REPORT OF:	**City Attorney**
TITLE:	**Petition dated August 7, 2007 from K. Hinkley, 2006 N. 5th St., Madison re: The use of public transit system vehicles that are presently being used to advertise gambling and alcohol**
AUTHOR:	**Carolyn S. Hogg, Assistant City Attorney and Michael P. May, City Attorney**
DATED:	**January 16, 2008**

PRESENTED	**9/4/2007**
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TO THE MAYOR AND COMMON COUNCIL:

A petition entitled "Petition to stop the use of public transit system vehicles that are presently being used to advertise gambling and alcohol", I.D. #07231, was referred to the Office of the City Attorney to address constitutional and contractual issues implicated by the petition. This report discusses the current Metro Transit Leased Advertising Space Policy; Metro Transit's current contract for the sale of transit bus advertising; legal issues relating to regulating speech on publicly-owned property; and potential contractual issues. All of these issues may affect the Common Council's decision-making in this matter.

I. INTRODUCTION

A. Background

The petition filed with the Mayor and the Common Council implicates competing and, at times, conflicting interests: (1) the City's desire as a property owner to exercise management and control of its property in furtherance of its intended purpose, including generating revenue; (2) the City's interest in the health and welfare of the public; and (3) the City's obligation to ensure that speech entitled to protection under the First Amendment to the United States Constitution is not unlawfully prohibited or restricted.

At times, these policies and principles may conflict. This is sometimes the case with respect to advertising on public property dedicated to transportation purposes but opened up in part to expressive activity (advertising) for revenue generating and other purposes. At the present time, such conflicts arise in a legal environment that recognizes the First Amendment value of commercial speech and imposes close legal scrutiny on otherwise legitimate non-commercial

(political, social issue, etc.) speech. If the City were to face litigation in this area it could be costly, lengthy and uncertain.

B. Metro Transit Leased Ad Space Policy

Advertising has been allowed on City of Madison transit buses for some years pursuant to a Leased Advertising Space Policy first adopted by the Transportation Commission (now the Transit and Parking Commission) in 1986. Madison's policy as expressed in the document is "to restrict advertising as little as possible while still responding to operational safety concerns." Consistent with this expressed intent, restrictions in the policy's copy standard are minimal (obscene; libelous; fraudulent). In addition, pursuant to the requirements of federal law enacted as part of the federal tobacco litigation settlement, Metro Transit will not accept any advertisements for tobacco and tobacco-related products.

C. Contract to Sell/Manage Leased Ad Space

Madison Metro has traditionally used an outside vendor to sell and manage interior and exterior transit bus advertising. The current contract, with Adams Outdoor Advertising, Ltd. Partnership, runs from February 1, 2007 to December 31, 2009 with a single option exercisable by the City to extend the contract for one three-year period (January 1, 2010 to December 31, 2012). Exterior advertisements range in size. They include smaller side and back panels; full back panels; partial bus wraps and full bus wraps. Under the contract and pursuant to the ad policy, full bus wraps are permitted under a trial program on a maximum of 15 buses. (Five additional wraps were authorized to be added to the program during the recent budget process, subject to Common Council approval of a contract amendment to that effect, which amendment was approved by the Board of Estimates on January 15, 2008, Legistar #08438.) This is a two-year program which began when the first fully wrapped bus was introduced in revenue service on March 28, 2007. The contractor is not authorized to sell any full bus wrap advertisements which extend beyond this two-year period unless the program is reauthorized by the City. Pursuant to the contract, the contractor must comply with Metro Transit Leased Advertising Space Policy currently in effect and as may be amended from time to time. The contract also contains the City's standard "termination for convenience" clause which allows the City to terminate the contract for any reason upon 10 days' notice. Such provision, however, would not operate to terminate any advertising space contracts previously executed by the contractor with an advertiser.

II. SUMMARY OF LEGAL CONCLUSIONS AND OPTIONS

A. Current Policy Options

Based on the language and implementation of the Metro Transit Leased Ad Space Policy and an analysis of applicable case law, it is my opinion that the City would be deemed to have created this leased advertising space as a "designated public forum" under current legal precedent. Additionally, the "forum" at issue is not Metro Transit facilities generally but the leased advertising space in particular, with no distinction being drawn between smaller ad spaces and

full wraps (referred to herein as the Transit Ad Space). The practical ramifications of this conclusion on the City's ability to regulate advertising in these spaces under the current policy is two-fold:

1. The standard for regulating/restricting speech in a non-public forum, i.e., that the regulation be reasonable, non-discriminatory and viewpoint neutral is not the applicable standard; and

2. Any content-based speech regulations must satisfy a high legal standard: the "compelling interest/narrowly tailored" test for non-commercial speech and the "Central Hudson Test" for commercial speech.

B. Potential Future Policy Options

Unlike the status of a traditional public forum, a forum's status as a "designated public forum" is not irrevocable. Consequently, the Common Council may opt to review and reassess the designation of transit advertising space as a designated public forum. It should be remembered, however, that courts look beyond mere labels; policies, use and purpose of the property must also be consistent with its designation in order to satisfy legal scrutiny. Given the fact that the City contracts for advertising services with an outside vendor, the timing of any policy changes is also important. Significant, substantive transit ad space policy modifications must take into consideration the current contractual relationship between the City and Adams and Adams and its advertisers. Consequently, comprehensive changes should only be implemented at the end of the contract term or at the end of the wrap program trial period, as appropriate.

Subject to those timing issues, briefly stated, the City may opt to explore the following options:

1. Retain the current policy.

2. Revisit the designation of the Transit Ad spaces as a designated public forum; take the necessary steps to recreate the ad space as a non-public forum for revenue raising commercial advertising purposes only and provide the required justification for any restrictions/prohibitions imposed using the less stringent reasonableness standard for a "non-public forum."

3. Retain the designation of the Transit Ad Spaces as a "designated public forum" and engage in a study to determine whether and to what extent restrictions/prohibitions on advertising certain commercial products (such as alcohol beverages) can be legally justified under the "*Central Hudson*" test.

4. Ban all transit ads and forgo the revenue.

A cautionary note is appropriate. The potential options identified in Nos. 2 and 3 above are not simply a matter of amending and wordsmithing the current transit ad policy. Each requires study and necessary factual and legal support for the ultimate policy choices made. The requirement

that defensible policies have an adequate factual justification is not theoretical; it is real and substantial.

III. LEGAL FRAMEWORK

A. Public Property vs. Speech Protected by the First Amendment

1. Forum Analysis

Governmental restrictions on the use of Public Property for speech purposes are subject to challenge under the First Amendment (Freedom of Speech). In deciding whether and to what extent speech may be regulated, courts first engage in a forum analysis. Courts have recognized three separate types of forums in this context: traditional public forum; designated public forum; non-public forum.

- *Traditional public forums* are places traditionally held open for exercise of First Amendment Rights.; they are considered irrevocable venues for expressive activity. Examples of such areas are streets, sidewalks and public squares.

- *A designated public forum* is not property that has by tradition been held open to the public for expressive activity; it has been designated as such by the governmental entity property owner. The designation of particular property as a public forum may be deduced from the surrounding facts and circumstances. The designation is not perpetual; it may be revoked. Typical examples of such property are community meeting rooms in a public building (open to all on a first come, first served basis); public theaters and the like.

- *A non-public forum* is neither a traditional public forum nor a designated public forum. Speech may or may not occur there, but the property is not designed for nor designated for use by the public for speech purposes. Examples of a non-public forum are interior office spaces of public offices; the City web page; and the City's glass paneled, community event kiosks located around the Capital Square.

2. Governmental Entity: Proprietor vs. Regulator

The fact that the government acts as a proprietor does not negate the need to engage in a public forum analysis, *Air Line Pilots, Ass'n v. Dept. of Aviation of the City of Chicago*, 45 F.3d 1144 (1995). The government's proprietary role is simply one factor to be considered in determining whether a public forum was intended. *Id.* While relevant, the distinction cannot be used to justify impermissible regulations of speech on property in a nonpublic forum or on property that has been designated as a public forum.

Interestingly, in *New York Magazine v. MTA*, 136 F.3d 123 (1998) the United States Second Circuit found that the nature of excluded categories of speech shed light on whether the government was acting primarily as a "proprietor" or a "regulator". Significantly, the court noted that the justification for refusing to allow the New York Magazine ad (that the ad was allegedly in violation of New York Civil Rights Law by using someone's name in advertising without that person's permission) supported the conclusion that the forum was a designated public forum, since the MTA was acting as a "regulatory" agency (a general interest in upholding the law) and not from its "proprietary" interests (a commercial reason or internal operational reason) when it did so.

B. Designated Public Forum v. Non-Public Forum

One of the first considerations is to define the relevant forum. Courts are uniform in the approach to this issue: the relevant forum is defined by focusing on "the access sought by the speaker." *Cornelius v. NAACP Legal Defense Educational Fund, Inc.*, 473 U.S. 788, 797, 105 S.C. 3439, 3446 (1985). With respect to Transit Advertising, the courts have concluded that it is the advertising space and not the public transportation system as a whole that is the "forum". As such, it is the ad space that is the focus of the public forum/non-public forum analysis. In one case the court actually concluded based on the relevant factors that a large 103 ft. by 10 ft., back-lit billboard in Penn Station was not a public forum although other locations for ads in the station might be. *Lebron v. Amtrak*, 69 F.3d 650 (1995). One of the considerations in making a determination regarding the status of particular property is "its compatibility with expressive activity." That is somewhat problematic when dealing with ad space. As the Seventh Circuit and other courts have noted, it would be anomalous to suggest that such spaces are inconsistent with expressive activity since by their very nature they are intended for communication. However, the courts also look to other surrounding circumstances mentioned above when making the final determination

Public transit vehicles are not traditional public forums. The primary purpose to which they are dedicated is public transportation services. A governmental entity is not required to make either the insides or the outsides of such vehicles available for speech purposes. While public transportation systems may be principally funded by state or federal subsidies and passenger fares, such entities have also looked to the sale of advertising as a source of additional operating revenue. A question arises then regarding the status of this advertising space: is it a non-public forum like transit vehicles generally or, being space designed and used for some expressive activity, is it a public forum by designation? When determining whether public property has become a designated public forum, courts look to certain factors, such as, the intended purpose of property; policy and practice with respect to the property; the nature of the property; its compatibility with expressive activity; and the nature of the restraints imposed on speech. Judicial decisions in this arena are necessarily fact specific. Two examples can serve to illustrate this point:

- In *Planned Parenthood Association/Chicago Area v. CTA*, 767 F.2d 1225 (C.A. 7th 1985), the Seventh Circuit found internal and external ad space on the CTA to be a designated public forum. Of significance to the court were the following facts: there were very few restrictions on the ads; the space was used for a wide variety of commercial, public-service, public issue and political ads; the space was open to virtually anyone willing to pay the required fee. The court distinguished *Lehmann v. Shaker Heights* (cite), a case frequently cited by supporters of restrictive regulations, noting that the transit entity in the *Shaker Heights* case consistently rejected political/public issue/controversial ads and that the court was dealing solely with the interior of buses where the passengers were effectively a captive audience.

- In contrast, applying the same legal principles, the First Circuit in *Ridley v. Massachusetts Bay Transportation Authority*, 390 F.3d 65 (C.A. 1st, 2004) did not find a designated public forum had been created. The court noted that there was an explicit statement that the space was not intended to be a public forum had been created. There were extensive limitations on ads, including no political ads; there was a stringent review of ads for conformance with established policy. Ironically, the court went on to hold that the Transit Agency's rejection of some ads violated even the more relaxed "reasonableness" standard.

Based on the language and implementation of the Metro Transit Leased Ad Space Policy and an analysis of applicable case law, it is my opinion that the City would be deemed to have created this leased advertising space as a "designated public forum" under current legal precedent. The Seventh Circuit's decision in *Planned Parenthood*, supra, itself requires this conclusion. Additionally, the "forum" at issue is not Metro Transit facilities generally but the leased advertising space in particular, with no distinction being drawn between smaller ad spaces and full wraps.

C. Permissible Restrictions on Speech

The forum analysis is not simply academic; the type of forum determines the extent to which speech may be regulated and the standards by which courts will measure such regulations.

- *Traditional public forums and designated public forums:* Reasonable, non-content based time/place/manner restrictions may be imposed. Content-based restrictions may also be imposed; however, any such restrictions must serve a compelling state interest and be narrowly tailored to accomplish or further those interests. Restrictions based on the speaker's viewpoint are prohibited.

- *Non-public forums.* Speech restrictions need only be reasonable; non-discriminatory; view point neutral

1. "Reasonable" Regulations in a Non-Public Forum

Restrictions in a non-public forum need only be reasonable, non-discriminatory and view point neutral. However, the Seventh Circuit has given strong cautionary guidance on this point. Reasonableness of a given restriction "must be assessed in light of the purpose of the forum and all surrounding circumstances." *Air Line Pilots Ass'n v. Dept. of Aviation of the City of Chicago*, 45 F.3d 1144, 1159 (1995); the inquiry "requires an examination of both the governmental interest and the particular forum's nature and function" *Id.* It requires "a determination of whether the proposed conduct would actually interfere with the forum's stated purposes." *Id.* While these statements were made in the context of social issue speech, the "reasonableness" standard in a non-public forum applies to both commercial and non-commercial speech.

Given our conclusion that the Transit Ad Spaces are a public forum, the reasonableness standard does not apply. However, if the City were to determine to modify the nature of the forum, such standards might be applicable.

2. Commercial Speech Regulations in a Designated Public Forum

The legal protection given commercial speech has clearly evolved in case law over the years. Non-commercial speech is still accorded greatest protection. However, commercial speech is also protected by the First Amendment. Restrictions on commercial speech enacted by the government in its regulatory capacity or placed by the governmental proprietor on property that is a designated public forum must meet the legal standard set forth in 1980 in *Central Hudson Gas & Electric Corp. v. PSC*, 447 U.S. 557 (1980).

1) whether the speech is truthful and relates to lawful activity;
2)whether the state/city has a substantial interest to be advances;
3)whether the restriction directly advanced the state interest; and
4) whether it is the least restrictive alternative available.

Cases using these standards may reach different conclusions as to the validity of a particular regulation at issue depending on the evidence introduced to satisfy the four prongs of the Central Hudson test. I note the following examples:

- In *Anheuser-Busch v. Schmoke*, 101 F.3d 325 (CA 4 1996), the Fourth Circuit held that a City of Baltimore ordinance banning stationary outdoor advertising of alcohol beverages in certain areas of city where children were likely to walk to school or play passed the *Central Hudson* test and upheld it against First Amendment attack. Interestingly, the court did not approach the ordinance as a content-based restriction; rather as alcohol ads were not completely prohibited, the court upheld it as a reasonable time place and manner restriction. The US Supreme Court denied review of the case.

- In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (USSC 1998) the Supreme Court found that the regulation at issue failed the *Central Hudson* test. The Court struck down a restriction that prohibited disclosure of alcohol content on a beer label. Although the interest was substantial (preventing alcohol content "strength wars") the Court concluded that the state didn't show the third and fourth prongs of *Central Hudson* (directly advancing the state interest and being the least restrictive alternative) were met.

As mentioned above, I have concluded that the Transit Ad Space as currently assigned and administered would be deemed to be a designated public forum. As a consequence, any restriction on commercial speech under the current policy must satisfy the *Central Hudson* test set forth above.

IV. DISCUSSION OF OPTIONS

As noted above, Madison Metro's current, long-standing, expansive ad policy would be deemed to have created a designated forum under the law. As a result, the standard for regulating/restricting speech in a non-public forum, i.e. that the regulation be reasonable, non-discriminatory and viewpoint neutral, is not be applicable. Any content-based speech regulation would have to satisfy a higher legal standard. For commercial speech, the standard is the *Central Hudson* test.

The jurisdictions that have chosen to prohibit alcohol do not appear to have taken Madison's approach. Some of the jurisdictions may have created and administered their transit ad space as a non-public forum; some may have satisfied themselves that they have a factually and legally sufficient foundation to satisfy the *Central Hudson* test as to any content-based restrictions on commercial advertising they impose. Madison has done none of those things. Consequently, merely having the TPC or the Common Council amend the policy by inserting an alcohol ad prohibition into Metro's current policy would leave the City vulnerable to legal challenge. This is not an option.

The City may explore different options: maintaining the current policy; removing all ads from buses; taking legally sufficient steps to make the space into a non-public forum; maintaining the space as a "designated forum" and gathering legally sufficient evidence in support of any content-based regulation. Each has its own legal, practical and policy concerns which must be thoughtfully weighed.

1. Maintain the Current Policy.

The City could maintain its existing policy, leaving the Transit Ad Spaces as a designated public forum, with the resulting legal requirement that nearly all advertising would be allowed on the buses.

2. Transform the Space into a Non-public forum.

Any decision by the Common Council to recreate Transit Ad Spaces as a non public forum will need to be supported by a legally defensible articulation of the forum's nature and function. In

addition, policies on the use of the space will need to be consistent with and in furtherance of the forum's purpose and articulated government interests. Since courts have generally considered policies that allow a broad range of public issue oriented and public service ads as indicative of an intent to create a designated public forum, transit agencies moving toward a non-public forum often limit ad space to commercial or paid advertising. This may mean a loss of a useful venue for non-profit, public service announcements. Further, transit agencies that want to ensure that they fall on the non-public forum side of the line have frequently ended up in costly litigation with public issue groups whose paid advertising has been rejected as being "controversial". Such challenges often proceed along two fronts: the ad space is a designated forum and the restriction does not satisfy the "compelling interest/narrowly tailored" test; and, alternatively, the space is a non-public forum and the restriction is unreasonable. *Ridley v. Massachusetts Bay Transportation Authority*, supra, is such an example. Therefore, regulations of non-commercial speech will need to be narrowly crafted and legally defensible.

Although restrictions on speech in a non-public forum need only meet a "reasonableness" standard, courts, in particular the Seventh Circuit, require a factual determination specific to the nature and purpose of the forum in question. No court has specifically addressed the reasonableness of rules prohibiting the advertising of alcohol on transit ad space that has been found to be a non-public forum. It is an open question whether the data regarding the relationship between alcohol advertising and underage consumption (which may be important to the government as a "regulator" in the public interest) is a sufficient basis for such a prohibition in this context, where accepting the ad would appear to be in furtherance of the transit agency's revenue generating goal. Interestingly, the Second Circuit in *New York Magazine v MTA*, supra., used the fact that the City was acting in its regulatory interest and not in its commercial interest as evidence that the City intended the ad space to be a designated public forum. Consequently, facts to support the reasonableness of any restriction on a commercial product should be linked to the effect of the speech on the forum's stated purposes; legitimate government interest and the overall purpose of the property.

If the City were to pursue this option, it could only be implemented at the end of the current contracts for advertising. As a practical matter, the city would have to articulate reasonable grounds for any types of advertising that it would no longer accept on its Transit Ad Space. While some possibilities exist for restricting alcohol ads (such ads encourage underage drinking or binge drinking, contrary to some City policy against the excesses of alcohol use), I cannot say if such rationales can be supported by evidence. Moreover, without the articulation of other classes of advertising that would also be restricted, the mere designation of the Transit Ad Space as a non-public forum might itself be subject to challenge; this is, if all the Council did was to declare Transit Ad Space a non-public forum and accept all ads except alcohol and gambling, the City's actions could be subject to legal challenge.

In sum, the option of changing the City's current treatment of the Transit Ad Space as a designated public forum to a non-public forum would be lengthy and of uncertain outcome, but it is one option that the Council may wish to consider.

3. Keep the Space as designated public forum, but impose restrictions meeting the *Central Hudson* test.

The Council may opt to explore maintaining the Transit Ad Space as a designated public forum and undertake to satisfy the *Central Hudson* test for any restrictions it decides to place on commercial advertising. In the case of advertising of alcohol beverages, I assume that the ads will be truthful, satisfying the first prong of the *Central Hudson*, and courts have no problem in concluding that preventing underage drinking is a compelling state interest, satisfying the second prong of *Central Hudson.*[1] The difficulty is in providing the evidentiary support to satisfy the third and fourth prongs of the *Central Hudson* test: whether the restriction directly advances the state interest; and whether it is the least restrictive alternative available. In *Anheuser-Busch v. Schmoke*, supra, the Fourth Circuit concluded that the City of Baltimore ordinance banning stationary outdoor advertising of alcohol beverages in certain areas of the City where children were likely to walk to school or play passed the *Central Hudson* test. However, it is hard to harmonize this holding with Supreme Court pronouncements in this area in which the court discusses the burden of proof under these two prongs. The Supreme Court opined in *44 Liquor Mart v. Rhode Island*, 517 U.S. 484, 504-05 (1996):

> Because a commercial speech regulation may not be sustained if it provides only ineffective or remote support for the government's purpose, the State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so to a material degree. In this case, therefore, the State must show that the ban will significantly reduce alcohol consumption. (Citations omitted.)

Without the factual support necessary to satisfy all prongs of the *Central Hudson* test, a broad prohibition on advertising an otherwise legal product (in a designated public forum) would unreasonably risk litigation. As with a move to a non-public forum, any attempt by the City to justify restrictions in a designated public forum setting must await the end of the current contracts, will require study and evidence to support the change, and will be subject to greater legal scrutiny than if the Transit Ad Space were designated a non-public forum.

4. Abandon Transit Advertising.

The Council could avoid these issues by determining that it was no longer going to make space available on Metro buses for advertising. This would result in the loss of advertising revenue.

V. CONCLUSION

Should the Common Council wish to explore options for amending the policy, it should create a committee that could gather necessary information to support and justify policy changes--whether it be a move toward a non-public forum or restrictions/limitations on the advertising of certain commercial products such as alcoholic beverages in the current designated public forum.

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[1] This report does not examine in any depth the sustainability of regulations of particular products. Alcohol is mentioned as an example because it is the subject of the petition. The same standards would apply to other commercial products, e.g., gambling. I note, however, that the Supreme Court has struck down prohibitions on advertising legal gambling activities under the *Central Hudson* test. *Greater New Orleans Broadcasting Association, Inc. v. United States, et al.*, 527 U.S. 173 (1999).

Because this area of speech regulation is not one of bright lines and broad distinctions, I cannot state with any certainty that a policy that prohibits alcohol advertising will not be subject to litigation. A policy supported by strong factual foundations that address the standards for regulation of speech set forth in this report will nonetheless place the City in the best posture to defend a restrictive policy.

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