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Memorandum

TO: Public Works Committee
FROM: Takeisha R. Redd, Assistant City Attorney
DATE: April 8, 2017
SUBJECT: Legality of Political Advertising on WSTA Property
CC: Lee Garrity, City Manager; Angela I. Carmon, City Attorney

The purpose of this memo is to provide a brief summary of the legality of revising Winston Salem Transit Authority (WSTA)'s Bus Advertising Policy ("Advertising Policy") to allow political advertisements on WSTA property. Currently, WSTA's Advertising Policy prohibits political advertising on WSTA property and defines political advertising as "any advertising that supports or opposes the election of any candidate or group of candidates, or any ballot question, initiative, petition or referendum issues including bond issues, constitutional amendments or proposed legislation."

The legal protection afforded to speech or expressive activity in a traditional or designated public forum is robust and any regulation regarding the speech or expressive activity must meet the strict scrutiny standard in order to withstand a constitutional challenge. The legal protection afforded to speech or expressive activity in a non-public forum is less extensive and a governmental entity is only required to show that a regulation is reasonable and content-neutral in order to withstand a constitutional challenge. WSTA buses are considered a non-public forum. Governmental entities are allowed to place advertising in a non-public forum without converting that space to a designated public forum so long as the advertisements remain commercial in nature. If the governmental entity opens that space to political advertising, a designated public forum is created and any regulations regarding the advertisements must meet the strict scrutiny standard.

Any potential increase in advertising revenue from political advertisements must be weighed against the discretion that WSTA stands to lose in being able to choose advertisements are allowed on its property. You must also consider any potential liability that could result from an improper content based denial of a political advertisement.

WSTA currently contracts exclusively with Streetlevel Media to recruit advertisers and manage the installation and removal of advertisements from WSTA's buses in accordance with WSTA's Advertising Policy. Potential advertising clients contract directly with Streetlevel Media. Streetlevel Media then shares a percentage of the advertising revenue with WSTA. The current contract fixes the revenue sharing percentages for a period of two years. Thereafter, the parties are free to renegotiate the revenue sharing percentages. The contract also contemplates the possibility of expanding the advertising program to other types of WSTA property.

While it is legally permissible for WSTA to reverse its prohibition on political advertising it is not advisable for the following reasons: 1) doing so could be seen as converting those advertising spaces from non-public forums to designated public forums; 2) political

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advertisements are cyclical and therefore would only provide cyclical increases in revenue; and 3) the contract between WSTA and Streetlevel Media allows the for renegotiation of the revenue sharing agreement and contemplates expansion. For these reasons, staff recommends that WSTA's prohibition of political advertising remain in place and other opportunities for increasing advertising revenue be explored.

Takeisha R. Redd