COMMERICAL ADVERTISING ON PUBLIC PROPERTY

Wayne Snodgrass
Deputy City Attorney
City and County of San Francisco
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102
I. INTRODUCTION

As California’s cities, facing flat or shrinking tax revenues, struggle to finance public programs and balance municipal budgets, many will likely turn increasing attention toward innovative ways to generate revenue. One potential revenue source is the sale of advertising display space on public property, including on such objects as transit shelters, transit vehicles, public restrooms, and public buildings. What, after all, could be easier than to receive money for the rental of public space that would otherwise be unoccupied and economically unproductive?

But if a city that allows advertising to be displayed on its property is not very careful – and perhaps even if it is – it could face some unexpected, and unfortunate, consequences. One city discovered that because the local transit authority leased advertising space on the exterior of its buses, it was powerless to reject an advertisement that offended, and may have even violated the privacy rights of, the city’s mayor. Other cities that similarly have allowed advertisements to be displayed on public buses have found themselves unable to reject advertisements concerning controversial and divisive subjects, such as abortion – even advertisements that may be misleading or factually wrong.

In short, cities entering this arena must contend with murky and unsettled constitutional questions about whether a public entity that sells advertising space can retain the ability to decline to display advertisements it deems inappropriate. This paper begins by surveying the leading court opinions concerning public entities’ attempts to control the contents of advertising displayed on public property. It then attempts to distill from those decisions a number of suggested approaches that a city may wish to consider if it intends to sell advertising space on public property yet does not wish to relinquish all control over the type of advertisements displayed.

II. THE CASELAW: A MIXED BAG

The courts that have considered the issue of a city’s ability to deny space on its public property to advertisements it deems unsuitable have reached widely differing conclusions. On the one hand are such cases as Lehman v. Shaker Heights, 418 U.S. 298 (1974), Children of the Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998), and DiLoreto v. Downey Unified School District Board of Education, 196 F.3d 958 (9th Cir. 1999), which hold that a public entity may sell advertising space on public property without thereby abdicating its right to reject certain types of advertisements as unsuitable. Such decisions typically accord considerable weight to the notion that the government has the leeway to manage its property in a proprietary capacity to raise revenue, much like a private entity. On the other hand are such cases as New York Magazine v. Metropolitan Transportation Authority, 136 F.3d 123 (2nd Cir. 1998) and Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority, 148 F.3d 242 (3rd Cir. 1998), which hold that a public entity’s sale of advertising space on its property may compel that entity to display even advertisements that satirize public officials, or that may offend and divide the community.

---

1 Although this paper refers to cities throughout, the legal principles discussed herein are generally applicable to any public entity that controls public property on which advertising might be permitted, including transit providers, utilities, etc.
A.  Lehman and Its Progeny: Proprietary Actions Do Not A Public Forum Make

1.  Lehman v. Shaker Heights

The seminal opinion in this area is the Supreme Court’s decision in Lehman v. Shaker Heights, 418 U.S. 298 (1974). There, the city of Shaker Heights, Ohio, operated a public rapid transit system, funded in part by the sale of advertising space on “car cards” placed on and in the rapid transit cars. (418 U.S. at 299-301.) Although the system accepted advertisements from a wide variety of commercial and noncommercial concerns – including “cigarette companies, banks, savings and loan associations, liquor companies, retain and service establishments, churches, and civic and public-service oriented groups” – it was undisputed that during its 26 years of operation, the system “had not accepted or permitted any political or public issue advertising on its vehicles.” (Id. at 300.) When a candidate for political office attempted to purchase advertising space on the system’s car cards and was rejected, he brought suit under a variety of theories. The Supreme Court granted certiorari on First Amendment grounds.

Although the opinion predates the Supreme Court’s later adoption of public forum analysis, the plurality anticipated that approach, holding that the rapid transit car cards did not constitute a “First Amendment forum” because the city had acted in a purely proprietary capacity by selling advertising space to raise revenue. (418 U.S. at 304.) The Court distinguished the advertising space, the purpose of which was to raise revenue, from public property traditionally reserved for expressive purposes. As it explained,

Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce .... [t]he car card space, although incidental to the provision of public transportation, is a part of the commercial venture. [Id. at 303.]

And, while the city could not deny access to the car card advertising space in a manner that was “arbitrary, capricious, or invidious,” the Court readily accepted as eminently reasonable the city’s justification for excluding political or public issue advertising:

Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. [Id. at 304.]

As a result, the plurality held, the city’s “managerial” and “proprietary” decision “to limit car card space to innocuous and less controversial commercial and service oriented advertising” did not violate the First Amendment. (Id.)

2.  Children of the Rosary v. City of Phoenix

Some 24 years later, the Ninth Circuit, in Children of the Rosary v. City of Phoenix, 154 F.3d 972 (9th Cir. 1998), relied heavily on Lehman’s proprietary activity rationale to hold that a city that sold space on the exterior of its buses for commercial advertisements could reject proposed advertisements that mixed commercial and noncommercial messages.
The factual context underlying the Children of the Rosary opinion is particularly interesting because it involves the sort of governmental rejection of a particular message that very often triggers heightened judicial suspicion. Phoenix had initially made space on its bus panels available to all advertisements except those “supporting or opposing a candidate, issue or cause, or which advocate[] or oppose a religion or belief.” (154 F.3d at 975.) However, the city refused to display an advertisement proposed by Children of the Rosary (“COR”), which stated:

‘Before I formed you in the womb, I knew you’ - God

Jeremiah 1:5

CHOOSE LIFE!
[COR logo] Children of the Rosary

After COR sued and obtained an injunction compelling the city to display its ad, the city revised its advertising standard to allow the display only of advertisements that “propose[] a commercial transaction.” (Id. at 975.) Based on its newly revised standard, the city again rejected COR’s advertisement. COR, undeterred, then revised the advertisement so that, in addition to its previous content, the advertisement stated that the public could purchase COR’s message as a bumper sticker. The city rejected the revised advertisement, reasoning that its primary purpose was to promote a noncommercial message, not a commercial transaction. (Id.) 2 COR again sued. The District Court denied its motion for a preliminary injunction. In a 2-1 decision, the Ninth Circuit affirmed.

The Ninth Circuit began by applying forum analysis to the bus advertising panels, concluding that those panels constituted nonpublic fora. (154 F.3d at 976-77.) The court based its holding on the fact that the City had consistently restricted political and religious advertising. Even under the city’s original policy – which allowed certain noncommercial advertisements, such as public service messages – only one percent of the advertisements displayed on the exterior of the city’s buses had actually been noncommercial. (Id. at 976.) Moreover, the court held that the fact that the city did not allow political advertisements on its buses, and consistently allowed only commercial advertisements, supported the conclusion that it intended to raise revenue, not to create a forum for general discourse. (Id. at 977-78.)

Second, the court held that the city’s exclusion of noncommercial advertising was reasonable. The court held that any one of the three different interests asserted by the city in support of its advertising policy – “maintaining a position of neutrality on political and religious issues,” preventing violent acts against buses and passengers that the city feared might occur if advertising were not restricted, and “preventing a reduction in income earned from selling advertising space because commercial advertisers would be dissuaded from using the same forum commonly used by those wishing to communicate primarily political or religious messages” – would be sufficient. (154 F.3d at 979.) It also stated that the city’s interests in “protecting revenue and maintaining neutrality on political and religious issues” were “especially strong,” even though, as in Lehman, the court did not mention – and apparently did not require the city to produce – any evidence that displaying noncommercial advertising would jeopardize its asserted interests. (Id. at 979.)

2 The city also rejected an advertisement proposed by the ACLU, which stated that “The ACLU Supports Free Speech For Everyone” accompanied by a telephone number to contact to purchase the advertisement in the form of a bumper sticker. (Id., 154 F.3d at 975.)
Third, the court held that the city’s exclusion of noncommercial advertisements did not constitute viewpoint discrimination. Although it acknowledged that the distinction between permissible restrictions on subject matter and impermissible viewpoint discrimination “is not a precise one,” the court held that the city employed “a neutral standard based on [the city’s] desire to avoid jeopardizing revenue and the city’s neutrality.” (154 F.3d at 980.) Moreover, the city applied its standard to exclude all noncommercial advertisements, not merely those with which it disagreed. (Id.)

Fourth, the court rejected COR’s claim that the city had applied its commercial-advertising-only standard in a viewpoint-based manner. COR’s advertisements, the court held, “were ideological communications and the essential issue-oriented nature of the advertisements could not be changed to commercial advertisements by simply adding an offer to purchase a bumper sticker containing a political or religious message.” (154 F.3d at 981.) Allowing an ideological advertiser to evade the city’s limitation to commercial messages by simply repackaging its ideological message in a commercial guise, explained the court, would subvert the principles of Lehman, and “would significantly undermine the government’s ability to act as a proprietor and control access to a nonpublic forum, thereby forcing the government into ‘an all-or-nothing choice’ where ‘it might not open the property at all.’” (154 F.3d at 981.) As the court explained:

When the government is acting as a proprietor in this nonpublic forum, the government may regulate this nonpublic forum by rejecting an advertisement combining political and religious advertisements with a commercial offer. The city did not apply the standard in a viewpoint discriminatory manner by rejecting [COR]’s advertisements promoting their views on public issues. [Id. at 982.]

In dissent, Circuit Judge Noonan argued that the city had discriminated on the basis of viewpoint. He asserted that “[i]n the America of 1998 to give the commercial advertiser space, without reference to the product being pushed, is for a city to take sides more than occasionally on issues of life and health and energy and the ecosystem,” citing as an example the fact that the city’s policy barred “the message of a group acknowledging the sacredness of human life in the womb” but allowed Planned Parenthood to advertise its abortion clinics. (154 F.3d at 984-85.) True viewpoint neutrality, the dissenting judge opined, required the city to specify the particular subjects (such as abortion or environmental disputes) on which the city would not display advertisements, not merely to reject advertisements that were noncommercial in nature. The dissenting judge also disagreed with the majority’s conclusion that COR’s advertisement was primarily ideological rather than commercial, stating that “[w]hat Children of the Rosary offers for sale is not something devised to evade the ordinance.” (Id. at 984.)

3. DiLoreto v. Downey Unified School District Board of Education

The Ninth Circuit employed a similarly deferential approach in DiLoreto v. Downey Unified School District Board of Education, 196 F.3d 958 (9th Cir. 1999), in which the Downey school district sold advertising space on the fence at a high school’s baseball field in order to fund the baseball team. The school district refused to display an advertisement submitted by a local business which listed, and urged the public to follow, the Ten Commandments, stating it feared doing so would violate the Establishment Clause and would lead to “disruption, controversy and expensive litigation that might arise from community members seeking to remove the sign or from religious or political statements that others might wish to post.” (196 F.3d at 962-63.) The business sued, and the Ninth Circuit affirmed the trial court’s entry of summary judgment for the district.
Even though the school district apparently had no formal policy as to the types of advertisements that could permissibly be displayed on the baseball field fence, the Ninth Circuit held that the fence constituted a nonpublic forum. (Id. at 966.) Citing Lehman, the court stated that “where the government acts in a proprietary capacity to raise money ... the Supreme Court generally has found a nonpublic forum, subject only to the requirements of reasonableness and viewpoint neutrality.” (Id.) In this case, the Ninth Circuit explained, “[t]he school sold advertising space on the fence to defray athletic program expenses ... the intent of the school in opening the fence to advertising was to raise funds, not to create a forum for unlimited public expression.” (Id.) Moreover, even though the district had no formal advertising policy, it had “solicited business advertisements, thereby limiting the content of the forum through its solicitation practices. District officials excluded certain subjects from the advertising forum as sensitive or too controversial for the forum’s high school context,” such as advertisements for alcohol and family planning clinics, and the district had apparently never displayed any noncommercial advertisements on this particular fence. (Id. at 963, 966.) And while the opinion mentions no governmental policy or practice specifically concerning religious advertisements, the Ninth Circuit cited the fact that the school district had rejected the Ten Commandments advertisement as “evidence that the District intended to create a limited public forum closed to certain subjects, such as religion.” (Id. at 967.)

Next, the Ninth Circuit held that the school district had acted reasonably in rejecting the proposed advertisement. While the court expressly refrained from addressing the school district’s argument that it was entitled to reject the advertisement to avoid an Establishment Clause violation, it did hold that “[t]he District’s concerns regarding disruption and potential controversy are legitimate reasons for restricting the content of the ads, given the purpose of the forum and the surrounding circumstances of the public secondary school.” (196 F.3d at 968.) The Ninth Circuit also accepted as sufficient the school district’s fears that displaying the advertisement could lead to expensive litigation, even though the opinion mentions no evidence on this issue. (Id. at 968-69.)

4. **Lebron v. National Railroad Passenger Corporation (Amtrak)**

The Second Circuit applied the same proprietary activity rationale in Lebron v. National Railroad Passenger Corporation (Amtrak), 69 F.3d 650 (2nd Cir. 1995), which involved access to a single, particularly prominent billboard within New York City’s Pennsylvania Station. There, the Second Circuit held that Amtrak did not violate the First Amendment by refusing to display a political advertisement attacking Coors beer and the American political right. (69 F.3d at 653-54.) Although Amtrak had no written policy against the display of political advertisements or other noncommercial advertisements on the billboard in question, it was undisputed that particular billboard had never been used to display anything other than commercial advertisements in its twenty-six years of operation. (Id.) The Second Circuit held that the billboard was a nonpublic forum, and that “Amtrak’s decision, as a proprietor, to decline to enter the political arena, even indirectly, by displaying political advertisements is certainly reasonable.” (69 F.3d at 658.) And while the court acknowledged that Amtrak’s advertising rules – which had reserved to the railroad the right to reject advertisements that “involve political or other views which could result in dissension or involve Amtrak in dissension, complaints or controversy with its patrons or the public” -- would

---

3 The Court’s reliance on the school setting makes it difficult to determine the degree to which this holding would apply in cases involving non-school public property.
discriminate on the basis of viewpoint if they resulted in rejection only of controversial political advertisements, the court instead construed the policy as “a justification, however inartfully phrased, for a categorical ban against political advertising.” (Id. at 658.)

B. New York Magazine and Its Progeny: Public Entities Beware

1. New York Magazine v. Metropolitan Transportation Authority

While the decisions discussed above may paint a rosy picture of judicial generosity to public entities seeking to exclude undesirable advertisements from public property, a number of federal appellate courts have reached very different results. Most prominent is the Second Circuit’s opinion in New York Magazine v. Metropolitan Transportation Authority, 136 F.3d 123 (2nd Cir. 1998). There, the MTA, the state-created public entity that operates New York City’s buses and that “raises revenue for its operation, in part, by leasing advertising space on the buses,” agreed to display an advertisement submitted by the plaintiff magazine that contained the magazine’s logo accompanied by the words “Possibly the only good thing in New York Rudy hasn’t taken credit for.” (136 F.3d at 125.) Shortly thereafter, New York City’s mayor objected that the use of his name to promote a commercial product violated a state privacy statute. (Id. at 126.) The magazine obtained a preliminary injunction to prevent the removal of its advertisements.

The Second Circuit affirmed the injunction. First, it held that the bus advertising panels constituted a designated public forum, not a nonpublic forum. Although the Second Circuit noted that the Supreme Court has considered public property to be a nonpublic forum where the government has “opened the property for speech in its proprietary capacity, for the purpose of raising revenue,” it also noted that the high court had found a public forum to be created “[w]here the government acted for the purpose of benefiting the public.” (136 F.3d at 129.) Here, the fact that the MTA “accepts both political and commercial advertising” for display on its bus panels showed that it intended those panels to be a public forum, since “[a]llowing political speech ... evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy that the Court in Lehman recognized as inconsistent with sound commercial practice.” (Id. at 130.) Moreover, the MTA’s asserted ground for rejecting the advertisement in question – a section of its advertising policy that prohibited the display of advertisements that violate the state privacy statute – demonstrated that the MTA had acted in a regulatory, rather than a proprietary, capacity because it asserted “a general interest in upholding the law” rather than any interest in maximizing revenue or preserving orderly internal procedures. (Id.)

Having determined that the bus panels were a designated public forum, the Second Circuit then held that the MTA’s attempts to remove the advertisement had constituted a form of prior restraint, which violated the First Amendment due to the lack of attendant procedural safeguards (such as a guarantee of prompt judicial review and a prompt “final judicial determination”). While the court acknowledged that prior restraints against commercial speech may be permissible, it held that “this case aptly demonstrates that where there are both commercial and political elements present in speech, even the determination whether speech is commercial or not may be fraught with ambiguity and should not be vested in an agency such as MTA.” (Id. at 131.) As the court explained:

We need not decide whether the Advertisement is actually commercial speech or core-protected speech; the difficulty of the question alone
convinces us that the requirement of procedural safeguards in a system of prior restraints should not be loosened even in the context of commercial speech. [Id.]

Because the MTA’s advertising policy contained no such procedural safeguards, the court held that the plaintiff magazine had demonstrated a probability of success on its First Amendment claims and was therefore entitled to a preliminary injunction.

New York Magazine is noteworthy for several reasons. First, as the dissent noted, the court’s reliance on prior restraint doctrine seems to ignore the fact that the MTA’s advertising policy, and its practice in this case, did not require the agency’s prior approval of advertisements. In fact, the MTA had begun to display the advertisement in question before New York City’s Mayor objected to it and litigation commenced. (136 F.3d at 135.) Further, the circumstance that the Second Circuit majority held triggered the requirement of procedural safeguards – specifically, an advertisement containing “both commercial and political elements” – was also present in Children of the Rosary, and yet caused the Ninth Circuit majority no apparent concern.

2. Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority

Another prominent appellate opinion limiting governmental control of advertisements displayed on public property is the Third Circuit’s opinion in Christ’s Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority, 148 F.3d 242 (3rd Cir. 1998). There, the defendant government agency (“SEPTA”) operated buses, subways, and rail lines in and around Philadelphia, and leased advertising space in its stations and on vehicles in order to raise revenue. SEPTA agreed to display in subway and railroad stations an advertisement placed by Christ’s Bride Ministries (“CBM”), stating “Women Who Choose Abortion Suffer More & Deadlier Breast Cancer.” (148 F.3d at 244-45.) SEPTA then removed the advertisements based on concerns about their accuracy. ([Id. at 245.) SEPTA then removed the advertisements based on concerns about their accuracy. (Id. at 246.) CBM then sued, and following bench trial, the District Court ruled for SEPTA.

The Third Circuit reversed. First, it held that for several reasons, the advertising spaces in SEPTA’s stations and on its transit vehicles constituted designated public fora. While SEPTA sold advertising space in order to generate revenue, the Third Circuit apparently rejected the concept of proprietary action underlying Lehman and its progeny, stating that “[t]he goal of generating income by leasing ad space suggests that the forum may be open to those who pay the requisite fee.” (148 F.3d at 251.) A governmental commercial operation was not inherently inconsistent with the creation of a public forum, the court stated, because even though the advertising spaces at issue were “partly commercial, consistent with the goal of SEPTA to earn a profit on its advertising space,” SEPTA “has also used the advertising space to generate a profit through expressive activity.” The “nature of the forum suggests ... that the government has dedicated the space to expression in the form of paid advertisements.” ([Id. at 250.) In any event, the court noted, the advertising spaces also were “suitable for speech concerning social problems and issues.” ([148 F.3d at 251, 249, fn. 4.)

While SEPTA’s advertising policy stated that the agency reserved the absolute right to reject any advertisement it deemed objectionable, the court downplayed the significance of that fact:
[T]he fact that the government has reserved the right to control speech without any particular standards or goals, and without reference to the purpose of the forum, does not necessarily mean that it has not created a public forum. If anything, we must scrutinize more closely the speech that the government bans under such a protean standard. [Id. at 251.]

The court noted, too, that SEPTA had accepted a broad range of noncommercial advertisements, including advertisements on topics related to abortion. (Id. at 251-52.)

Having concluded that the advertising spaces constituted a designated public forum, the Third Circuit then suggested that its exact classification of the forum in this case was not determinative, because even if those spaces were a nonpublic forum, SEPTA violated the First Amendment because its exclusion of CBM’s advertisements was unreasonable: “SEPTA acted as a censor, limiting speech because it found it to be ‘misleading’” without first giving CBM the opportunity to clarify the grounds for its advertising claims. (Id. at 256.)

III. DISCUSSION

What conclusions can a city draw from the above decisions? Some suggestions follow as to how a city that wishes to sell advertising space on public property may preserve some control over the advertising displayed.

A. Adopt Advertising Standards That Create A Nonpublic Forum, Not A Designated Public Forum

“[T]he extent to which the Government can control access [to public property for expressive purposes] depends on the nature of the relevant forum.” (Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 800 (1985); Perry Education Ass’n v. Perry Local Educators’ Ass’n., 460 U.S. 37, 44 (1983).) The question of what type of forum the government has created is of critical importance in determining what advertisements the government must allow there.

Although the courts have recognized three categories of fora for First Amendment purposes, the first such category – the traditional public forum – is of little relevance here, because it consists only of public property, such as public sidewalks and parks, that “by long tradition or by government fiat ... has been ‘devoted to assembly and debate,’” (Arkansas Educational Television Commission v. Forbes, 523 U.S. 666, 677 (1998).) In fact, the government has little, if any, authority to decide that sidewalks and parks are not public fora. The crucial distinction here is between a designated public forum and a nonpublic forum.

A designated public forum “consists of public property which the state has opened for use by the public as a place for expressive activity.” (Perry Education Association, supra, 460 U.S. at 45.) Within such a forum, the state may enforce a content-based

4 In Arkansas Educational Television Commission the Supreme Court suggested, without elaboration, that there may be a fourth category of property for purposes of forum analysis, consisting of government property which is “not a forum at all.” (523 U.S. at 677-678.) The Court has not explained what distinguishes such a “non-forum” from a nonpublic forum.
exclusion only if it can satisfy the often-insurmountable requirements of strict scrutiny by showing “that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” (Id. (cite omitted).)

In contrast, the nonpublic forum consists of “[p]ublic property which is not by tradition or designation a forum for public communication.” (Perry Education Association, supra, 460 U.S. at 46.) The Supreme Court has allowed the government to reserve property classified as a nonpublic forum for its intended purposes, as long as the regulation on speech meets a test that is considerably less demanding than strict scrutiny: namely, the regulation must be reasonable in light of the property’s purposes and must not be mere viewpoint discrimination. (Id.)

How, then, should a city ensure that the areas it makes available for advertising displays will not be deemed a public forum? There are several steps a city may take to decrease the likelihood of such a result.

1. Most importantly, the city should adopt formal written standards governing the types of advertising it will and will not permit within the areas where it intends to allow advertising displays. These should be adopted before the advertising program is initiated.

2. The city’s advertising standards should clearly state that the city intends the area in question to be a nonpublic forum, not a designated public forum or other type of public forum.

3. The city’s advertising standards should clearly state that the city is allowing advertising displays for the sole purpose of generating revenue, and not for the purpose of providing a forum for expression.

4. The federal appellate courts have repeatedly held that “[a]llowing political speech ... evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy ... inconsistent with sound commercial practice.” (New York Magazine, supra, 136 F.3d at 130.) Therefore, the city’s advertising standards should clearly prohibit displays of political advertisements or other noncommercial, issue-oriented advertisements.

5. The city’s advertising standards should be clear and their implementation as non-discretionary as possible.

6. The city may wish to adopt a policy of allowing only commercial advertisements as that was upheld by the Ninth Circuit in Children of the Rosary. If the city chooses to adopt this standard, it should define commercial advertisements as advertisements that do “no more than propose a commercial transaction” – a definition that the Supreme Court has described as the “core notion” of commercial speech. (Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423 (1993).)

7. Any advertising standards that the city adopts must be related to the forum’s purposes. Because the purpose of allowing advertising displays on public property is to generate revenue, not to open a forum for general expression, the city must
make sure that it justifies any grounds for excluding particular types of advertisements in terms which rationally relate to the revenue-raising purpose of the forum.

8. The Supreme Court has stated that the government “creates a designated public forum when it makes its property generally available to a certain class of speakers,” but not when it “does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, ‘obtain permission’ to use it.” (Arkansas Educational Television Commission, supra, 523 U.S. at 679.) Therefore, in addition to defining a certain group of speakers (e.g. commercial advertisers) for whom the forum is reserved, the city’s advertising standards should also require each member of that group who wishes to display advertising to obtain permission to do so.

B. Follow The Advertising Standards

While this point may seem elementary, it is essential. The determination of whether the city has created a designated public forum or a nonpublic forum will turn not only on the city’s advertising policy, but also on the city’s actual practice. (Cornelius, supra, 473 U.S. at 802.) Therefore, the city must ensure that its policy, including grounds for excluding particular types of advertisements, is consistently followed, and that it documents its actions in order to demonstrate such consistent application.

IV. CONCLUSION

Because the law is unsettled as to when a city that sells advertising space on public property can retain control over the advertisements displayed, there is a risk that if a city allows such advertising displays it will be deemed to have forfeited its authority over such displays. However, that risk can be reduced by adopting and implementing an advertising policy consistent with the suggestions listed above.