CITY OF BALTIMORE
STEPHANIE RAWLINGS-BLAKE, Mayor

DEPARTMENT OF LAW
GEORGE A. NILSON, City Solicitor
101 City Hall
Baltimore, Maryland 21202

May 22, 2012

The Honorable President and Members
of the Baltimore City Council
Attn: Karen Randle, Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Re: City Council Bill 12-0043R – Private Sponsorship of Fire Trucks

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 12-0043R for form and legal sufficiency. This resolution discusses the Council's desire to explore how best to recruit private sponsors for City fire trucks. The goal with these sponsorships would be to generate enough revenue to maintain the current level of services from the Fire Department.

There are several concerns with private sponsorship of City assets when signs are placed on those assets to acknowledge the sponsorship. Although there are generally two main hurdles to overcome for the placement of signs on City property: the prohibition in Article 19 of the City Code against placing any signs on or within City property and the Zoning Code prohibition on general advertising signs, neither is at issue in the case of placing signs on City fire trucks because, Article 19 would allow the City to place signs on its own property and because the Zoning Code addresses only stationary signs. *See* City Code, Art. 19, §§45-1(b),(c), 45-2; Zoning Code §§1-189, 11-2A06, 11-101(e), 11-306, 11-406.

The main hurdle here is that placing advertising signs on government property could appear as if the City is promoting a certain product or corporation. However, the City cannot simply restrict the permissible sponsors without being seen as restricting free speech in a public forum. To strike this delicate balance, the City must be extremely mindful of the court decisions that discuss what advertisements the City could categorically prohibit that do not run afoul of the First Amendment. *See, e.g.*, *United States v. Kokinda*, 497 U.S. 720, 725 (1990)(Courts have recognized the "long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when 'the governmental function operating … [is] not the power to regulate or license, as law-maker, … but, rather, as proprietor, to manage [its] internal operation[s].'"); *accord Metro Lights v. City of Los Angeles*, 558 F.3d 898, 903 (9th Cir. 2009); *Metromedia v. San Diego*, 453 U.S. 490 (1981); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974).

Comments

Since the purpose of the advertising space is to "generate revenue, rather than to promote the free exchange of ideas," the space will not be treated as a public forum and the government can restrict some content. *Park Shuttle N Fly v. Norfolk Airport Authority*, 352 F. Supp. 2d 688, 704, 705 (E.D. V.A. 2004); *accord Lehman,* 418 U.S. at 303 (quoted in *Kokinda,* 497 U.S. at 725)(upheld ban on certain advertising content in city transit vehicles reasoning that it was not like a meeting space or street corner and that "a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.")). The applicable test appears to be that "[a]s long as the city can show with plausibility sufficient to merit the deference of *Metromedia* that the sign ordinance, even coupled with [the contractual arrangement to sell advertising on city property] advances the city's interests and is narrowly tailored, then the city's policy survives First Amendment scrutiny." *Metro Lights*, 558 F.3d at 913-14.

However, to demonstrate that the City is wearing this commercial "hat," it would be wise to place any restrictions or criteria for the ads in a contract rather than embodying them in legislation to avoid First Amendment issues since the First Amendment forbids the government *to pass any law* abridging free speech.

Additionally, any content-based restrictions must be reasonable and nondiscriminatory. *See, e.g., Lehman,* 497 U.S. at 304; *Ridley*, 390 F.3d at 71, 82, 91, 92. Although identifying an ad as commercial or noncommercial does involve some content review, recent decisions suggest that this distinction is not considered a "content-based" restriction absent some discriminatory purpose. *Wag More Dogs v. Artman,* 795 F. Supp. 2d 377, 385 (E.D. Va. 2011). Needless to say the regulation of the content of advertisements or sponsorships on City property is a delicate dance between avoiding viewpoint discrimination and maintaining the decorum of the space. *See Entertainment Software Assoc. v. Chicago Transit Authority,* 696 F.Supp. 2d 934, 938, 949 (N.D. Il. 2010)(held the public space was opened to a wide variety of content, making the government unable to refuse certain advertisements based on content). Even if the City were to strike the right constitutional balance, the International Municipal Lawyers Association ("IMLA") warns that local governments should avoid situations where the government sells advertisements on government property because it opens governments up to "endless" legal challenges on equal protection and First Amendment grounds. Randal R. Morrison, International Municipal Lawyers Magazine, *ABC's of Sign Regulation and Sign Litigation*, 2009, p. 63. Even though these challenges may be defensible, IMLA cautions that any foray into advertising on public property could "provide a bottomless chasm of future litigation that will drain any economic benefit that might have been envisioned." *Id.* Anne Arundel County decided to terminate its adopt-a-highway program for similar reasons.

Finally, the Board of Estimates, which sets City fiscal policy, cannot be mandated by ordinance to fund any particular expenditure. *See* Charter, Art VI, §§ 2, 3. All appropriations needed for each City agency are estimated for the year and if additional appropriations beyond the Ordinance of Estimates are needed, the agency must request them in a supplementary appropriation ordinance, limited to one program, purpose or project, which must be approved by the Board of Estimates and passed by the City Council. Charter, Article VI, § 8(c). There is no authority for an agency to raise money by any means other than through this process. *See also*

87 Op. City Sol. 1 (1995)(director of a City agency could not raise money to cover program costs by selling advertisements in a souvenir journal.). Therefore, it would not be possible by ordinance to dedicate any revenue to the Fire Department's budget or to have the Fire Department keep the revenue generated by the sponsorships.

However, since a resolution of the City Council is typically used to address matters of concern to the City or policy matters that impact the City but are outside of the realm of the City Council's authority to act, City Council Bill 12-0043R is the appropriate manner in which to discuss the private sponsors for City fire trucks. McQuillin, Municipal Corporations, §§15.01 *et seq.*; *see also Inlet Assocs. v. Assateague House Condominium,* 313 Md. 413, 428 (1988). The Law Department, therefore, approves the resolution for form and legal sufficiency.

Very truly yours,

Hilary Ruley
Assistant Solicitor

cc: George Nilson, City Solicitor
Angela C. Gibson, Mayor's Legislative Liaison
Elena DiPietro, Chief Solicitor
Ashlea Brown, Assistant Solicitor
Victor Tervala, Assistant Solicitor