1153, 1166 [100 Cal. Rptr. 3d 1]*.) Here, we find no abuse of discretion and uphold the order granting the preliminary injunction.

B. *The City's Relocation Agreements with Lamar Do Not Unlawfully Discriminate Against Defendants, Because the City Has Not Allowed Lamar to Erect Any Off-site Billboards Other than Grandfathered Billboards (CMC, § 17.74.070(H).)*

The crux of defendants' claim, in the trial court and in this appeal, is that the City is applying the 2004 ordinance against them in an unlawfully discriminatory manner. Defendants claim the City has entered into relocation agreements with Lamar that have allowed Lamar to erect *new* billboards in the City, after the 2004 ordinance went into effect, which are not grandfathered billboards because they were not erected in the City before September **[***13]** 1, 2004. (CMC, § 17.74.070(H).)
[*300]

This claim fails because it is contrary to the facts. As the trial court found, and as the City demonstrated with substantial, uncontradicted evidence, *all of the off-site billboards* currently in the City, consisting of nine owned by Lamar and two owned by another billboard operator, General Outdoor Advertising, are grandfathered billboards in that they were either in their current location before the 2004 ordinance went into effect, or they are traceable to pre-September 1, 2004, grandfathered billboards.

1. *Additional Background*

In support of its application for the temporary restraining order and preliminary injunction, the City adduced original and supplemental declarations of its community development director, Joanne Coletta. Ms. Coletta had served as the City's community development director since 2008 and had worked in the community development department for 20 years.

According to Ms. Coletta, the City had not allowed any new billboards to be erected since September 1, 2004, when the 2004 ordinance went into effect, except in connection with an approved relocation agreement. Likewise, no permits to construct new billboards had been issued except in connection with **[***14]** an approved relocation agreement. A relocation agreement was **[**570]** required when any billboard had to be moved, such as when a freeway was being widened. As of January 2015, several billboards had either been relocated, or were in the process of being relocated, in connection with Caltrans's widening of State Route 91 through the City.

Lamar had nine billboards in the City, and each was either a "grandfathered" billboard that was in place before the 2004 ordinance went into effect, or was traceable to a grandfathered billboard. For example, the Lamar billboard on Delilah Street had been relocated from East Third Street due to the State Route 91 widening project, pursuant to a relocation agreement. The billboard was originally erected along Interstate 15 at Magnolia Avenue, before the 2004 ordinance went into effect and was relocated to Third Street pursuant to an original relocation agreement. Due to the State Route 91 widening project, the board had to be relocated again.

Lamar purchased one of its nine billboards from Empire Outdoor Advertising, and assumed Empire Outdoor Advertising's relocation agreement with the City. Some of Lamar's billboards also had been "converted from

static **[*301]** [to] **[***15]** digital" pursuant to an approved relocation agreement.[6] None of Lamar's grandfathered billboards had been relocated without an approved relocation agreement.[7]

Another billboard operator, General Outdoor Advertising, had two double-sided billboards in the City, bringing the total number of off-site billboards in the City to 11. General Outdoor Advertising had a relocation agreement with the City that allowed it to change its two double-sided billboards from static to "changeable message board" in the same locations, and the City and General Outdoor Advertising were in the process of negotiating a relocation agreement for both billboards. The 11 grandfathered off-site billboards were the only off-site **[***16]** billboards in the City.[8]

Pursuant to its relocation agreements with Lamar and General Outdoor Advertising, the City was entitled to place public service announcements on the digital billboards, or waive that right and receive the greater of a guaranteed minimum amount of revenue from each billboard face, or a percentage of the actual amount of revenue from each billboard face. "The vast majority of the time, the City receive[d] the guaranteed minimum. Occasionally, the percentage ha[d] exceeded the minimum, but never by a substantial amount."

2. *Analysis*

In support of their unlawful discrimination claim, defendants principally rely on *Summit Media LLC v. City of Los Angeles (2012) 211 Cal.App.4th 921 [150 Cal. Rptr. 3d 574]*. There, the City of Los Angeles entered into settlement agreements **[**571]** with certain billboard operators, allowing the operators to digitize their existing billboards despite a municipal ordinance banning "'alterations or enlargements **[***17]** of legally existing off-site signs.'" (*Id. at p. 924*.) The settlement agreements thus permitted the city and the settling billboard operators to "circumvent the general ban in the municipal code on alterations to existing offsite signs." (*Id. at p. 934*.) The agreements were therefore void, or ultra vires, because the city acted beyond its authority in entering into them.
[*302]

(7) Here, in contrast to the ultra vires and void settlement agreements in *Summit Media*, the City has banned all new off-site billboards since 2004, and CMC section 17.74.070(H) allows billboards in place before the 2004 ban to be relocated to other areas in the City pursuant to a relocation agreement with the City. When the owner of a grandfathered billboard either wants to move it or has to move it because it will be condemned by eminent domain, both the OAA and the CMC authorize the City to negotiate the terms of the relocation. (*Bus. & Prof. Code, § 5412*; CMC, § 17.74.070(H).)

Contrary to defendants' claim, the City's relocation agreements with Lamar do not circumvent the 2004 ordinance ban on *new* off-site billboards. The relocation agreements merely provide for orderly relocation, in the City, of grandfathered off-site billboards—those erected in the City before the 2004 ordinance went **[***18]** into effect. Thus, defendants' assertion that the City has unfettered discretion to approve or deny *new billboard applications*, and unlawfully discriminates against new billboard applicants, is unsupported by any evidence in the record.

Valley Outdoor, Inc. v. City of Riverside (9th Cir. 2006) 446 F.3d 948 is also distinguishable. The problem in *Valley Outdoor*, as the court put it, was that "the City assert[ed] unbridled discretion under its municipal code to decide which late-filed applicants get to erect billboards and which do not." (*Id. at p. 954*.) Here, the City had no authority to discriminate and did not in fact discriminate against any new off-site billboard applicants. The 2004 ordinance banned all *new* off-site billboards, and the record shows the City has uniformly enforced that ban. Since the 2004

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[6] Since 2006, when the City adopted ordinance No. 2864, the City also required a relocation agreement to replace a static billboard face with an electronic message center, electronic message board, or changeable message board.

[7] After September 2004, Lamar surrendered three grandfathered billboards to the City. Thus, despite purchasing one grandfathered billboard from Empire Outdoor Advertising, Lamar had fewer billboards in the City than it had when the 2004 ordinance went into effect.

[8] On December 30, 2014, Ms. Coletta issued a written denial of AMG's December 23 application for a building permit for its billboard. The CMC provided for an administrative appeal hearing before a neutral hearing officer in the event a permit application was denied. (CMC, §§ 15.02.195, 1.09.010 et seq.) AMG did not appeal the City's denial of its permit application.

ordinance went into effect, the City has only allowed off-site billboards to be erected in the City *if* the billboard was erected in the City before the 2004 ordinance went into effect or the billboard was traceable to such a grandfathered billboard. (CMC, § 17.74.070(H).)

C. *Equal Protection*

Defendants claim the City's relocation agreements with Lamar violate their equal protection rights. We disagree. A substantially similar claim was squarely rejected in *Maldonado v. Morales (9th Cir. 2009) 556 F.3d 1037, 1048*, where the court found that the grandfathering **[***19]** clause of the OAA, exempting its application to billboards in place before November 7, 1967, did not violate the equal protection rights of new off-site billboard operators, because "banning new offsite billboards but allowing legal nonconforming billboards to remain 'furthers the State's significant interest in reducing blight and increasing traffic safety,' even if all billboards are not eliminated." And, unlike Lamar and General Outdoor Advertising, defendants do not own any **[*303]** billboards erected in the City before the 2004 ordinance went into effect. Thus, defendants are not similarly situated with Lamar or General Outdoor Advertising for equal protection purposes. (*Ibid.*)

D. *The 2004 Ordinance and Preliminary Injunction Are Not Invalid Prior Restraints*

(8) Defendants claim the 2004 ordinance and the preliminary injunction **[**572]** amount to unconstitutional prior restraints on their free speech rights. Not so. Content-neutral injunctions which do not bar all avenues of expression are not treated as prior restraints. (*Madsen v. Women's Health Center, Inc. (1994) 512 U.S. 753, 763, fn. 2 [129 L. Ed. 2d 593, 114 S. Ct. 2516]*.) An injunction is content neutral if its challenged provisions "burden no more speech than necessary to serve a significant government interest." (*Id. at p. 765*.)

The 2004 ordinance bans all **[***20]** new off-site billboards, and the preliminary injunction requires defendants to cease operating and remove their new off-site billboard. Neither burdens more speech than necessary to accomplish the City's interest in increased traffic safety and aesthetics (*Maldonado v. Morales, supra, 556 F.3d at pp. 1046–1048*) and defendants may avail themselves of other forms of communication (*G.K. Ltd. Travel v. City of Lake Oswego (9th Cir. 2006) 436 F.3d 1064, 1074*).

(9) The 2004 ordinance is also not a prior restraint because it does not afford the City unbridled discretion. Under the prior restraint doctrine, "'a law cannot condition the free exercise of *First Amendment* rights on the "unbridled discretion" of government officials.'" (*Desert Outdoor Advertising v. City of Moreno Valley (9th Cir. 1996) 103 F.3d 814, 818*.) "'Unbridled discretion challenges typically arise when discretion is delegated to an administrator, police officer, or other executive official,' as opposed to a legislative body." (*World Wide Rush, LLC v. City of Los Angeles, supra, 606 F.3d at p. 688*.) That is not the case here. Instead, the 2004 ordinance allowed the City Council, in the exercise of its legislative authority to regulate land use, to approve relocation agreements for grandfathered off-site billboards. (CMC, §§ 17.74.160, 17.74.070(H).) As such, the 2004 ordinance is not an invalid prior restraint on free speech. (*World Wide Rush, LLC v. City of Los Angeles, supra, at p. 688* [city council's exercise of its legislative authority to regulate land use does not implicate the *1st Amend.*].)

E. *The 2004 **[***21]** Ordinance Is Not Facially Invalid Under the California Constitution*

(10) Defendants claim the 2004 ordinance is facially invalid under the *free speech clause of the California Constitution*. Again, we disagree. First, it is settled **[*304]** that a governmental entity's ban on all new off-site commercial billboards does not violate the *First Amendment of the federal Constitution*. In *Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 510–513 [69 L. Ed. 2d 800, 101 S. Ct. 2882]* (*Metromedia*), a plurality of the high court concluded that a City of San Diego ordinance did not violate the *First Amendment*, to the extent it banned all off-site commercial billboards. Specifically, the plurality concluded that the city ordinance banning all off-site commercial billboards satisfied the four-prong, intermediate scrutiny test established in *Central Hudson Gas & Elec. v. Public Serv. Comm'n (1980) 447 U.S. 557, 562–566 [65 L. Ed. 2d 341, 100 S. Ct. 2343]* for determining whether a governmental restriction on commercial speech violates the *First Amendment*.

(11) *Central Hudson* held: "The Constitution … accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. [Citation.] The protection available for a particular commercial expression

turns on the nature both of the expression and of the governmental interests served by its regulation." (*Central Hudson Gas & Elec. v. Public Serv. Comm'n, supra, 447 U.S. at pp. 562–563*.) *Central Hudson* adopted a four-part test for determining the validity of governmental restrictions on **[**573]** commercial speech: (1) "whether **[***22]** the expression is protected by the *First Amendment*," if so, (2) "whether the asserted governmental interest is substantial," if so, (3) "whether the regulation directly advances the governmental interest asserted," and (4) "whether [the regulation] is not more extensive than is necessary to serve that interest." (*Id. at p. 566*.) The *Metromedia* plurality specifically held that the City of San Diego ordinance was constitutional to the extent it banned all off-site commercial billboards, but unconstitutional to the extent it generally banned billboards with noncommercial content while allowing on-site billboards carrying commercial content, and thus afforded greater protection to commercial speech than to noncommercial speech.[9] (*Metromedia, supra, 453 U.S. at pp. 513–514*.)

(12) *Metromedia* remains the law of the land. (See, e.g., *Outdoor Systems, Inc. v. City of Mesa (9th Cir. 1993) 997 F.2d 604, 610* ["*Metromedia* remains the leading decision in the field, holding that a city, consistent with the *Central Hudson* test, may ban all offsite commercial signs, even if the city **[*305]** simultaneously allows onsite commercial signs."]; *Clear Channel Outdoor, Inc. v. City of Los Angeles (9th Cir. 2003) 340 F.3d 810, 813* ["The Supreme Court, the Ninth Circuit, and many other courts have held that the on-site/off-site distinction is not an impermissible content-based regulation."]; *Tahoe Regional Planning Agency v. King (1991) 233 Cal.App.3d 1365, 1405 [285 Cal.Rptr. 335]* ["*Metromedia* … establishes that a governing entity 'may permit onsite signs while restricting offsite signs. The only restrictions are that noncommercial messages must be permitted in locations where commercial messages are permitted, and the local entity cannot regulate what type of noncommercial message … is permissible … .'"]; *City and County of San Francisco v. Eller Outdoor Advertising (1987) 192 Cal.App.3d 643, 658–665 [237 Cal. Rptr. 815]*.)

Notwithstanding *Metromedia*, defendants claim that the City's 2004 ban on all new off-site commercial billboards violates the *free speech clause of the California Constitution*, **[***24]** which states: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (*Cal. Const., art. I, § 2, subd. (a)*.)

Defendants argue that "[t]he State Constitution has always protected commercial speech[,] and state free speech jurisprudence does not recognize the federal 'commercial speech/noncommercial speech' dichotomy with its limited protection for commercial speech … ." In support of their state constitutional claim, defendants rely solely on *Gerawan Farming, Inc. v. Lyons (2000) 24 Cal.4th 468 [101 Cal. Rptr. 2d 470, 12 P.3d 720]* (*Gerawan I*) where the court concluded that a marketing program and order issued by the California Secretary of the Department of Food and Agriculture, **[**574]** namely, the California Plum Marketing Program and Marketing Order No. 917, compelling California plum producers, including Gerawan, to fund generic advertising for California-produced plums, "implicate[d]" Gerawan's free speech rights under *article I, section 2 of the California Constitution*. (*Gerawan I, supra, at pp. 509–515.*) In making this determination, the court observed that, as a general rule, "*article I*'s free speech clause and its right to freedom of speech are not only as broad and as great as the *First Amendment's*, they are even 'broader' and 'greater.' [Citations.]" (*Id. at p. 491*.) Defendants' state constitutional claim **[***25]** rests solely on this general proposition.

Gerawan I did not hold that the marketing program violated Gerawan's free speech rights under the California Constitution; it left that issue for the Court of Appeal to determine on remand, and directed the Court of Appeal to decide the proper test to be employed in determining whether the marketing program violated Gerawan's free speech rights under the state Constitution. (*Gerawan I, supra, 24 Cal.4th at pp. 515–517*.) On remand, the Court

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[9] The *Metromedia* plurality remanded the matter to the California Supreme Court to determine whether the unconstitutional portions of the ordinance could be severed from the constitutionally permissible portions. (*Metromedia, supra, 453 U.S. at p. 521* & fn. 26.) On remand, our Supreme Court declined to sever the unconstitutional portions of the ordinance from its constitutionally permissible portions, because that would "leave the city with an ordinance … less effective in achieving the city's goals, and one which would **[***23]** invite constitutional difficulties in distinguishing between commercial and noncommercial signs." (*Metromedia, Inc. v. City of San Diego (1982) 32 Cal.3d 180, 191 [185 Cal. Rptr. 260, 649 P.2d 902]*.) Here, in contrast, the 2004 ordinance is content neutral: it bans all off-site billboards, regardless of their commercial or noncommercial content.

of **[*306]** Appeal concluded that the marketing program violated Gerawan's free speech rights under the state Constitution because the generic advertising it required Gerawan and other plum growers to finance did not advance a valid government interest. (*Gerawan Farming, Inc. v. Kawamura (2004) 33 Cal.4th 1, 10 [14 Cal. Rptr. 3d 14, 90 P.3d 1179]* (*Gerawan II*).) The Court of Appeal thus found it unnecessary to determine "precisely which legal standard to employ" in determining whether the marketing order violated the state Constitution. (*Ibid.*)

The case returned to the state Supreme Court in *Gerawan II*. There, the court concluded, in light of intervening United States Supreme Court precedent, that it would be inappropriate to subject the marketing program "to only minimal scrutiny," and determined that the *Central Hudson* test was the proper test to apply **[***26]** in determining whether the marketing program violated Gerawan's free speech rights under the state Constitution. (*Gerawan II, supra, 33 Cal.4th at pp. 20–24*.) Applying that test, the court concluded the matter could not be resolved on the pleadings and had to be remanded to the trial court "for further factfinding" to determine whether the marketing program satisfied the four-prong *Central Hudson* test. (*Id. at p. 24*.)

Based on the "broader" and "greater" free speech protections afforded by *article I of the California Constitution* noted in *Gerawan I*, defendants maintain that "a city may not discriminate against lawful commercial speech, or between different types of lawful commercial speech simply because it is commercial." As noted, however, under *Metromedia* a governmental entity may, consistent with the *Central Hudson* test, allow or discriminate in favor of *on-site* commercial signs, while banning or discriminating against *off-site* commercial signs, without violating the free speech clause of the *First Amendment*. (*Metromedia, supra, 453 U.S. at pp. 507–512*.) In light of *Gerawan II*, the analysis and result are the same under the California Constitution.

Lastly, defendants argue that the City's ban on all new off-site billboards "is exactly the same ban already found unconstitutional" in *Metromedia*. Not so. As noted, the 2004 ordinance **[***27]** prohibits *all* new off-site billboards, regardless of their content (CMC, §§ 17.74.160, 17.74.070(H)) and thus does not treat noncommercial speech less favorably than commercial speech—the element of the City of San Diego ordinance **[**575]** found facially invalid in *Metromedia* on *First Amendment* grounds (*Metromedia, supra, 453 U.S. at p. 513*; see also *Kasky v. Nike, Inc. (2002) 27 Cal.4th 939, 959 [119 Cal. Rptr. 2d 296, 45 P.3d 243]* ["This court has never suggested that the state and federal Constitutions impose *different boundaries* between the categories of commercial and noncommercial speech."]; *Vanguard Outdoor, LLC v. City of Los Angeles (9th Cir. 2011) 648 F.3d 737, 739* ["claim that the California **[*307]** Constitution affords greater protection than the *First Amendment* fails in light of California Supreme Court case law"]; *Vanguard Outdoor, LLC, supra, at pp. 746–747*.).

IV. DISPOSITION

The January 25, 2013 order granting the preliminary injunction is affirmed. The City shall recover its costs on appeal. (*Cal. Rules of Court, rule 8.278*.)

McKinster, **[***28]** Acting P. J., and Miller, J., concurred.

On January 26, 2016, the opinion was modified to read as printed above.

End of Document

Exhibit C

MICHAEL N. FEUER
CITY ATTORNEY

January 25, 2016

Acting Presiding Justice Art W. McKinster,
Justice Jeffrey King, and
Justice Douglas P. Miller,
Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside, CA 92501

Re: Request for Publication of Opinion
City of Corona v. AMG Outdoor Advertising, Inc., et al.
Case No. E062869

Dear Justices of the Court of Appeal:

Pursuant to the California Rules of Court ("CRC"), Rules 8.1120 and 8.1105(c), the City of Los Angeles (the "City") respectfully requests that the Court publish its January 7, 2016 decision in the above referenced case. Publication is warranted because the decision's holding that article I of the California Constitution permits local agencies to ban off-site commercial signs while allowing on-site commercials signs involves a legal issue of continuing public interest, and because it reaffirms a principle of law not applied in a recently reported California state court appellate decision.

1. The City Is Interested In The Case Given Its Long History Of Litigating Sign Regulations

Like the City of Corona, the City generally bans off-site commercial signs, but allows on-site commercial signs. The City also exempts from its off-site sign ban those signs that are either erected in a legislatively adopted sign district that allows off-site signs, erected in the public right of way pursuant to City regulation, or erected pursuant to a relocation agreement approved by the City Council.

Given the very lucrative advertising market in Los Angeles, the City's sign regulations are under attack almost constantly. Since the turn of the millennium, litigation over the City's sign regulations have resulted in no fewer than five published Ninth Circuit opinions, three of which are cited in this Court's *AMG* decision.[1]

Over the past decade, most legal challenges concerning local sign regulations in California have been brought in federal court under the First Amendment. The five published City of Los Angeles decisions, coupled with several other published Ninth Circuit decisions concerning other California cities' sign regulations, have clarified significantly how local agencies in California can regulate billboards. Local agencies across California, including the City, have relied on these decisions and have drafted their sign regulations to comply with them.

Because First Amendment rules governing sign regulations are now fairly settled, the billboard industry has recently embarked on a new strategy: attacking local sign regulations under article I of the California Constitution. In these cases, billboard companies argue that First Amendment case law is irrelevant because the California Constitution provides greater protection for speech than does the First Amendment. This tactic was employed in the *AMG* case before this Court, in *Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737 (9th Cir. 2011), and in *Citizens for Free Speech v. County of Alameda*, Case No. C14-02513 CRB, 2015 U.S. Dist. LEXIS 92998 (N.D. Cal. July 16, 2015). Lamar Central Outdoor, LLC is also pursuing this tactic in a challenge to the City of Los Angeles's ban on offsite signs that is currently pending before Division Eight of the Second Appellate District.

Notably, in the *Lamar* case, the trial court accepted Lamar's argument and ruled that article I of the California Constitution does not tolerate local regulations that distinguish between on-site and off-site messages. The trial court acknowledged that in *Vanguard*, the Ninth Circuit held that California law follows First Amendment jurisprudence and that the on-site-off-site distinction is constitutional under the United States Supreme Court's *Central Hudson* test, but concluded that California courts are not bound by federal court decisions construing the California Constitution, and that contrary to the Ninth Circuit's holding in *Vanguard*, the on-site-off-site distinction is an impermissible content based restriction under the California Constitution. This Court, of course, reached a contrary conclusion in *AMG*.

The City of Los Angeles, like all local agencies that regulate signs in this State, has a strong interest in legal certainty surrounding sign regulation. The City, therefore, requests that the Court publish its *AMG* decision.

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[1] There have been countless additional legal challenges to the City's sign regulations that have not resulted in a published decision.

2. The *AMG* Decision Involves A Legal Issue Of Continuing Public Interest, And Reaffirms A Principle Of Law Not Applied In A Recently Reported Decision

California Rule of Court 8.1105 provides that an opinion of a Court of Appeal "should be certified for publication in the Official Reports if the opinion: . . . (6) Involves a legal issue of continuing public interest."

Whether the California Constitution permits local agencies to ban off-site commercial signs, or at least regulate them differently than on-site commercial signs, is a matter of significant public interest. In 1980, when the California Supreme Court first considered whether a ban on off-site signs violates article I of the California Constitution, it noted that "over 100 cities and towns in California" had banned off-site signs. *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 869 (1980). In conducting research for its appeal in *Lamar*, the City confirmed that in the 35 years that have passed since the *Metromedia* decision, the practice of banning off-site signs in California has not diminished. Of the 10 largest cities in California by population, all either prohibit off-site signs, or regulate off-site signs more stringently than on-site signs.

The State of California also regulates on-site signs differently than off-site signs. For example, Business and Professions Code section 5440 provides that "no advertising display may be placed or maintained on property adjacent to a section of a freeway that has been landscaped if the advertising display is designed to be viewed" primarily from the freeway. Business and Professions Code section 5442(c), however, exempts from section 5440's reach those displays that "advertise goods manufactured or produced, or services rendered, on the property upon which the advertising display is placed." Significantly, if California did not prohibit off-site signs adjacent to landscaped freeways, California would risk losing 10 percent of its federal highway funds allocation. *See* 23 U.S.C. § 131(b),(c) (those states that do not prohibit off-site signs within 660 feet from Interstate system shall have their Federal-aid highway funds reduced by 10 percent).

The distinction between on-site and off-site signs is also present in the California Environmental Quality Act ("CEQA"). CEQA categorically exempts the construction of new on-site signs (referred to as on-premises signs) from environmental review, but does not exempt the construction of new off-site signs. See 14 Cal. Code Regs. § 15311.

The issue of whether or not the California Constitution prohibits the on-site-off-site distinction is, therefore, a matter of continuing public interest and supports publication of this Court's *AMG* decision.

California Rule of Court 8.1105 also provides that an opinion of a Court of Appeal "should be certified for publication in the Official Reports if the opinion: . . .(8) . . . [R]eaffirms a principle of law not applied in a recently reported decision."

The California Supreme Court held in *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 867 (1980) that article I of the California Constitution does not prohibit local agencies from banning off-site commercial signs, while allowing on-site commercial signs. As far as the City can tell, since the California Supreme Court issued its decision more than 35 years ago, no California state court appellate decision has analyzed how article I of the California Constitution applies to sign regulations. All state court appellate decisions addressing sign regulations since *Metromedia* appear to have been decided under the First Amendment. While the federal courts have applied article I of the California Constitution to signs regulations more recently (the *Vanguard* and *Citizens for Free Speech* cases discussed above are examples), federal court interpretations of the California Constitution are not binding on California state courts, and in the *Lamar* case, the trial court declined to follow federal precedent. Thus, local agencies, the State of California itself, and all those interested in outdoor advertising, would greatly benefit from this Court's publication of the *AMG* decision, which reaffirms the principle of law originally established in *Metromedia*, and adds certainty in the area of billboard regulation.

For all of the foregoing reasons, the City respectfully requests that the Court publish its *AMG* decision.

Sincerely,

Michael J. Bostrom
Deputy City Attorney

MJB:cg

PROOF OF SERVICE

I, the undersigned, declare as follows: I am over the age of 18 years and not a party to this action. My business address is 200 North Main Street, City Hall East - Room 701, Los Angeles, CA 90012.

On January 25, 2016, at my place of business at Los Angeles, California, copies of the attached **LETTER BRIEF RE: REQUEST FOR PUBLICATION OF OPINION** were placed in sealed envelopes with first-class postage fully prepaid and addressed to:

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CITY OF CORONA on behalf of
the PEOPLE OF THE STATE OF CALIFORNIA

[X] BY MAIL - I deposited such envelope in the mail at Los Angeles, California, with First class postage thereon fully prepaid. I am readily familiar with the business practice for collection and processing of correspondence for mailing. Under that practice, it is deposited with the United States Postal Service on that same day, at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 25, 2016, at Los Angeles, California.

CLAIRE GUTIERREZ

LRM DEPT ♦ CITY ATTORNEY'S OFFICE

Phone: 951-279-3506

"Advocating for the Corona Community"
400 S. Vicentia Avenue • Corona, California • 92882-2187
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January 25, 2016

Acting Presiding Justice Art W. McKinster,
Justice Jeffrey King, and
Justice Douglas P. Miller,
Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside, CA 92501

Re: Request for Publication of Opinion
City of Corona v. AMG Outdoor Advertising, Inc., et al.,
Case No. E062869

Dear Justices of the Court of Appeal:

Pursuant to California Rule of Court, Rules 8:1105 and 8.1120, Respondent City of Corona respectfully requests that the January 7, 2016 unpublished opinion in the above-referenced appeal be ordered published.

1. The City's Interest in Publication

The City has a direct interest in this matter as a party to the present action, and on the additional grounds that it reasonably anticipates further challenges to its billboard ordinance going forward. The individuals behind the erection of the illegal billboard in this action – some of whom are named parties to the action while others are lurking behind the scenes – have already threatened to build more illegal billboards in Corona, as they have done in other jurisdictions, including in Riverside several years ago, and more recently in Los Angeles. They already have signed leases with three other property owners in Corona to erect and operate billboards on their properties, and have been actively seeking more sites in Corona despite the preliminary injunction.

While the unpublished decision will be very helpful in bringing about a more expeditious end to the present litigation, it will not necessarily prevent the same cast of characters from re-grouping and trying again under a different corporate name, which is a routine practice among a certain

segment of the billboard industry. Publication of the opinion would help deter such mischief. At a minimum, it would strengthen and clarify the law in several key respects, which in turn would benefit the trial courts, the City, and numerous other public agencies going forward.

2. The Opinion Meets Several of the Standards for Publication

The Court's opinion in this matter meets not just one, but several of the criteria for publication. Indeed, the City respectfully submits that publication is warranted, in whole or in part, under no less than *six* of the nine criteria enumerated in Rule 8.1105(c), in that the opinion:

> (1) Establishes a new rule of law;
>
> (2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;
>
> (3) Modifies, explains, or criticizes with reasons given, an existing rule of law;
>
> (4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance or court rule;
>
> (6) Involves a legal issue of continuing public interest; and
>
> (8) ... reaffirms a principle of law not applied in a recently reported decision.

First, there are currently no published California appellate decisions regarding the constitutionality or equal protection aspects of billboard relocation agreements, as contemplated in Business & Professions Code section 5412. There is one Ninth Circuit decision – *Maldonado v. Morales* (9th Cir. 2009) 556 F.3d 1037 – which briefly addressed a similar issue in the context of an analogous Business and Professions Code provision, but state courts are not required to follow federal circuit court decisions in matters of state law. Additionally, *Maldonado* involved an action against CalTrans, and did not address the constitutionality or equal protection aspects of a *local* ordinance which bans new billboards subject to a Business & Professions Code section 5412 exception for relocating grandfathered pre-ban billboards.

This Court's decision directly addresses Business & Professions Code section 5412, and also directly addresses the constitutionality and equal protection aspects of a municipal ordinance adopted pursuant to that state statute. Thus, this Court's decision, if published, would effectively make *new* law in this area, satisfying publication criteria (1). At a minimum, it would be the first published California appellate decision to *apply* existing federal precedent in this area, to *explain* that precedent in the context of a local ordinance, and to *interpret* Business & Professions Code section 5412 in this context, satisfying criteria (2), (3), and (4), respectively.

Moreover, relocation of grandfathered pre-ban billboards is an issue of *continuing public interest* throughout the state. Many local public agencies have exceptions for relocation agreements embedded in their off-site billboard bans. Billboards are typically located along freeways,

highways and other large public streets – i.e., areas which are routinely impacted by road widening, utility relocations and various other public works projects. The associated use of eminent domain frequently results in forced removal of very lucrative billboards, which would be extraordinarily expensive for the public to condemn, but for the ability to relocate those billboards – the very reason why Business and Professions Code section 5412 was enacted. Accordingly, publication would also satisfy criteria (6).

Second, this Court's opinion clarifies, for the first time in over 30 years, that there is no difference between the First Amendment and the California constitution's treatment of local bans on off-site commercial billboards.

There were several published California appellate court decision addressing the constitutionality of local billboard bans in the years following the United States Supreme Court's decision in *Metromedia, Inc. v. City of San Diego* (1981) 453 U.S. 490 and the California Supreme Court's bookend decisions in *Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848 and *Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180.

The most notable of those were *City and County of San Francisco v. Eller Outdoor Advertising* (1987) 192 Cal.App.3d 643, *City of Salinas v. Ryan Outdoor Advertising, Inc.* (1987) 189 Cal.App.3d 416, and *Tahoe Regional Planning Agency v. King* (1991) 233 Cal.App.3d 1365. However, over the past 25 years, there has been a dearth of published California appellate decisions on this important issue. Moreover, even the aforementioned trio of state appellate court opinions was decided under the First Amendment, not the California constitution.

During the 1990's and 2000's, nearly all constitutional challenges to billboard ordinances in California were litigated in federal court under the First Amendment. Following a string of decisive losses in the Ninth Circuit – most notably in *Metro Lights v. City of Los Angeles* (9th Cir. 2009) 551 F.3d 898, *World Wide Rush, LLC v. City of Los Angeles* (9th Cir. 2010) 606 F.3d 676, and *Vanguard Outdoor, LLC v. City of Los Angeles* (9th Cir. 2011) 648 F.3d 737 – both institutional and would-be billboard operators are increasingly returning to state court, presumably hoping for a different result from a new generation of judges interpreting the California constitution.

The argument that commercial speech receives a higher level of protection under the California constitution than the First Amendment was directly considered and rejected by the Ninth Circuit just a few years ago. (*Vanguard v. City of Los Angeles* (9th Cir. 2011) 648 F.3d 737, 739, 746-747 ["claim that the California Constitution affords greater protection than the First Amendment fails in light of California Supreme Court case law.]") The California Supreme Court reached a similar conclusion, albeit in a different context, in *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 959 ["This court has never suggested that the state and federal Constitutions impose different boundaries between the categories of commercial and noncommercial speech"].) However, *Vanguard* was not a state court case, and *Kasky* was not a billboard case.

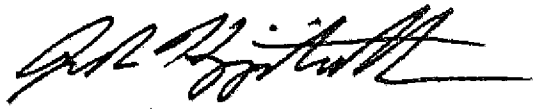
This Court's opinion appears to be the first California appellate decision since the California Supreme Court's initial *Metromedia* decision in 1980 – *over 35 years ago* – to analyze how the California constitution applies to billboard regulation. In that regard, this Court's decision expressly reaffirms that: (1) the United States Supreme Court's decision in "*Metromedia* remains the law of the land"; (2) the commercial/non-commercial and on-site/off-site distinctions are *not* impermissible content-based regulations under the California constitution; and (3) the California constitution does *not* provide 'broader' or 'greater' protection to off-site commercial billboards than does the First Amendment.

The importance of these holdings cannot be overstated. The use of on-site/off-site and commercial/non-commercial distinctions is commonplace in local sign ordinances, and is a cornerstone of effective sign regulation. As this Court's opinion correctly recognizes, distinctions based on location or context are *not* impermissibly content-based under federal *or* state law. That principle is under concerted attack through the state – attacks which are made possible by the lack of recent published California authority interpreting the California constitution in the context of sign regulation. Publication of this Court's opinion would provide much needed clarity and long overdue reaffirmation of California law on this important issue, and would therefore satisfy criteria (6) and (8).

Third, this Court's analysis of the 'prior restraint' issue also satisfies the publication criteria. This Court's opinion holds that the City's 2004 Ordinance banning new off-site commercial billboards is *not* a 'prior restraint.' Federal law in this area is reasonably well-developed, as reflected by the fact that all of the several cases cited in this portion of the opinion are federal cases. Application of these principles in a published California appellate court decision would strengthen and add clarity and certainty to California law on this issue.

For each of these reasons, the City respectfully requests that this Court publish the opinion in its entirety.

Respectfully submitted,



John Higginbotham
Assistant City Attorney

CITY ATTORNEY
CITY OF CORONA
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PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 400 S. Vicentia Ave., Corona, CA 92882. On January 25, 2016, I served the following document(s):

REQUEST FOR PUBLICATION OF OPINION

☐ **By personal service.** I personally delivered the documents to the person(s) at the addresses listed below. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

☐ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the person(s) at the addresses listed below, and deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Corona, California.

☑ **By e-mail or electronic transmission.** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the person(s) at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

John B. Campbell, Esq. Attorney for Curlan, LTD and Sid's Carpet Barn, Inc.	john.campbell@cbellgroup.com
Dana Cole, Esq. Attorney for AMG Outdoor Advertising, Inc., Rockefellas, California Outdoor Equities Partners, LLC, Alex M. Garcia, Betzalel Louk, Anat Louk, Mark Breiter, Melissa Breiter and Hisham Elkatib	coledana@pacbell.net
Mark Mellor, Esq. Co-counsel for AMG, Garcia and Rockefellas	mmellor@mellorlawfirm.com

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 25, 2016, at Corona, California.

John Higginbotham

Exhibit D

80038-0028
pldg

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Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Desert Development, LLC Plaintiff/Petitioner(s) VS. City of Emeryville Defendant/Respondent(s) (Abbreviated Title)	No. RG10499954 Order Demurrer to Complaint Sustained

The Demurrer to Complaint filed for Board of Directors of the Emeryville Redevelopment Agnency and Emeryville Redevelopment Agency and City Council of the City of Emeryville and City of Emeryville was set for hearing on 07/09/2010 at 09:00 AM in Department 25 before the Honorable Ronni MacLaren. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The demurrer by Defendants City of Emeryville, City Council of the City of Emeryville, Emeryville Redevelopment Agency, and Board of Directors of the Emeryville Redevelopment Agency (collectively "City") to the complaint by Plaintiff Desert Development, LLC ("Plaintiff") is ruled upon as follows:
I. Demurrer to First Cause of Action

The demurrer to the First Cause of Action for inverse condemnation is SUSTAINED WITHOUT LEAVE TO AMEND.

City argues that Plaintiff's claim for inverse condemnation fails as a matter of law for two independent reasons: (1) City did not take any property owned or possessed by Plaintiff and, therefore, no compensation is owed; and (2) Plaintiff's month-to-month lease with Clear Channel, and its billboard easement tied to the lease, are not compensable property interests. The Court agrees that both grounds are sufficient to sustain City's demurrer to the inverse condemnation claim.

(a) Absence of a compensable taking
Plaintiff has not stated a viable claim for inverse condemnation because the facts alleged, including the Stipulation for Judgment in Condemnation ("Stipulated Judgment") and Outdoor Advertising Sign Relocation Agreement ("Relocation Agreement"), do not show a taking, as a matter of law. Under the California Constitution, article 1, Section 19, property may be taken or damaged for public use only where just compensation is paid to the owner. A landowner may seek compensation under a cause of action for inverse condemnation in the absence of the government's exercise of its power of eminent domain, but the landowner must show an invasion or appropriation of land resulting from a definite and unequivocal manifestation that the public entity was ready to use its power to condemn and, in fact, would have clearly done so if necessary to acquire the property at issue. The mere fact that a government entity has the power of eminent domain, when that power was not exercised or remotely threatened, is insufficient to render it liable in an inverse condemnation action when it deals in an open

market transaction that results in leases or licenses being broken. Pacific Outdoor Advertising Co. v. City of Burbank (1978) 86 Cal.App.3d 5, 11-12; Langer v. Redevelopment Agency of City of Santa Cruz (1999) 71 Cal.App.4th 998, 1008.

The complaint alleges that the relocation resulted from agreements between the billboard owner, Clear Channel, and government agencies, and that the billboard was not the subject of an eminent domain proceeding. There are no allegations that suggest that City was threatening to condemn Plaintiff's property in order to remove the billboard. Thus, there is no basis to conclude that Clear Channel's agreement to remove the existing billboard shows that City compelled Clear Channel to remove the billboard and terminate the lease, through a threat to use its power of eminent domain or otherwise.

Plaintiff argues that City "compelled" the removal of the billboard under the Relocation Agreement because the removal of the old billboard was necessary under Business and Professions Code section 5443.5, in that the new billboard location was situated adjacent to a landscaped freeway. This argument is not persuasive. Plaintiff ignores the fact that the Stipulated Judgment and Relocation Agreement were agreements, and that Clear Channel had the option under the Stipulated Judgment to accept $5 million dollars in lieu of City's cooperation with relocation of the I-80 billboard and its agreement to extend the lease term for Clear Channel's "Ipod Billboard." Further, all the parties to this action agree that the relocation of the billboard, even though it required destruction of the existing billboard structure, was in Clear Channel's interest, rather than an act compelled by City. Thus, the contention that City caused the termination of the lease by Clear Channel is not a viable basis for an inverse condemnation claim, because there is no allegation that the termination resulted from a threat to use City's power of eminent domain. Langer, supra, 71 Cal.App.4th at pp. 1008-1009.

Plaintiff argues that the holding in Pacific Outdoor Advertising, supra, 86 Cal.App.3d at 11, is not applicable because Clear Channel's termination of the I-80 billboard lease was not the result of bargaining in the open market. Plaintiff bases this conclusion on the fact that City "contractually bound and obligated" Clear Channel to remove the I-80 billboard, whereas in Pacific Outdoor Advertising the lease termination was merely the natural result of the contract between the government and the property owner. This is a distinction without a difference. The critical factor supporting the holding in Pacific Outdoor Advertising was the fact that the government had not used or threatened to use its power of condemnation. 86 Cal.App.3d at 9-12. The same is true in this case. The holdings in Pacific Outdoor Advertising and Langer, supra, 71 Cal.App.4th at 1008-1009, are directly on point. Under the rule set out in these cases, the government is free to enter into a contract that causes economic damage to third parties who own or possess land affected by the contract, without incurring liability for inverse condemnation, as long as the contract did not result from a threat to use the government's eminent domain powers.

Plaintiff asserts that City is using the relocation of the I-80 billboard to pay for its condemnation of Clear Channel's billboard located at 36th Street. Plaintiff argues that this ties the relocation of the I-80 sign to the condemnation action and triggers the right to compensation, presumably because there has been a taking. The fact that City offered to allow Clear Chanel to relocate its billboard on Plaintiff's property to another location as an alternative to payment to Clear Channel for the condemnation of another billboard owned by Clear Channel is apparent from the pleadings, but there is no legal basis for finding that the relocation constituted a taking merely because it was offered as a substitute for payment for a separate taking of Clear Channel's property. The agreement to allow Clear Channel to relocate its billboard is not a taking of Plaintiff's property, and City's motivation for offering the relocation - to pay money owed to Clear Channel for property taken from Clear Channel by condemnation - is irrelevant.

Plaintiff argues that a public agency's collusion with one party to a lease in order to avoid paying compensation to another party to a lease constitutes a taking. Plaintiff relies on U.S. v. 12.18 Acres of Land in Jefferson County, Kan. (10th Cir. 1980) 623 F.2d 131, 132-133. The facts in that case are distinguishable. The government entity in U.S. v. 12.18 Acres of Land intended to acquire the land on which the lessees had improvements, and in fact did acquire that land by condemnation after the property owner terminated the leases. To the extent that U.S. v. 12.18 Acres of Land is offered to show that there was a taking, it has no application to the facts in this case, in which City never gave any indication of its intent to acquire Plaintiff's property and did not actually acquire any property as a result of its agreements with Clear Channel.

Plaintiff contends that pursuant to Business and Professions Code section 5412, City was required to pay compensation to it, as the owner of land on which the billboard display was located. The statute

requires payment of compensation when removal of a billboard is compelled. As discussed above, Plaintiff has not alleged facts showing that removal of the billboard was compelled. Moreover, the statute expressly states that it does not apply to billboards that are relocated by mutual agreement between the display owner and the local entity. The lease between Plaintiff and Clear Channel shows on its face that Clear Channel was the display owner. The statute explicitly defines "relocation" as removal of a display and construction of a new display to substitute for the display removed, which is what is alleged to have occurred in this case. Thus, by its own terms, the statute does not apply in this case.

The fact that section 5412, as well as Business and Professions Code section 5443.5, contemplate removal of the prior billboard and construction of a new display when a billboard is relocated, springs from the State's police power, rather than an exercise of eminent domain. Section 5412 also expresses a public policy in favor of relocation as an alternative to payment of public funds to an affected landowner. Plaintiff's contention that compensation is mandated under the circumstances of this case would discourage relocation of billboards in any situation in which the billboard space was leased from a property owner. That result is directly contrary to the public policy in favor of relocation agreements.

Plaintiff argues that the removal of the I-80 billboard was the substantial equivalent of condemnation because under Business & Professions Code sections 5412 and 5443.5, relocation agreements may only be used for billboards that are the subject of compensation. Similarly, Plaintiff argued at the hearing that it should be given leave to amend to allege that the Outdoor Advertising Act provides that relocation of a billboard is allowed only in a condemnation action. Plaintiff contends that this is sufficient to tie the relocation to the condemnation action against Clear Channel and trigger an obligation to compensate Plaintiff. Plaintiff also asserts that this is the policy of the California Department of Transportation ("Caltrans"). This argument is not persuasive. The Outdoor Advertising Act is not reasonably construed to limit the ability of government entities to allow relocation of billboards without compensation in this manner. Plaintiff's argument is based on a misreading of section 5443.5, which merely authorizes Caltrans to allow relocation even if the billboard is located on property being acquired by eminent domain. The statute does not expressly or impliedly bar relocation agreements in other contexts. Further, interpreting the statute to mean that any relocation agreement necessarily involves the exercise of eminent domain would discourage relocation agreements, since presumably it would require payment of compensation to a property owner leasing space for a billboard whether a billboard was condemned or merely relocated. Plaintiff dos not explain why the policy of Caltrans with regard to allowing relocation of billboard is relevant and the Court finds that it is not. For those reasons, the request for leave to amend to allege a violation of the Outdoor Advertising Act is DENIED.

(b) Lack of Compensable Interest

Plaintiff's claim for inverse condemnation also fails because the property interests it lost are not compensable property interests in an eminent domain proceeding. Plaintiff claims that the month-to-month lease is a compensable property interest because it had a reasonable expectation that the lease would be renewed indefinitely on a month-to-month basis, based on the fact that the use was non-conforming and Clear Channel, as a practical matter, would be unable to relocate the billboard to a similar site. This type of expectation of lease renewal, even if it is a probability of renewal, is not a compensable property interest. San Diego Metro Transit v. Handlery Hotel (1999) 73 Cal.App.4th 517, 531. Clear Channel could have determined at any point the rent demanded by Plaintiff exceeded the value to Clear Channel of the billboard space and lawfully terminated the lease. In addition, Plaintiff had no reason to expect that Clear Channel would not enter into an agreement with a government entity to relocate its billboard to a different site with more favorable lease terms, as occurred here.

Plaintiff argued at the hearing that its lease is a compensable property interest because it lost goodwill associated with a business. Plaintiff relies on Redevelopment Agency of City of San Diego v. Attisha (2005) 128 Cal.App.4th 357, 366-368, 370-373, and Los Angeles Unified School District v. Pulgarin (2009) 175 Cal.App.4th 101, 104-107. In each of those cases, the court acknowledged that there is no constitutional right to compensation for the loss of goodwill associated with the loss of a business location. The right to compensation for the loss of goodwill is found in Code of Civil Procedure section 1263.510, which provides that the "owner of a business conducted on the property taken" must be compensated for the loss of goodwill if the owner proves that the loss is caused by the taking of the property or an injury to the remainder. Plaintiff argues that its "business" is leasing billboard space, so that it was operating a business on its property. The Court concludes that Plaintiff was not operating a "business" on its property within the meaning of section 1263.510, and, thus, is not entitled to

compensation for loss of goodwill associated with that business, even if it could show a taking. There is no dispute that the billboard, and the right to display the billboard, belonged to Clear Channel. The only business being conducted by Plaintiff was the leasing of space. Under Plaintiff's interpretation, the exception to Handlery created by Attisha and Pulgarin would swallow the rule that a month-to-month lease is not a compensable property interest. Further, the intent of the statute is clearly to compensate owners of a business that must be relocated due to condemnation of the property on which it is operated, but Plaintiff's leasing business cannot be relocated. For that reason, the holdings in Attisha and Pulgarin do not support the conclusion that Plaintiff is entitled to compensation for the loss of its month-to-month lease with Clear Channel.

Plaintiff also argues that its easement is a property interest distinct from the lease, for which it is entitled to compensation. The facts alleged do not support the conclusion that the easement is distinct. The easement's value derives entirely from the rent provided by the billboard. Plaintiff alleges that once the billboard is removed, it cannot be restored. Since the easement allows Plaintiff to rent the space for a nonconforming use, it has no independent value from the rent obtained under the lease, and Plaintiff's claim for compensation for loss of the easement is not compensable for the same reasons as its claim for the loss of the lease.

II. Second Cause of Action

The demurrer to the Second Cause of Action for Violation of Civil Rights (42 U.S.C. sec. 1983) is SUSTAINED WITHOUT LEAVE TO AMEND.

Plaintiff has not stated viable claims for violation of equal protection or substantive due process. Plaintiff does not allege or claim that it is a member of a protected class. Plaintiff alleges that City treated it differently by conspiring to require Plaintiff to bear the financial burden of City's obligation to pay condemnation compensation to Clear Channel, and that it had no rational basis for its conduct because the Relocation Agreement was a violation of the Business and Professions Code section 5412. However, Plaintiff's allegations that City entered into an agreement with Clear Channel allowing Clear Channel to relocate its billboard are not a violation of section 5412. To the contrary, since section 5412 explicitly allows billboard relocation agreements and expresses a policy in favor of relocation agreements that avoid expenditure of public funds, the Relocation Agreement in this case was rationally related to a legitimate government interest as a matter of law. Plaintiff's claims for violation of equal protection and substantive due process fail on that basis.

Plaintiff has not stated a claim for violation of procedural due process. The facts do not show that governmental power was used to deprive Plaintiff of life, liberty, or property. For the reasons discussed above, Plaintiff has not alleged that there was a taking or a violation of Business and Professions Code section 5412, and Plaintiff provides no other basis for requiring notice from City.

III. Third Cause of Action

The demurrer to the Third Cause of Action for declaratory relief is SUSTAINED WITHOUT LEAVE TO AMEND. The claim for declaratory relief is dependent upon the viability of the claims in the First and Second Causes of Action. In addition, the facts alleged do not show the need for a declaration of rights. All of Plaintiff's claims have accrued. Plaintiff seeks, in essence, a declaration that it is entitled to an award of damages.

Leave to amend is DENIED because it is not reasonably likely that Plaintiff will be able to allege facts stating a cause of action against City. Nothing in Plaintiff's opposition indicates that a viable claim can be alleged under the circumstances presented.

IV. Judicial Notice

Plaintiff's requests for judicial notice are GRANTED.

Dated: 07/22/2010

Digital

Judge Ronni MacLaren

Order

SHORT TITLE:	CASE NUMBER:
Desert Development, LLC VS City of Emeryville	RG10499954

ADDITIONAL ADDRESSEES

Behrens, Gossage, Baca, Wong & Wyman
Attn: Wyman, James A.
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Suite 1700
San Francisco, CA 94105____

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Case Number: RG10499954
Order After Hearing Re: 7/09/2010

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Executed on 7/23/2010.

Executive Officer, Clerk of the Superior Court

By: *Trinidad R. Bigayan,* Deputy Clerk

Exhibit E

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February 22, 2013

Honorable Darrell Steinberg
Room 205, State Capitol

OUTDOOR ADVERTISING: RELOCATION AGREEMENTS - #1308709

Dear Senator Steinberg:

QUESTION

Business and Professions Code section 5412 prohibits removal of a lawfully erected advertising display without payment of compensation. However, that section also authorizes a local entity to enter into an agreement with a display owner to relocate a display (relocation agreement). You have asked us whether a local entity must first initiate proceedings under the Eminent Domain Law to compel the removal of an advertising display before the display owner and the local entity may enter into a relocation agreement.

OPINION

A local entity does not have to initiate proceedings under the Eminent Domain Law to compel the removal of an advertising display before the display owner and the local entity may enter into a relocation agreement.

ANALYSIS

Business and Professions Code section 5412[1] provides as follows:

"5412. 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

[1] All further section references are to the Business and Professions Code, unless otherwise indicated.

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.

"This section applies to all displays which were lawfully erected in compliance with state laws and local ordinances in effect when the displays were erected if the displays were in existence on November 6, 1978, or lawfully erected after November 6, 1978, regardless of whether the displays have become nonconforming or have been provided an amortization period. This section does not apply to on-premise displays as specified in Section 5272 or to displays which are relocated by mutual agreement between the display owner and the local entity.

"'Relocation,' as used in this section, includes removal of a display and construction of a new display to substitute for the display removed.

"It is a policy of this state to encourage local entities and display owners to enter into relocation agreements which allow local entities to continue development in a planned manner without expenditure of public funds while allowing the continued maintenance of private investment and a medium of public communication. Cities, counties, cities and counties, and all other local entities are specifically empowered to enter into relocation agreements on whatever terms are agreeable to the display owner and the city, county, city and county, or other local entity, and to adopt ordinances or resolutions providing for relocation of displays." (Emphasis added.)

To ascertain the meaning of a statute, we begin with the language in which the statute is framed. (*Leroy T. v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 434, 438; *Visalia School Dist. v. Workers' Comp. Appeals Bd.* (1995) 40 Cal.App.4th 1211, 1220.) When statutory language is clear and unambiguous, there is no need for interpretation, and the court must apply the statute as written. (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 547.)

Section 5412 states that cities, counties, cities and counties, and all other local entities are specifically empowered to enter into relocation agreements. Furthermore, these relocation agreements are to be on whatever terms are agreeable to the display owner and the city, county, city and county, or other local entity. (§ 5412.)

Section 5412 places no further requirements or restrictions on a local entity's ability to enter into a relocation agreement with a display owner. And there is no indication that the relocation agreements are contingent upon an attempt to compel removal with payment of compensation by initiating an eminent domain proceeding. In fact, section 5412 specifically notes that compelled removal with payment of compensation does not apply to

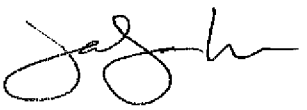
billboards that are relocated by mutual agreement between the display owner and the local entity.

Finally, section 5412 states that it is a policy of the state to encourage relocation agreements "which allow local entities to continue development in a planned manner without expenditure of public funds while allowing the continued maintenance of private investment and a medium of public communication." Thus the statute expresses a public policy encouraging relocation agreements between local entities and display owners to allow local entities to continue development and avoid expenditure of public funds, while protecting private investments and public communication. Requiring a local entity to institute an eminent domain proceeding in order to obtain authorization to enter into a relocation agreement would run contrary to this policy.

Thus, it is our opinion that a local entity does not have to initiate proceedings under the Eminent Domain Law to compel the removal of an advertising display before the display owner and the local entity may enter into a relocation agreement.

Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel



By
Jason K. Lee
Deputy Legislative Counsel

JKL:sjk