

TO: AIRPORT COMMISSION

FROM: Matthew Kazmierczak
Manager of Strategy and Policy

SUBJECT: Background Billboard Information
For January 26, 2022

DATE: January 14, 2022

Airport Commission Special Study Session and Special Meeting for January 26, 2022 at 6pm.

On August 18, 2021, Outfront Media submitted to the EIR comment process an objection to the process that allowed Clear Channel to proceed with this project (attached). This letter was addressed in the [Addendum Responses to Comments](#), starting on page 111.

On December 28, 2021, Clear Channel sent a letter to the City Council responding to this complaint and rebutting the objection (attached).



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August 17, 2021

VIA E-MAIL AND U.S. MAIL

Adam Petersen
Principal Planner
City of San Jose
Planning Division
200 E. Santa Clara St. Tower, 3rd Floor
San Jose, CA 95113
Email: adam.petersen@sanjoseca.gov

Re: US 101 Airport Electronic Signs Addendum (File No. ER 21-015)

Dear Mr. Petersen:

This office represents Outfront Media LLC (“Outfront”) regarding the City of San Jose’s Initial Study (IS) / Addendum (the “Addendum”) for the proposed addition of two V-shaped electronic displays adjacent to Highway 101 on portions of the Norman Y. Mineta San Jose International Airport (the “Project”). Outfront submits this comment because the Addendum does not accurately describe the procedures required to complete the Project, which are clearly outlined in City Council Policy 6-4 (“Policy 6-4”). Policy 6-4 expressly requires that the City “seek proposals” for new billboards on City-owned land. When the City selects a proposal for a new billboard on City-owned land, Policy 6-4 then requires the City to enter into a “lease or other contractual agreement” subject to review under the California Environmental Quality Act (“CEQA”) and with the issuance of a building permit. Policy 6-4 does not require approval of a site development permit or design review as the Addendum indicates.

As described in the Addendum, the City’s apparent approach is to allow Clear Channel Outdoor to move forward with the Project based on a competitively bid 2007 airport advertising and concession agreement that *expressly excludes* billboard advertising (“Master Concession Agreement”). Neither the Master Concession Agreement, nor any of its six amendments authorize Clear Channel to complete the Project. To allow the Project to move forward as contemplated in the Addendum would violate Policy 6-4 and deny the City the benefit of a competitive process meant to select the entity best suited to complete the Project in an advantageous manner for the City.

Outfront respectfully requests that the City comply with its own governing policies and solicit proposals from qualified bidders before moving forward with the Project.

I. **Clear Channel's Master Concession Agreement Does Not Authorize The Project.**

The Addendum appears to contemplate allowing Clear Channel to proceed with the Project based on the Master Concession Agreement Clear Channel entered with the City in July of 2007. This Agreement and its amendments contemplate in-terminal and limited outdoor advertising on airport grounds but *expressly excludes* billboard advertising.

The City awarded Clear Channel the Master Concession Agreement after issuing a Request for Proposals for an Advertising Concession, with proposals due on March 20, 2007 ("2007 RFP"). Accordingly, on June 5, 2007, the City Council approved a resolution authorizing the City Manager to negotiate and execute concession agreements with Clear Channel for Option 5 (including fixed display internal, outdoor advertising, and transit/bus shelter advertising, and promotional and marketing opportunities). The City Council also authorized a separate agreement with Clear Channel for Option 3, for transit/bus shelter advertising.¹

The 2007 RFP included five separate proposal options that responding entities could respond to. Responding entities could provide separate proposals for each of Options One through Four (Fixed Display Internal, Outdoor, Transit/Bus Shelter, and Marketing Income). Responding entities could also respond with a proposal for Option Five, which included a comprehensive advertising program incorporating all of the elements from Options One through Four. (See 2007 RFP, at pp. 8-12.)

Crucially, none of these Options requested proposals for electronic billboards or V-shaped freestanding freeway signs like those included in the Project. For example, in Option Two – Outdoor Display Package, the City sought proposals for the following: (a) Exterior wrap of the Terminal A Parking Garage, (b) One "Welcome to SJC" Monument sign located on the airport roadway system, and (c) Up to 23 light poles for two-sided banner displays. (2007 RFP, at 9.) The 2007 RFP's Option III – Transit/Bus Shelter proposal category was the only other proposal package related to outdoor advertising, this sought proposals for displays related to 27 exterior bus shelters, and for the inside and exterior of the City's shuttle buses. (2007 RFP, at 10.) The Master Concession Agreement executed by Clear Channel is consistent with the scope of the 2007 RFP.²

¹ The agreement regarding Option 5 included a minimal concession fee guarantee to the City of \$4,075,000. The separate agreement with Clear Channel for Option 3 included a minimal concession fee guarantee to the City of \$75,000 per year.

² This is consistent with the language of City Council Policy 6-4, and the Municipal Code at the time, which prohibited all new billboards on City-owned Property. (See Policy 6-4, p. 1; see also SJMC, § 23.02.1010.)

Specifically, and in alignment with the limited scope of the 2007 RFP, the Master Concession Agreement expressly excludes billboard advertising:

Because of the City's substantial interest in protecting the health and welfare of its Citizens, Concessionaire agrees that it will not allow free-standing, outdoor billboards in the Concession Areas which:... are freestanding, outdoor billboards.

(2007 Master Concession Agreement, at Section 4.7 (emphasis added).)

The City approved amendments to the Master Concession Agreement six times, however none of these altered Section 4.7 of the Agreement. For example, the most recent amendment, the "Sixth Amendment to the Master Agreement", amends the definition of Advertising Sites and authorizes the Director of Aviation to approve, change, or modify concession areas with a new digital program. However, nothing in the Master Concession Agreement or its amendments authorize Clear Channel to construct, lease, license, or operate digital billboards like those contemplated as part of the Project.

The work contemplated in the Project was not part of the 2007 RFP, and the work proposed by the Project is fundamentally different than the advertising services in the 2007 RFP. If the City wishes to move forward with the Project, Policy 6-4 requires the City to solicit competitive bids to select the entity most advantageous to the City to complete the Project.

II. Policy 6-4 Requires The City To Solicit Proposals For the Project.

The City Council adopted the current language of Policy 6-4 on September 25, 2018, and it was effective on November 9, 2018. Prior to that date, Policy 6-4 and the Municipal Code banned all new billboards on City-owned property. (Policy 6-4, at 1.) For several years prior to 2018, the City Council expressed interest in a policy that would allow for some digital off-site advertising signs and billboards. Policies considered ranged from allowing new billboards on private and public land, and policies only allowing for billboards on City property. Policy 6-4 was intended as an incremental approach to allow for "off-site advertising on City-owned sites throughout the City . . ." while still maintaining a general prohibition against new billboards on private land. (Policy 6-4, at 1.)

In reversing the City's blanket prohibition, Policy 6-4 established a uniform set of standards and procedures to allow for new billboards on City-owned land. The Policy makes clear that new signs authorized by the Policy will only be allowed "**as and where expressly allowed** pursuant this Council Policy 6-4." (Policy 6-4, at 2 (emphasis added).)

Policy 6-4 then goes on to list six selection criteria the City must use to determine whether a city-owned site is eligible (or "potentially eligible") for new signs under the

Policy. (Policy 6-4, at 4.)³ Using this criteria, the Policy identifies 17 eligible or potentially eligible City-owned sites, but notes that the City Council can add sites if such sites meet the site selection criteria.

Crucially, Policy 6-4 unambiguously lays out a specific procedure in its “Sign Approval Process” for all new billboards authorized by Policy 6-4. This procedure commences with the requirement that the City shall solicit proposals for new billboards, as follows:

1. The City will solicit proposals for [billboards] pursuant to this Policy. City Council direction will be obtained prior to the commencement of any solicitation process.

(Policy 6-4, at 7 (emphasis added).)⁴

Policy 6-4’s Sign Approval Process then provides that the City may approve placement of a sign pursuant to the Policy through “approval of a lease or other contractual agreement.” While development specific environmental clearance under CEQA with a building permit is required, “no other regulatory permit issued by the City will be required, such as a Site Development Permit.” (Policy 6-4, at 7.) Policy 6-4 then goes on to list the reasons why the City should solicit proposals for new signs, noting that the City may do so for “some or all” of “the following purposes pursuant to this policy”:

(a) To generate revenue for the City;

³ I.e., the site must have a General Plan land use designation other than Open Space; the site must be in a zoning district other than Open Space or Agricultural; the site must not violate the City’s riparian corridor and bird protection policies; the site must comply with the City’s historical preservation standards; the site must be “compatible with any existing use on the site or any potential use of the site”; and the City Finance Department must determine that the site can be used for a sign without violating bond covenants or other restrictions. (Policy 6-4 at 4, “Sign Location, Type, Size, Height and Number”.)

⁴ This requirement to solicit proposals is consistent with the Municipal Code’s regulation of commercial activity on airport property. For example, unless certain narrow findings can be made, the City must generally seek a minimum of three competitive proposals, if practicable, “for the lease of land, structures, or other premises on the airport.” (SJMC 25.08.1320 (A).) Such leases shall be awarded to the “responsible proposer” that submits the proposal determined by the City to be the most advantageous, considering but not limited to, such factors as “revenues to the airport, services to be provided by the proposer . . . , investment in facilities to be constructed on the land or other premises, etc. . . .” (*Id.* at subpart (B).)

(b) To generate revenue to support City-owned facilities, programs, or services;

(c) To eliminate visual clutter and blight by reducing the overall number of existing Billboards City-wide or eliminating existing Billboards from locations where they are particularly unsightly or incompatible with surrounding land uses.

(Policy 6-4, at 8.)

Policy 6-4 provides a clear procedure that the City must adhere to approve new billboards like those proposed by the Project. If the City wants to approve new billboards on City-owned land, it must first solicit proposals, and can only approve billboards on sites that meet the selection criteria outlined in Policy 6-4. After a suitable proposal is selected, the City must then approve a lease or other contractual agreement for the proposed billboard. It is this solicitation process and City Council approval of a lease or other contractual agreement that Policy 6-4 envisions as the City's discretionary approval process for new billboards on City-owned property. Policy 6-4 *does not* envision the City granting an entity an approval for new billboards on City-owned land with no competitive bidding process, and under an agreement that always excluded billboards from its scope.

III. **Conclusion.**

For the foregoing reasons, Outfront respectfully requests that the City suspend its environmental review and follow the procedural requirements as set forth in Policy 6-4. If the City wishes to proceed with the Project, the City must issue a Request for Proposals. The City would then select the responsible proposer who submits the proposal determined by the City to be the most advantageous to the City. To do otherwise would violate the clear standards and procedures adopted by the City Council.

Very truly yours,

MILLER STARR REGALIA



Anthony M. Leones

cc: Chris Burton, Planning Director, City of San Jose, chris.burton@sanjoseca.gov
John Aitken, Aviation Director, Norman Y. Mineta San Jose International Airport, john.aitken@sjc.org
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December 28, 2021

BY FIRST-CLASS MAIL AND EMAIL

Honorable Mayor Liccardo
Vice Mayor Jones
City Councilmembers
Office of the City Clerk
200 E. Santa Clara St.
San Jose, CA 95113
cityclerk@sanjoseca.gov

RE: US 101 Airport Electric Signs Project

Dear Mayor, Vice Mayor and Councilmembers:

This office represents Clear Channel Outdoor, Inc. (“Clear Channel”) with respect to the approved Clear Channel Outdoor Digital Billboards-San Jose International Airport Project Plan. This is in response to the November 22, 2021, correspondence from counsel for Outfront Media LLC (“Outfront”) regarding the approved outdoor billboards adjacent to Highway 101 on portions of the Normal Y. Mineta San Jose International Airport and Council’s action taken November 30, 2021, related to the Addendum to EIR addressing these billboards.

Outfront contends that outdoor billboards are prohibited both by the terms of the Advertising Concession Agreement (“Agreement”) between the City of San Jose and Clear Channel and the terms of City Replacement Policy 6-4. Apparently, as a result of these objections and other concerns related to billboards, the City Council (“Council”) declined to accept the Amended EIR and instead is considering an RFP for these outdoor billboards at the San Jose Airport. For the reasons addressed in this letter, the objections raised by Outfront are unfounded and untimely as these billboards were properly approved by Council and awarded to Clear Channel.

The Outdoor Billboard Project (“Project”) was properly proposed and approved under the terms of the amended Agreement in February 2020. Any objections or concerns related to that Project should have been raised at that time. The Addendum to the EIR, which was required as part of the Project plan, was completed in July 2021, and

identified no additional impacts from the proposed billboards. The Council's failure to approve the Addendum was based on objections to the Project and unrelated to the Addendum. The Addendum should have been approved and the Project should proceed.

The Project was properly approved in accordance with the Agreement as amended and Replacement Policy 6-4. A simple review of the history of the Agreement and Policy demonstrates this is the case.

The original Agreement was approved by the City on or about July 31, 2007.¹ Since then, there have been six (6) amendments; each amendment was submitted to and approved by the Council. The 6th Amendment, dated April 3, 2019, revised the advertising sites, added a new digital program, extended the Agreement to 2027 and added the Airport Director's authority to add or modify advertising sites. The Council expressly approved this amendment which clearly provided the Airport Director with the authority to approve new advertising locations.²

In 2007 when the Agreement was initially negotiated, Policy 6-4 expressly prohibited outdoor billboards on City owned property. In accordance with that policy, outdoor billboards were prohibited in the Agreement. Replacement Policy 6-4 was ratified and effective November 9, 2018.³ That Replacement Policy provided guidance related to billboards and confirmed the City's interest in billboards, including Programmable Electronic Signs, on City-owned property. The Replacement Policy included potential City-owned sites for signage installation including locations at the Airport.

Thereafter, on July 23, 2019, the Council unanimously approved the scope and timeline for large format signage/billboard Request for Proposal on City-owned land. The Memorandum to the Mayor and Council specifies those sites specified in Replacement Policy 6-4 to be addressed in the RFPs and expressly states that the Airport sites identified in the Policy are not part of the proposed RFPs, noting that the Airport has an existing agreement with an advertising concessionaire (Clear Channel) and recognizing that: "The Airport intends to address other advertising opportunities including outdoor billboard advertising once the in-terminal program has been fully developed."⁴

Through the Replacement Policy and approval of the Recommendations referencing the Airport negotiations, the City expressly approved and anticipated digital

¹ Advertising Concession Agreement by and between the City of San Jose and Clear Channel Outdoor, Inc., dba Clear Channel Outdoor Airports

² Sixth Amendment to Advertising Concession Agreement Between the City of San Jose and Clear Channel Outdoor, Inc., dba Clear Channel Outdoor Airports

³ Signs on City-Owned Land Including Billboards, Programmable Electronic Signs and Signs Displaying Off-Site Commercial Speech, City of San Jose Council Policy, res No 78814 (Replacement Policy 6-4)

⁴ City of San Jose Memorandum to Honorable Mayor and City Council dated July 15, 2019, and approved July 23, 2019

billboards at the Airport sites and approved the Airport's direct negotiations with the concessionaire (Clear Channel) regarding those sites.

In November 2019, Clear Channel submitted a LOI to the City outlining the proposed terms for the development and operations of digital billboards at the specified Airport locations. Thereafter, on February 19, 2020, pursuant to Section 3.3.4 of the Agreement, Clear Channel submitted a formal Project Plan for the Outdoor Digital Billboards. That plan was approved, as specified in Section 3.3.4, on February 21, 2020.⁵ The approved locations were those Airport locations specified in Replacement Policy 6-4. That approval constitutes an amendment to the Agreement permitting those outdoor digital billboards as new advertising sites. Clear Channel has incurred significant time and expense in the development of the Project Plan and in the Addendum to the EIR to address the proposed billboards.

The Project Plan was submitted and approved more than 18 months ago. The Council was well aware of the negotiations and the Project which was properly approved in accordance with the terms of the Agreement. Any objections to the approval of the Project should have been raised at the time of the approval and not at the time of the Addendum to the EIR which was prepared only after Project approval.

Outfront, in an effort to persuade the Council to alter the approval, asserts that Replacement Policy 6-4 requires that any outdoor billboard project requires an RFP. That is incorrect. The sign approval process specified in Replacement Policy 6-4 provides at paragraph 2 that the City may approved placement of a Sign on City-owned property pursuant to this Policy through approval of a lease or other contractual agreement. The City expressly omitted Airport locations from its RFP and chose to approve placement through its existing contractual agreement with Clear Channel. The policy expressly permits approval through contractual agreement which is how the approval was granted.

Clear Channel has complied with the express terms of its Agreement with the City, the terms of the policy and all City requirements related to the installation of the digital billboards. The Addendum to the EIR found no significant impact from the installation of the digital signs and Clear Channel has already taken appropriate action to address any environmental concerns related to the signage. Moreover, the Federal Aviation Administration notified Clear Channel on December 17, 2021, that it does not object to Clear Channel's conditions for the construction of the subject digital signs as "[determined] with respect to the safe and efficient use of navigable airspace by aircraft and with respect to the safety of persons and property on the ground."

As noted, Clear Channel has expended significant time and resources in the development of the Project relying on those approvals received in February 2020. There is no legitimate bases to, at this time, refuse to approve the Addendum to the EIR or to circumvent the approved contract with Clear Channel permitting the installation of the

⁵ February 21, 2020, Project Plan Approval for Outdoor Digital billboards

Honorable Mayor and City Council

December 28, 2021

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digital billboards. Any objections are invalid and untimely.

Clear Channel respectfully requests that the Council approve the Addendum to the EIR and allow the Project to proceed.

Very truly yours,



Vicki R. Nuetzel

cc: Nora Frimann, City Attorney (via e-mail only)
Dan Connelly, Chair, Airport Commission (via e-mail only)