



STAFF REPORT

DATE: October 3, 2017

TO: Ronald L. Olson, City Manager

FROM: Kathryn H. Davis, City Attorney

SUBJECT: Approval of a release and settlement agreement with Beau Burkett Media LP

BACKGROUND AND FINDINGS:

On February 6, 2017, Burkett Media's application for a sign permit for a 672 sq. ft. billboard was denied because it was proposed within the 1500 foot radius of another large off-premises sign, a city billboard. The city's ordinance requires that the distance between the requested large off-premises sign site and the closest off-premises sign be greater than 1500 feet measured as a radial distance. Burkett appealed the Building Official's determination to the City Manager and then to the Zoning Board of Adjustment. The appeal was denied.

On May 17, 2017, Burkett filed a petition for writ of certiorari and other relief in the 169th Judicial District Court naming the City of Killeen, the Zoning Boarding of Adjustment, and Earl Abbott in his official capacity as Building Official as defendants. The petition alleges various claims including that the determination of the Building Official and Zoning Board are illegal, that the city's sign is illegal under TxDOT regulations, and that the city's ordinance is unconstitutional to the extent it regulates signs based on content. The City denied these allegations and removed the case to federal court based on the constitutional claims.

TML Risk Pool assigned this case to Naman Howell Smith & Lee, Attorneys at Law, to assume defense of this case. After initial pleadings, Judge Manske recommended that the parties attempt to mediate the case prior to formal discovery. In response to Judge Manske's recommendation, the City negotiated a settlement agreement subject to City Council approval with the following terms:

- (1) Burkett Media will at its sole expense within 60 calendar days after City Council approval of the settlement and the parties' execution of a settlement agreement convert the existing City of Killeen large static sign into a medium size (378 square foot, 35 foot tall) static sign, which sign will be at the current location of the City sign,
- (2) Burkett Media will at its sole expense provide the City with 6 free vinyl changes on its medium static sign at times selected by the City over the next two years,
- (3) Burkett Media will provide to the City free use of one 10 second flip per minute on the digital sign located at the shopping mall on W.S. Young for the next four years and will assist the City in making digital changes to that sign as requested by the City, with the understanding

that if said sign is destroyed by forces of nature, Burkett will provide the City with advertising on another digital sign mutually agreed upon by the Parties within the City of Killeen for the remainder of the four year period;

(4) The City will grant Burkett Media a permit to construct its new large sign on the proposed site at the location previously proposed by Burkett Media in its permit application, and

(5) In consideration of the above, all parties to the pending litigation will mutually release each other from all claims for attorneys' fees and expenses and other damages resulting from or related to the events which are the subject of the pending litigation and the pending litigation will be dismissed with prejudice.

THE ALTERNATIVES CONSIDERED:

- 1) Approve release and settlement Agreement
- 2) Disapprove release and settlement Agreement and continue to defend the lawsuit

Which alternative is recommended? Why?

Naman Howell Smith & Lee, along with city staff, recommend the first alternative of approval of a release and settlement agreement as outlined above. The settlement offers approximately \$93,600 of advertising value over the next four years to the City of Killeen, which can be used to advertise events at the Killeen Civic and Conference Center as well as running ads for hiring opportunities, city news and events. Use of the digital W.S. Young sign would not be limited to non-commercial verbiage as the city billboard is limited under TxDOT regulations. Additionally, the settlement also offers approximately \$19,200 in savings on vinyl changes for the city billboard over the next two years. The City would not pay any monetary damages, but would allow Burkett Media to convert the City's billboard from a large sign to a medium sign.

Challenges at trial could include factual issues such as Burkett Media's allegation that a former City employee told Burkett Media that the requested location of the sign would be allowed prior to Burkett Media spending money to develop the site. The conversation is alleged to have occurred prior to Burkett Media's permit application, but the City does not have and has not seen any evidence that this is true. Another issue may be that only six of seven Zoning Board of Adjustment members were present when Burkett Media's appeal was denied. While the Board voted 5:1 to approve the variance and allow Burkett Media's sign to be constructed within the required distance between large off-premises sign, the appeal was not granted because the Local Government Code requires the concurring vote of 75 percent of the members of the Board to reverse a determination of the Building Official. That means that it would have required the votes of all six members present to approve the variance. Legal challenges include a constitutional challenge based on relatively new caselaw coming out of the U.S. Supreme Court and the Texas courts regarding whether commercial and off-premises distinctions in sign codes should be treated as content based regulation and subject to strict scrutiny.

The TML Risk Pool is defending this lawsuit based on the constitutional claims and likely would not have been required to defend the lawsuit had the claims only consisted of the state law claim contesting the determination of the Zoning Board of Adjustments. If City Council decides not to accept the settlement agreement and wishes to continue to defend the lawsuit, it is

possible that the constitutional claims could be dismissed, which would likely cause TML Risk Pool to withdraw representation and require the City to defend the lawsuit with City funds.

While the case is defensible from the City's perspective, Naman Howell Smith and Lee, along with city staff, believe that the terms of the proposed settlement are reasonable and offer value to the City.

CONFORMITY TO CITY POLICY:

The proposed settlement would require the City Council to authorize the permitting of Burkett Media's proposed off-premises sign at the requested location which would encroach approximately fifty feet into the seven hundred and fifty foot radial distance required between the City's new sign and Burkett's proposed sign.

FINANCIAL IMPACT:

What is the amount of the expenditure in the current fiscal year? For future years?

\$0

Is this a one-time or recurring expenditure?

N/A

Is this expenditure budgeted?

N/A

If not, where will the money come from?

N/A

Is there a sufficient amount in the budgeted line-item for this expenditure?

N/A

RECOMMENDATION:

City staff recommends that the City Council approve a release and settlement agreement as described herein with Burkett Media LP.

DEPARTMENTAL CLEARANCES:

Planning and Development
Community Development
Legal

ATTACHED SUPPORTING DOCUMENTS:

N/A