



City of Cambridge

Consent Agenda #4

IN CITY COUNCIL

February 3, 1997

COUNCILLOR DUEHAY

ORDERED: That the City Manager be and hereby is requested to direct the City Solicitor to draft an ordinance to make limitations for drug and alcohol advertising for banners or poles in the public way near where children congregate, as described in legal opinion and to sent the draft to the Ordinance Committee.

In City Council February 3, 1997

Adopted by the affirmative vote of nine members.

Attest:- D. Margaret Drury, City Clerk.

A true copy;

D. Margaret Drury

ATTEST:-

D. Margaret Drury
City Clerk



CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139
Tel. (617) 349-4121
Fax. (617) 349-4134

Russell B. Higley
City Solicitor

Donald A. Drisdell
Deputy City Solicitor

Michael C. Costello
Assistant City Solicitor

Legal Counsel

Birge Albright
Gail S. Gabriel
Arthur J. Goldberg
Linda A. Stamper
Deborah R. Cautela
Nancy E. Glowa

January 23, 1997

Robert W. Healy
City Manager
City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

Re: Council Order No. 72 (12-16-96) re use of public utility
poles for advertising

Dear Mr. Healy:

Council Order No. 72 (12-16-96) (copy enclosed) asks that you
report to the Council

what legal regulations, city, state or federal, exist
governing the use of public utility poles for
advertising.

The Order also asks, if the City decides to grant permits for signs
and banners on utility poles, whether the City may distinguish
between advertising by non-profit and for-profit institutions, and
whether the City could deny permits for banners advertising liquor,
beer and cigarette companies.

There are approximately 5946 utility poles in Cambridge. Of
these, 3437 are wooden. The wooden poles are jointly owned and
maintained by Commonwealth Electric and Nynex, neither of whom
allow banners to be attached to them for safety reasons. Of the
2212 metal poles, 598 are owned by the City and 1614 by

Commonwealth Electric.

Discussion

A. Legal Regulations

The Cambridge Code, §12.08.010 (Encroachments onto streets) provides:

12.08.010 Encroachments onto streets - Permit
 required - Fee - Exceptions.

No sign, advertising device, clock, marquee, barber pole, stationary or movable, permanent awning or other like structures projecting into or placed on or over the public highway a distance of more than six inches, except poles, wires, conduits and appurtenances of telegraph and telephone, water, gas, electric light, heat and power companies and public transportation authorities shall be placed or maintained in any public way until a permit therefor has been granted by the City Council. The permit shall be issued by the Superintendent of Streets and the fee shall be one dollar. (Prior code §3-1).

This section has been implemented by a "Procedure for Obtaining Sign Permits," including an application form, a copy of which is attached hereto.

Regarding banners attached to Commonwealth Electric poles, I attach copies of the following:

- 1) Agreement between the City and Commonwealth Electric.
- 2) Procedure for Processing Application for Pole Attachment.
- 3) Application form.

I also enclose a copy of Attachment Standards issued by Commonwealth Electric. I understand that these standards are followed regardless of who owns the pole.

I am not aware of any state or federal regulations in this area.

B. Restriction against certain banners

The Order also asks whether the City may distinguish between advertising by non-profit and for-profit institutions, and whether the City could deny permits for banners advertising liquor, beer and cigarette companies.

In the first place, it seems likely that the City could ban all advertising on all utility poles. This opinion is based on City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), which held that a Los Angeles ordinance prohibiting the posting of signs on public property was constitutional. A similar ordinance might be upheld in Cambridge, even though a majority of the utility poles are privately owned.

However, if the Council were to move beyond a total ban of all signs and attempt to ban certain signs based on their message, I believe that it would be skating on thin ice. This is so, because, for the past twenty years, the U.S. Supreme Court has been giving increasing protection to commercial speech. See, e.g., 44 Liquormart, Inc. v. Rhode Island, 517 U.S., 134 L. Ed. 2d 711, 116 S. Ct. 1495 (1996), which held that a statutory prohibition on liquor price advertising did not withstand First Amendment scrutiny.

In 44 Liquormart, Justice Stevens, writing for a plurality, noted that

Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on "commercial speech" for vital information about the market.

134 L. Ed. 2d at 723.

Justice Stevens also observed that "the First Amendment protect(s) the dissemination of truthful and non-misleading commercial messages about lawful products and services" and that "a State's paternalistic assumption that the public will use truthful, non-misleading commercial information unwisely cannot justify a decision to suppress it." Id. at 723-724.

Justice Stevens rejected all three of Rhode Island's arguments urging the Court to defer to the state legislature. First, he rejected the argument that the legislature need only have made a "reasonable choice" in regard to the ban. In refusing to give the state discretion to impose a ban on truthful, non-misleading advertising for paternalistic purposes, Justice Stevens rejected the reasoning of Posadas de Puerto Rico Associates v. Tourism Co., 478 U.S. 328 (1986), in which the Court accepted such regulations. Justice Stevens stated that, although there is some room for legislative judgment in regulating commercial speech, the Posadas Court "erroneously performed the First Amendment analysis" and broke with precedent in validating Puerto Rico's decision to impose a complete ban on casino advertising rather than a policy that was less restrictive of speech. Id. at 731-732.

Justice Stevens also rejected the "greater-includes-the-lesser" reasoning of Posadas, upon which Rhode Island relied to argue that the state's "undisputed authority to ban alcoholic beverages must include the power to restrict advertisements offering them for sale." Id. at 732-734.

Finally, Justice Stevens rejected the argument that the Court

should accord deference to the legislature because alcohol is a "vice" product. He explained that attaching a "vice" label to lawful activities is anomalous and either would require the creation of a federal common law of vice or would allow state legislatures "to justify censorship by the simple expedient of placing the 'vice' label on selected lawful activities." Id. at 734.

Although there were four separate opinions in 44 Liquormart, all of the Justices concurred in the judgment that the Rhode Island statute violated the First Amendment.

It is true that in Anheuser-Busch, Inc. v. Schموke, 63 F. 3d 1305 (CA4, 1995), the Fourth Circuit upheld, against a constitutional challenge, an ordinance prohibiting the placement of stationary, outdoor advertising of alcoholic beverages in certain areas of Baltimore. The ordinance was designed to promote the welfare and temperance of minors by banning such advertisements in particular areas where children customarily walk to school or play. A companion case, Penn Advertising of Baltimore v. Mayor and City Council, 63 F. 3d 1318 (CA4, 1995) upheld similar restrictions on cigarette advertising.

Both cases were appealed to the U.S. Supreme Court, which remanded them for reconsideration in light of 44 Liquormart. 116 S. Ct. 1821.

After remand, in Anheuser-Busch, Inc. v. Schموke (Anheuser-Busch II), CA4, No. 94-1431, on November 13, 1996, the Fourth Circuit reaffirmed its earlier decision, and, for the same reasons,

it also reaffirmed its earlier decision in Penn Advertising.

In Anheuser-Busch II, the Fourth Circuit noted that in its prior decision (Anheuser-Busch I), the Court had held "that the ban of outdoor advertising of alcoholic beverages in limited areas directly and materially advances Baltimore's interest in promoting the welfare and temperance of minors." The ordinance differs in several respects from the Rhode Island law, the Court said. It is not a total ban on advertisements, but only a time, place and manner restriction on outdoor signs in certain areas, exempting commercial and industrial zones and leaving other media open for advertisements of alcoholic beverages.

The Court also noted that, "Baltimore's ordinance expressly targets persons who cannot be legal users of alcoholic beverages, not legal users as in Rhode Island And (the) ordinance does not foreclose the plethora of newspaper, magazine, radio, television, direct mail, Internet and other media available to Anheuser-Busch and its competitors."

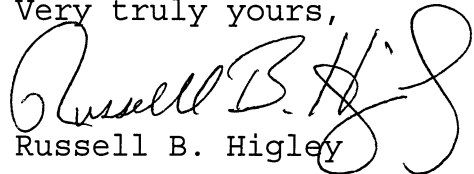
The Court concluded by pointing out that, unlike Rhode Island's ban, which suppressed advertisements to curb adult drinking, "Baltimore's interest is to protect children who are not yet independently able to assess the value of the message presented." That interest accords with Supreme Court decisions recognizing that "children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media."

Conclusion

It seems likely that Anheuser-Busch II will be appealed to the U.S. Supreme Court, and we do not know what the outcome will be. But, even if the Baltimore ordinance is ultimately upheld, this would not mean that the City Council could ban all advertising banners which advertise liquor, beer and cigarettes. It would mean only that the Council could ban banners in particular areas where children are expected to congregate.

I should also point out that the Baltimore ordinance had been authorized by the Maryland legislature and that, "Before enacting the ordinance, the Baltimore City Council conducted public hearings, receiving testimony and previously conducted studies detailing the adverse effects on minors of alcohol consumption and the correlation between underage drinking and the advertising of alcoholic beverages." Anheuser-Busch I, 63 F. 3d at 1309.

Very truly yours,


Russell B. Higley

RBH/jb
Enclosures

City of Cambridge

PROCEDURE FOR OBTAINING SIGN PERMITS

- 1) APPLICATION MAY BE SECURED AT THE CITY CLERK'S OFFICE.
- 2) PRESENT TO INSPECTIONAL SERVICES DEPT.
 - A. APPLICATION FOR SIGN,
 - B. SKETCH OR DRAWING,
 - C. APPROVAL OF ABUTTERS.
- 3) PRESENT APPLICATION TO COMMUNITY DEVELOPMENT DEPT. FOR DESIGN REVIEW APPROVAL, IF APPLICABLE (i.e. awning or canopy with reading matter on said canopy or awning.)
- 4) AFTER APPROVAL FROM INSPECTIONAL SERVICES DEPT. AND COMMUNITY DEVELOPMENT DEPT. FILE THE APPLICATION WITH THE CITY CLERK'S OFFICE FOR THE APPROVAL OF THE CITY COUNCIL.
- 5) WHEN THE PETITION IS SUBMITTED A PERIOD OF SEVEN TO FOURTEEN DAYS WILL ELAPSE BEFORE THE APPROVAL OF THE COUNCIL WILL BE RECEIVED BY THE PETITIONER.
- 6) WHEN THE CITY COUNCIL HAS APPROVED THE PETITION, NOTICE OF ITS APPROVAL WILL BE SENT IMMEDIATELY TO THE PETITIONER TOGETHER WITH AN UNEXECUTED BOND FORM.
- 7) PETITIONER WILL HAVE THE BOND FORM EXECUTED BY A SURETY COMPANY AND WILL RETURN THE SAME TO CLERK'S OFFICE. AT THAT TIME PETITIONER WILL RECEIVE A COPY OF THE COUNCIL ORDER APPROVING THE SIGN AND STATING THAT A BOND IS ON FILE WITH THE CITY CLERK'S OFFICE.
- 8) THAT COUNCIL ORDER MUST BE PRESENTED BY THE PETITIONER TO THE INSPECTIONAL SERVICES DEPT., LOCATED AT 831 MASS. AVENUE.
- 9) INSPECTIONAL SERVICES WILL THEN ISSUE A PERMIT TO ERECT YOUR (SIGN, CANOPY, AWNING, MARQUIS, BARBER POLE, OR FLAG POLE.)
- 10) THE FINAL STEP IS GO TO DEPARTMENT OF PUBLIC WORKS, LOCATED AT 147 HAMPSHIRE STREET, TO OBTAIN A PERMIT TO OBSTRUCT THE SIDEWALK.

To the Honorable, the City Council of the City of Cambridge:

PRIOR TO APPROVAL OF THE CITY COUNCIL, EACH PETITION MUST BE ACCOMPANIED BY A DRAWING OF PROPOSED SIGN, INDICATING DESIGN AND DIMENSIONS AND LOCATION ON PREMISES.

The undersigned respectfully prays that _____ be granted permit to erect a sign of the following specifications in front of premises

Type: _____
(State whether Electric or otherwise and material used in construction)

Reading matter to go on sign: _____

Size: _____

Weight: _____

How Erected: A: _____ B: _____
(A: Give exact distance sign is to extend from building over sidewalk.)
(B: Also exact distance from bottom of sign to sidewalk.)

Height Above Grade: Bottom _____ Top _____

(Signature of Applicant)

(Address)

NOTICE - REGULATIONS

SECTION 1412.0 STATE BUILDING CODE

PROJECTING SIGNS

1. A projecting sign shall be constructed wholly of incombustible materials.
2. All signs must meet requirements of Zoning Ordinances and Building Code.

APPROVED: _____ Date _____
Building Inspector

AGREEMENT

This Agreement is between Cambridge Electric Light Company, a Massachusetts Corporation having its principal place of business at 675 Massachusetts Ave., Cambridge, Massachusetts (hereinafter known as "the Company") and the City of Cambridge, a municipal corporation having its place of business at 795 Massachusetts Ave., Cambridge, Massachusetts (hereinafter known as "the City").

WHEREAS, the Company installs and maintains electric light poles throughout the streets and ways of the City of Cambridge and

WHEREAS, the City has caused to install and maintain and wishes to cause to install and maintain and has also caused others to install and maintain and wishes to cause others to install and maintain signs, banners, advertisements, notices, and various other attachments and fixtures upon said electric light poles of the Company and

WHEREAS, the parties wish to enter into an Agreement which would spell out the duties and liabilities of the parties in the maintenance and installation of said attachments and in the event injuries to persons and/or damage to property occurs as the result of the presence and future installation and maintenance of said attachments:

NOW, THEREFORE, in consideration of the mutual covenants contained herein, it is hereby agreed that:

1. The Company grants permission to the City and to those business concerns dealing through and with the City to maintain the existing signs, banners, advertisements, notices and other attachments which are presently affixed to and upon the Company's electric light poles, subject to the terms of this Agreement.
2. Permission granted by this Agreement to install and maintain attachments on electric light poles of the Company shall be deemed to mean single aluminum and steel poles, and it is expressly agreed that a. no attachments whatsoever shall be affixed to any wooden poles of the Company, and b. no single attachment shall be affixed to more than one pole or string between poles.
3. The Company grants permission to the City upon written request by the City and express Company approval, and to those business concerns dealing through and with the City to install signs, banners, advertisements, notices and other attachments upon the electric light poles of the Company, subject to the terms of this Agreement.
4. The Company shall have the right to remove or to have ordered removed without objection and/or prior notice, any such sign, banner, advertisement, notice or other attachment which, in the reasonable opinion of the Company, may cause interference or obstruction to the Company's business operations or which may be deemed to be in conflict with any and all existing laws, regulations, codes or generally accepted engineering practices, or is deemed to be in such a state of disrepair as to pose a danger to persons, property, or both. The City agrees that the Company shall suffer no liability whatsoever for having exercised said right to remove or have ordered removed any attachment under this Section 4.

JAN-06-97 08:47 FROM: CAMBRIDGE ELECTRIC LIGHT ID:

PAGE 3/4

- 2 -

5. The Company shall have the right to impose reasonable restrictions in the number, size, shape, and structure of said attachments in order to assure compliance with any and all existing laws, regulations, codes or generally accepted engineering practices. The City hereby agrees to use its best efforts to comply with any said laws, regulations, codes and generally accepted engineering practices which may now or which may in the future exist.
6. The City agrees to indemnify and hold the Company harmless from any and all liabilities arising from the installation, maintenance and continued presence of said attachments on the electric light poles, whether affixed by the City, or any business concerns dealing through and with the City and whether affixed for the benefit of the City or for the benefit of said business concerns dealing through and with the City. Said liabilities shall include, but not be limited to, claims for personal injury and/or property damage plus reasonable attorney's fees, sustained by any persons as a result of the presence of said attachments, whether said injury and/or damage is caused by the attachments, caused by the poles as the result of the presence of the attachments, or both.
7. The City shall be covered by comprehensive general liability insurance and worker's compensation covering the City and those business concerns dealing through and with the City for all work performed pursuant to this Agreement.
8. No waiver, express or implied, of any breach of the duties and covenants of this Agreement shall be held or construed, as a waiver of any of the remaining duties and covenants of this Agreement.

IN WITNESS WHEREOF, the Company and the City have caused this Agreement to be executed by persons duly authorized this 7 day of August, 1990.

Cambridge Electric Light Company

Witness: *[Signature]*By: *R. L. Vello*

City of Cambridge

Witness: *Con C. Hogan*By: *[Signature]*
[Signature]

PROCEDURE FOR PROCESSING APPLICATION FOR
POLE ATTACHMENT (OTHER THAN WOOD POLES)

1. Application makes request via Consumer Services.
2. Customer Services provides application form and attachment standards.
3. Applicant fills out form completely and submits it to the City of Cambridge Public Works Commissioner for his approval. (A map showing pole number is available from Cambridge Electric Light Company Construction Planning Group).
4. Application is returned to Customer Services for final review by Cambridge Electric Light Company's General Foreman and final approval by the Manager of Electric Operations.
5. Customer Services will return copies, whether approved or denied, to the applicant and the Commissioner of Public Works.

CAMBRIDGE ELECTRIC LIGHT COMPANY APPLICATION FOR POLE ATTACHMENTS

APPLICANT'S NAME: _____

ADDRESS: Street _____

City _____

State _____

Zip Code _____

TELEPHONE NO. _____

BUSINESS _____

HOME _____

ORGANIZATION OR BUSINESS REPRESENTED

NAME: _____

ADDRESS: Street _____

City _____

State _____

Zip Code _____

TELEPHONE NO. _____

C.E.L. POLE NUMBER _____

MAP TO DESCRIBE POLE NUMBERS AVAILABLE FROM TRANSMISSION AND DISTRIBUTION DEPARTMENT.

LOCATION OF ATTACHMENTS

ADDRESS: NO. _____

STREET _____

DESCRIPTION OF ATTACHMENT: _____

TYPE LOGO, WORDING, INSIGNEIA _____

SIZE (SQ. INCH) _____

WEIGHT (LBS.) _____

WIDTH _____

LENGTH _____

THICKNESS _____

DIAMETER _____

MATERIAL TYPE _____

METHOD OF SECURING _____

DATE INSTALLED _____

DATE REMOVED _____

* APPROVED BY CAMBRIDGE COMMISSIONER OF PUBLIC WORKS _____

REVIEWED C.E.L. BY General Foreman _____

APPROVED C.E.L. BY Manager of Electric Operations _____

QUESTIONS PERTAINING TO THE ABOVE APPLICATION CAN BE DIRECTED TO THE TRANSMISSION AND DISTRIBUTION DEPARTMENT.

* Per Liability Agreement between the City of Cambridge and the Cambridge Electric Light Company, dated August 7, 1980, a copy of which is attached hereto.

ATTACHMENT STANDARDS

Approval is required by the Manager of Electric Operations. Permission to attach banners, signs, advertisements, and other attachments shall be given only after receipt of an application. Exempt from this procedure are attachments covered by the agreement with the City of Cambridge.

An application shall contain information describing logo, wording, insignia, location, pole number, size, shape, type of material and method of securing attachment. Application forms will be supplied by C.E.L. and require signature by the Commissioner of the Department of Public Works who will be recognized as the City of Cambridge authorized agent. A scaled drawing describing the actual representation of the attachment and its location on the pole shall be submitted with the application.

A print will be available from C.E.L. to determine the pole number to which an attachment will be affixed.

Prohibited shall be the use of wires, screws, nails or any securing means that are likely to mar or possibly provide an insecure attachment.

All clamps, brackets or materials used on the securing of an attachment to pole shall be galvanized steel, stainless steel or approved non-rusting metal. They shall conform also the size and shape of pole and be free of any unnecessarily long projecting ends.

All attachments shall be a height of at least seven feet and this dimension shall be measured from the sidewalk surface to the bottom of the attachment.

No attachment shall extend beyond the curb line towards any roadway surface or in the absence of a curb, no more than 12 inches.

There shall be at least 12 inches between any attachment and the bottom of a luminaire bracket or any Cambridge Electric Light attachment.

A temporary attachment shall be subject to the same specifications contained in these standards.

The maximum allowable number of attachments on a pole shall be restricted to four (4) with a total surface area not to exceed 850 square inches unless special permission is granted by C.E.L. Company.



CITY OF CAMBRIDGE
CAMBRIDGE, MASSACHUSETTS 02139

TEL 349-4300
FAX 349-4307



EXECUTIVE DEPARTMENT
ROBERT W. HEALY
City Manager

RICHARD C. ROSSI
Deputy City Manager

February 3, 1997

To the Honorable, the City Council:

In response to Awaiting Report #15 regarding the legal regulations that govern the use of public utility poles for advertising, attached please find a report from Russell B. Higley, City Solicitor.

Very truly yours,

Robert W. Healy
City Manager

Attachment

Consent Agenda #4

S-57

Relative to Awaiting Report Item
Number Fifteen, regarding the legal
regulations that govern the use of
public utility poles for advertising.

In City Council February 3, 1997

Order Adopted