

Bus Shelter Advertising Common Practices

Salt Lake City currently prohibits advertising on bus shelters citywide. Any bus shelter advertising program could consider all the main regulatory issues established across the research sample of cities including: bus shelter criterion, transit advertising policy, and program regulation. These common practices are a result of contacting six cities along with the Cache Valley Transit District (hereafter 'Cache Valley'), and four advertising companies that hold contracts with municipalities for bus shelter advertising. The items below were chosen because they reflect significant areas in the design of transit advertising ordinances, policies, and regulation in the research sample.

Bus Shelter Criterion

Percent of Shelters with Ads: The most frequent proportion of bus shelters with ads is 50%. San Francisco had the highest value of 67%. Denver had the lowest value of 9%.

Shelter Design & Cost: The most expensive shelter designs are \$25,000 (and even higher) with multiple electronic and physical amenities. The lowest cost shelter designs are \$2,000 with minimal amenities. Common amenities include benches, LED lighting, garbage bins, recycling bins, and a panel for bus route information and/or public service announcements. Less common amenities are etching & graffiti resistant materials, push-to-talk information for the visually impaired, sand-blasted art design on glass, solar panels, and Wi-Fi.

Shelter Maintenance Cost: Shelter maintenance varies greatly and is heavily dependent on design and location factors such as construction materials, crime, ridership volume, shelter amenities, and weather. The lowest reported maintenance cost was 1% of advertising revenue from that shelter. The highest reported cost was 50% of advertising revenue from that shelter.

Who Builds Shelters: Five of the seven cities have the advertising company build shelters. The City of Phoenix stopped this practice two years ago and now uses a separate company on contract to build shelters. The stated purpose is making it easier to track where the money is spent. Cache Valley builds all shelters in the district.

Who Maintains Shelters: Five of the seven cities have the advertising company handle all shelter maintenance. The City of Phoenix uses a split maintenance policy where the ad company handles "client presentation maintenance", that is, anything obstructing the advertisement effectiveness (typically lighting, graffiti removal, replacing plexiglass, and securing the ad poster). The City of Phoenix pays a separate company on contract to professionally clean the shelters. Cache Valley contracts with a local non-profit for persons with disabilities. A coach supervises the crew that cleans the shelters and garbage bins.

Who Owns Shelters: Five of the seven cities have the advertising company own shelters they build. The City of Phoenix stopped this practice two years ago and now owns the shelters a separate company on contract builds for the City. Cache Valley owns shelters in the district.

Transit Advertising Policy

Content of Advertising: All cities have an advertising content policy but the standards vary substantially. Frequently prohibited content includes: alcohol, expletives, false or misleading

content, gambling, gratuitous violence, illegal activity, content on political campaigns, sexual images, messages, or links to outside sexual material, offensive language, and tobacco products. Most cities require a disclaimer be posted on ads stating the advertisement is not endorsed or reflective of the agency's views. Identifying inappropriate sexual material, like obscene products or speech, is the subject of much litigation.

Location of Advertisements: All cities have limits on the location of ads at bus shelters. Typically the maximum number of ads per shelter is two. Ads cannot obstruct the view of oncoming traffic, pedestrians on the sidewalk, or approaching buses. Ads are placed at one end of the shelter perpendicular to the road so as to be easily seen by passing pedestrians and traffic.

Sizes & Types of Allowable Advertisements: All cities have limits on the size & types of allowable ads. The standard size limit is 4 feet x 6 feet. Often, special limitations are required when the shelter advertisement is within the boundaries of an airport, an historical area, recognized business district, park, or a predominantly residential neighborhood. Such special limitations are, of course, subject to legal requirements.

Program Regulation

Advertising Revenue: Six of the seven cities have a profit sharing agreement with the contracted ad company. The percentage varies greatly from a low of 10% in Washington, D.C. to a high of 63% in Phoenix. Denver's only source of revenue is from selling an advertising permit for each bus shelter. A majority of cities have a minimum annual guarantee (MAG) in addition to the profit sharing agreement. The MAG is used to cover administration & maintenance costs with the remaining surplus, if any, typically going into a transportation enterprise fund.

- Cache Valley generates \$25,000-\$45,000 annually including all bus and shelter ads
 - Profit sharing is 40% of net revenue to Cache Valley
- Provo has profit sharing 15% of advertising revenue
- Denver has 2,500 bus shelters, 230 with advertising, which generates approximately \$55,200 in annual revenue
- San Francisco has 1,100 bus shelters, 737 with advertising, \$12,339,000 MAG plus 55% profit sharing
 - Note, the City's contract has a sliding scale that changes each fiscal year and includes alternate calculations if revenue is below forecasts
- Washington D.C. has 1,500 bus shelters, 750 with advertising, MAG of \$300 per shelter for first five years then \$450 per shelter thereafter plus profit sharing of 10% first five years then 15% thereafter
- Phoenix has approximately 2,000 bus shelters, 1,000 with advertising, MAG of \$1,000,000 plus 63% profit sharing.
 - Note, the City's contract has a sliding scale that changes each fiscal year and includes alternate calculations if revenue is below forecasts
- It is not known whether cities consistently experience a net profit from bus shelter advertising in the long-run. It appears to Council Staff that net profits are feasible when the program is fully operational after the first few years.

Advertising Review Process: All cities include the advertising company in the review process and most allow the company to handle the initial ad review. All cities have an administrative

veto over the contractor's ad review decisions. If an ad is found non-compliant a request to modify the advertisement is sent. All cities report a high approval rate of modified ads. If a modified ad is again found non-compliant some cities have an appeal process with the department director or a panel given final judgment.

Contract vs. Free Market Approach: Six of the seven cities utilize a contract approach granting the exclusive right to advertise on all bus shelters to one company. Denver is the only city to use a free market approach, wherein any company can bid for a permit granting the exclusive right to advertise on one bus stop. In Denver six advertising companies regularly bid.

Free Speech Issues: Five of the seven cities report free speech issues including litigation from proposed advertisements that were found non-compliant with the local advertising policy. Most cities require advertising to be of a commercial nature; any political or issue-oriented advertising is forbidden. Cache Valley and Provo reported no free speech or litigation issues.

Insurance Coverage: A majority of cities require contractors hold insurance for property damage, personal injury, and general liability. The average minimum coverage is \$1 Million.

Program Administration Costs: Two of the seven cities report minimal staffing costs to administer their programs. The remaining five cities established a position dedicated to the program with typical job duties of verifying contracts and payment reports, reviewing ad content for compliance with municipal advertising standards, tracking maintenance requests, handling complaints of ad content, and need assessments of future bus shelter locations.

Noteworthy Items

- **Phoenix Case Study:** The City of Phoenix changed its bus shelter advertising policy two years ago to only allow commercial ads. This was in response to litigation from issue-oriented advertising proposals that were rejected as non-compliant with the city's ad policy. Other changes included bringing in a separate contractor to build bus shelters and another contractor to professionally clean the shelters. The program manager stated this structure makes it easier to track where the money is spent. It also guards against a lack of incentives for ad contractors to clean bus shelters as the end of their contract nears.
- Denver waives administrative and permit fees for the State Transportation Dept, neighborhood groups, civic groups, and recognized business districts. Thus, they can build, maintain, and advertise their own bus shelters
- Some cities reserve the right to display transit information and public service announcements at shelters built and owned by contractors
- Ad replacement rate and program revenue is highly dependent on the local market
 - Albuquerque example, 20% built, maintained, and owned by contractor. City expanded # of bus shelters almost three-fold to 500. 80% built, maintained, and owned by the City causing an oversupply and reduction in program revenue.
- Contractors and transit agencies use the same primary factors for bus shelter placement, namely ridership levels and traffic count.
- Per Utah Code Subsection 72-3-109(1)(c)(i), and Rule R933-4, municipalities are given the responsibility for bus shelters and bus benches.

Legal Considerations for Transit Advertising Policies

As a matter of case law the courts have not settled the issues of what First Amendment limitations are acceptable for municipal transit advertising programs. In short, the issue is complex weighing the right to free speech against compelling government interests. This summary outlines the relevant legal issues to consider when establishing a transit advertising policy. It draws on the detailed research provided by the Transit Cooperative Research Program of the National Academy of Sciences.

For an in-depth reading of the relevant legal issues see the legal circular PDF at this link:

http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_lrd_33.pdf

Note: Since the legal brief was written in 2010 further appeals and litigation have happened that are not reflected in this summary.

For an example of a controversial ad and helpful overview see The Atlantic story at this link:

<http://www.theatlanticcities.com/politics/2012/10/yes-ad-offensive-free-speech-rides-public-transit-too/3508/>

Note: The article was published October 2012

First Amendment Obligation: Salt Lake City government has a constitutional responsibility to respect and protect free speech through equal treatment.

How Courts See It: Forum analysis is a primary tool courts use to determine whether a government's desire to limit the use of its property outweighs the free speech rights of citizens to use the property for their desired purposes.

Three Forum Types:¹

Nonpublic Forum—courts uphold the majority of free speech restrictions in this type of classification.^{2,3,4,5}

- Most content restrictions are permissible if they are reasonable, viewpoint neutral, and not vague.
- Examples of this forum include places owned by the government but not traditionally used for, or intended to be used for, public expression such as airport terminals, hospitals, jails, office spaces, police stations and subway platforms below ground.

Designated Public Forum—more often than not courts will strike down content limitations on free speech in this type of forum. If a government shows through action or words intent to open up a nontraditional place for public discourse it will likely be classified a designated public forum.^{6,7}

¹ Smith, Gwen C., and James B. McDaniel. "Developing and Implementing A Transit Advertising Policy." *Transit Cooperative Research Program Legal Research Digest* J-05.33 (2010)

² Greer v. Spock, 424 U.S. 828, 828 (1976); Adderley v. Florida, 385 U.S. 39, 39 (1966)

³ Entertainment Software Ass'n v. Chicago Transit Auth., 38 Media Law Rep. 1257, 2010 U.S. Dist. Lexis 1156 at *19 n.6 (2010)

⁴ Lehman v. Shaker Heights, 418 U.S. 298 (1974)

⁵ Children of the Rosary v. City of Phoenix, 154 F. 3d 972 (9th Cir. 1998)

⁶ New York Magazine v. Metropolitan Transportation Authority, 136 F. 3d 123 (2d Cir. 1998)

- Content based restrictions are acceptable only if narrowly drawn to achieve a compelling government interest such as
 - Maintain a position of neutrality on political or religious issues
 - Protect passengers and City property that could be subjected to violence if advertising were allowed
 - Prevent a future loss of ad revenue because “commercial advertisers would be dissuaded from using the same forum commonly used by those wishing to communicate primarily political or religious messages.”⁸
- Examples of this forum include meeting rooms opened up to outside organizations, advertising benches on public sidewalks, and municipal theaters. When a government opens up meeting rooms, advertising on bus benches, and municipal theaters to some groups there is strong debate about the degree to which the government can then impose limits on expression in those places.

Public Forum—limitations on freedom of speech are struck down nearly always.

- Permissible content restrictions include encouragement of illegal activity, deceptive, false, or obscene speech. Identifying obscene products or speech is the subject of much litigation.
- Examples of this forum include places traditionally used for public expression such as City Council Public Hearings, parks, public thoroughfares, and subway platforms above ground.

Two Criterion courts use to determine if a government is unfairly restricting freedom of speech:

Vagueness and overly broad restrictions hinder advertisers from knowing what content is acceptable. This creates a chilling effect that courts to be find an unfair deterrence of free speech. Imposing fines or other sanctions for a proposed ad being rejected has been ruled a serious concern by courts for the resulting chilling effects.⁹

Viewpoint Discrimination is a limit on free speech wherein a government allows one point of view while rejecting the opposite view on the same issue.

- One court’s definition states: “[A]ll advertisers on all sides of all questions are allowed to positively promote their own perspective and even to criticize other positions so long as they do not use demeaning speech in their attacks.”¹⁰

Advertising Review Process: A good review process will guard against a judicial re-classification of forum type resulting from City actions being construed as inconsistent, overly broad, unfair, vague, or as viewpoint discrimination.^{11,12,13} It is vital that a city’s advertising

⁷ *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 802 (1985)

⁸ *Children of the Rosary v. City of Phoenix*, 154 F. 3d 972 (9th Cir. 1998)

⁹ *Ridley v. Massachusetts Bay Transp. Authority*, 390 F. 3d 65 (1st Cir. 2004)

¹⁰ *Ridley v. Massachusetts Bay Transp. Authority*, 390 F. 3d 65 (1st Cir. 2004)

¹¹ *Christ’s Bride Ministries, Inc v. Southeastern Pennsylvania Transportation Authority*, 148 F. 3d 242 (3d Cir. 1998)

¹² *United Food and Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority*, 163 F. 3d 341 (6th Cir. 1998)

¹³ *Planned Parenthood Assoc. v. Chicago Transit Authority*, 767 F. 2d 1225 (7th Cir. 1985)

review process be consistently applied and not be overly broad, unfair, vague, or discriminate based on viewpoint.

An appeal process for questionable ad proposals and rejected advertisements should include deliberations by multiple people. Groups reviewing these ads for compliance usually include an employee from the ad contractor, a lawyer, and at least one upper level manager. This practice was frequently cited by courts as part of the reason for upholding the rejection of a proposed advertisement.

3 Prongs of a Good Transit Advertising Policy¹⁴

1. Explicitly state intent for the type of forum being created.
2. Specify advertising content restrictions and that all restrictions are to be enforced in a viewpoint-neutral manner.
3. Ensure discretion to restrict content is consistent and fair over time by explaining the advertising review process in detail.

¹⁴ Ridley v. Massachusetts Bay Transp. Authority, 390 F. 3d 65 (1st Cir. 2004)

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DATE: *9-23-13*
RALPH BECKER
MAYOR

CITY COUNCIL TRANSMITTAL



David Everitt, Chief of Staff



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TO: Salt Lake City Council
Kyle LaMalfa, Chair

DATE: September 19, 2013

FROM: Eric D. Shaw, CED Director



SUBJECT: Bus Shelters and Advertising

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BACKGROUND/DISCUSSION:

In May 2013, the City Council requested that the Administration provide a report on the feasibility of installing bus shelters and the potential to allow advertising on those bus shelters for the purpose of revenue generation. This transmittal was prepared to fulfill that request and is broken into the following sections: historical context, feasibility of shelter construction, and advertising considerations and options.

Historical Context

Salt Lake City banned bus bench advertising as part of a larger signage overhaul in the 1970's because, at that time, bus bench advertising was largely unregulated and was largely used as an excuse to put an ad in front of a competitor. For example: a business would place a bench with their advertisement on it in front of a competitor and call it a public service, rather than an advertisement. Most bus benches had no relationship to actual bus stops, blocked pedestrian traffic and provided no income to the City or transit agency. Some of these benches still exist outside of Salt Lake City; however, Salt Lake City removed them in the 1970's within City limits because they were on public property.

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Salt Lake City revisited bus bench advertising beginning in approximately 2004. It was not for transportation income, but for income to pay for bus stop improvements in general, similar to what is seen in some Wasatch Front communities such as South Salt Lake or Provo. The idea was to contract out for bus shelter locations and a private company would build and maintain bus shelters in exchange for gathering the advertising income. The sites were to be specifically identified and controlled by contract. The ordinance changes required for such a program are minor and the larger issues were political. The largest billboard owner in the State claimed unfair competition and threatened to press for a bill to be passed at the Legislature to allow him to construct billboards on private property near any competing bus stop advertisement. As a result the push for bus shelter advertising ceased.

Feasibility of Shelter Construction

There is widespread agreement that improved bus shelters are needed in Salt Lake City. In addition to national literature supporting the connection between rider comfort and propensity to ride transit, Mayor Becker highlights our need to 'Build a Better Bus Stop' in the Mayor's Livability Agenda published in 2012. The City Council Philosophy Statement also supports improvements to bus shelters with its emphasis on making alternative modes more convenient and accessible.

An analysis of ridership data, in combination with field verification and photo documentation, identify the following locations as having the greatest need for bus stop improvements:

All bus stops within the UTA system are ranked according to the following criteria: high usage stops; proximity to various venues (such as hospital, senior center, or residential area as examples); number of bus routes served; ADA compliance; UTA investment and the amenities that are present, such as benches, schedules and signs. The ranking of potential new shelters is done on a point basis and locations ranked accordingly.

1. 200 South 460 West
2. 2100 South 898 East
3. 500 East 421 South
4. Central Campus Drive @ 260 South
5. Central Campus Drive @ 254 South
6. State Street @1320 South
7. State Street @ 1730 South
8. State Street @ 685 South

The cost to install a bus shelter ranges from \$3,000 to \$15,000 and depends on right of way needs, design elements, whether there is power to the shelter, etc. To increase the number of bus shelters on routes in Salt Lake City, the City can either work within the

grant program established through the Utah Transit Authority, or attempt to fund and install shelters independently.

UTA has annual formula funding available for the installation of bus amenities such as bus shelters, benches, trash cans, cement flat work, ADA ramp, schedule holder, additional signage, lighting, or anything other than the bus stop pole and sign.

UTA's Meadowbrook and Central Business Units (the two that serve Salt Lake City) each received 24% of the annual allocation and assemble a priority list for distribution of funding only at official UTA bus stops. An additional 25% is reserved for local match projects. Local match funding may include maintenance costs.

It is important to note that this program requires the hiring of one full-time maintenance employee per twenty shelters. This is an important consideration since Salt Lake City would have to maintain any self-funded shelters. A preliminary estimate of maintenance costs indicates that approximately \$3,000 per year, per shelter would be needed. Additional detailed information on the UTA ranking and application process, as well as a breakdown of maintenance costs, is available in a separate technical memorandum prepared by the Transportation Division.

If Salt Lake City chooses to fund and install bus shelters independently, it will be necessary to coordinate with UTA on design, safety, and ADA standards to maintain compatibility with existing bus service.

Advertising Considerations

The underlying issues around advertising remain the same as in 2004. Key questions that should be addressed before advertising is allowed on shelters within Salt Lake City include:

- How much visual clutter can/should the city tolerate?
- Should the city increase advertising on public property without simultaneously reducing it elsewhere?
- How much does a city contract compete with private entities? How does the city restrict private billboards, while simultaneously generating revenue from public ones? Is a public bidding process sufficiently open to all private companies or is it their responsibility if a sign company does not alter their business plan to compete in a changing market?
- Does a city bus shelter contract create a monopoly? Is there already a de facto existing billboard monopoly?
- How do bus shelter ads differ from billboards in terms of State laws regarding off-premise advertising (spacing, lighting, digital images, etc)?

In order to allow bus shelter advertising the city must make several changes, as noted below:

- Alter its own ordinance ban prohibiting bench advertising. This is a relatively straightforward process, however, since it is an ordinance change and a land use policy change it would normally be routed through the Planning Commission. As part of the conversation in 2004-2010, the city drafted proposed amendments to Title 21A-46 to make such advertising legal. The proposed amendments included adding to 21A-46-020 definitions of “bus shelter” and “bus shelter advertising,” and adding “bus shelter advertising” to the definition of “bench sign.” In addition, Section 21A-46-070K (relating to signs on public property) would have been amended to include bus shelter advertising. The proposed ordinance amendments were not considered by the Planning Commission or City Council and remain un-adopted.
- Set up contractual rules for the long term leasing of public property, including identifying specifically which bus stops need shelter. All the places that need shelter are not necessarily the places that the advertising company wants to place ads, and all places that the advertising company wants to place ads are not necessarily the places that the city wants them (i.e. busy streets in neighborhoods such as 1300 East).
- State law should be clarified to separate shelter advertising from regular off-premise advertising. Recently there have been competing bills regarding off-premise advertising at the Legislature, and there is currently some movement toward clarifying that bus shelter or kiosk advertising is NOT a billboard according to state law. However there remains no clear distinction at the State level.

In addition to aesthetic and permitting issues, first amendment concerns have also been raised. As part of the efforts between 2004 and 2010, the City Attorney’s Office identified First Amendment (free speech) issues regarding bus shelter advertising. It was learned that bus shelters probably would be considered a “limited (or nonpublic) forum” for speech, meaning that the city could have some control over the content of the advertisements. Specifically, it could limit speech to a certain class of speakers and a certain class of subjects.

Furthermore, it would be lawful for the city to prohibit advertisements that would not be consistent with the city’s goals and policies. For example, some other communities prohibit the following advertising on bus shelters: ads for pawn shops or sexually oriented businesses; political or religious ads; alcohol or tobacco ads; ads containing vulgarity, obscenity, or nudity.

Revenue Considerations

Nationally, bus shelter advertising costs have a range of \$150 - \$4,500 per ad per 4 week period, depending timing and market. Bus advertising on a typical shelter (as provided

by UTA) could accommodate costs between \$200-575 per ad per 4 week period. The cost of administering the advertising program is unknown, but without factoring in these costs, one shelter could generate approximately \$2,500 - \$7,000 annually. Administering an advertising program would significantly diminish this revenue, as the cost of staff time would need to be added. Maintenance costs, as noted above, would also affect total revenue. Lastly, the cost of construction, whether independently or through the UTA program, would need to be factored into an overall cost / benefit analysis.

It is important to recognize that there may be tension between site selection and locations for advertising revenue. The goals of private contractors related to revenue may not coincide with city goals for rider comfort and optimal placement.

