



COMMONWEALTH of VIRGINIA

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March 1, 2013

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The Honorable Barry D. Knight
Member, House of Delegates
1852 Mill Landing Road
Virginia Beach, Virginia 23457

Dear Delegate Knight:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether the First Amendment of the United States Constitution prohibits the Virginia Department of Transportation (“VDOT”) from charging a fee to a business wishing to distribute travel guide directories at Virginia highway Safety Rest Areas and Welcome Centers (collectively, “Rest Areas”).¹

Response

It is my opinion that the First Amendment protection of free speech does not prohibit VDOT, when it is acting in a proprietary capacity, from negotiating commercially reasonable, profit-conscious contracts for advertising and distributing written materials at its Rest Areas.

Background

Virginia’s Rest Areas are part of the federal interstate highway system and serve more than 30 million people annually.² In an effort to offset the expense of maintaining and operating Rest Areas and thereby improve their long term financial sustainability, Virginia instituted the state Sponsorship,

¹ The documents accompanying your inquiry state that VDOT does not impose a fee on all distributors at Rest Areas. According to information provided to this office by VDOT, while some distributions of written material have been permitted in the past without a fee, all distributions at Rest Areas are now subject to the fee requirements of the revenue generating program.

² See 2008 and 2009 Visitation Data for the VDOT Statewide Safety Rest Area/Welcome Center (SRA/WC) Program, available at http://www.virginiadot.org/info/resources/2009_Traffic_Accounts_for_Welcome_Centers_and_Safety_Rest_Area/rest_areas_Avg_Visitors_031110.pdf. In addition to the 40 Rest Areas maintained by VDOT on interstate highways in the Commonwealth, VDOT also maintains one Rest Area on U.S. Route 13 in Accomack County.

Advertising, and Vending Enhancement (“SAVE”) program in 2011.³ The SAVE program implements three state revenue generating initiatives at Rest Areas: sponsorships that are acknowledged by roadway signs, the sale of advertising space, and enhanced vending machine sales. A private contractor manages the various marketing components of the SAVE program for VDOT. Federal laws regulate signs, use of space and vending at Rest Areas. Access, use, and commercial activity are limited by federal statute and federal regulation.⁴ Vending is permitted at federal interstate highway system rest areas in compliance with the Randolph-Sheppard Act.⁵ State highway departments are responsible for managing interstate rights-of-way in accordance with Federal Highway Administration (“FHWA”) guidelines.⁶ VDOT has kept the FHWA informed on Virginia’s SAVE program to ensure compliance with federal regulatory requirements.

You relate that one of your constituents operates a business, VistaGraphics, Inc., that publishes and distributes the Virginia Hospitality and Travel Guide in coordination with the Virginia Hospitality and Travel Association (“VHTA”). The guide is a directory containing information of interest to travelers, including advertisements of attractions, lodging and dining in Virginia. Prior to the implementation of the SAVE program, VistaGraphics distributed its guides at the Rest Areas without charge. After implementation of the SAVE program, VDOT, through a contractor, made available advertising and distribution space at Rest Areas to marketing firms, all of which were charged a fee for the advertising space. At that time, VistaGraphics and other marketing firms entered into contracts to distribute travel guides and other travel-related advertising at Rest Areas in exchange for a fee. You relate that VistaGraphics now questions whether the First Amendment permits the Commonwealth to charge a fee for the use of state property as a distribution point for advertisements such as the Virginia Hospitality and Travel Guide.

Applicable Law and Discussion

Freedom of speech is protected by the Virginia Constitution⁷ and the United States Constitution.⁸ VDOT regulations governing the use of highway rights-of-way acknowledge that vendors of written

³ By resolution on December 8, 2010, the Commonwealth Transportation Board endorsed the Enhanced Sponsorship, Advertising and Vending Program, acknowledging that “as part of his governmental reform initiatives, Governor Robert F. McDonnell directed VDOT to identify and implement long-term strategies to streamline the operating costs of Virginia rest areas and make them more efficient.” Resolution of the Commonwealth Transportation Board (Dec. 8, 2010), *available at*

http://www.ctb.virginia.gov/resources/2010/dec/resol/Agenda_Item_10_CTB_ESAV_Vending_Resolution-final.pdf.

⁴ See 23 U.S.C. § 111; 23 C.F.R. § 1.23.

⁵ 20 U.S.C. § 107a.

⁶ 23 C.F.R. § 710.201.

⁷ VA. CONST. art. I, § 12 provides:

[t]hat the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

⁸ U.S. CONST. amend. I provides that “Congress shall make no law ... abridging the freedom of speech.”

materials are protected by the First Amendment.⁹ The issue raised here is whether those First Amendment constitutional protections necessarily prohibit VDOT from assessing a commercially reasonable fee for the use of its Rest Area facilities as a distribution point for travel guides.¹⁰

Although the use of Rest Areas for advertising is a relatively recent practice, other government venues, such as airports, university stadiums, and bus stations have a long history of generating revenue from advertising space.¹¹ In a similar case, reviewing the regulation of newspaper distribution in an airport, the Federal Court of Appeals for the Eleventh Circuit summarized the law applicable to this practice by stating: “We hold that when a government acts in a proprietary capacity, that is, in a role functionally indistinguishable from a private business, then commercially reasonable, profit-conscious contracts may be negotiated for distribution space in a non-public forum for *First Amendment* activities.”¹²

Following the constitutional analysis employed in this and other similar First Amendment cases, the threshold question is whether an interstate rest area is a non-public forum.¹³ A public forum is public property, such as a public street or park, which has by long tradition or designation “been devoted to assembly and debate.”¹⁴ A non-public forum is “[p]ublic property which is not by tradition or designation a forum for public communication [and] is governed by different [First Amendment] standards.”¹⁵ Numerous courts have determined that transportation facilities and their advertising spaces are non-public forums.¹⁶ One federal court has opined that an interstate rest area, specifically, is a non-public forum.¹⁷

⁹ 24 VA. ADMIN. CODE § 30-151-670 provides, in part, that “[v]endors of newspapers and written materials enjoy constitutional protection under the First Amendment to place or operate their services within rights-of-way, provided they neither impede traffic nor impact the safety of the traveling public.”

¹⁰ There is no issue raised here regarding any government restriction of the content of the advertisements.

¹¹ A line of cases in the Fourth Circuit employs a two-part test to analyze First Amendment cases involving commercial speech. First, the court determines whether the commercial speech concerns lawful activity and is not misleading. If the speech passes this test, it is entitled to First Amendment protection, and courts next determine whether the governmental regulation of the speech is justified by applying the forum analysis outlined by the U. S. Supreme Court. *Shopco Distrib. Co. v. Commanding General of Marine Corps Base, Camp Lejeune, North Carolina*, 885 F.2d 167, 171 (4th Cir. 1989); *Park Shuttle N Fly, Inc. v. Norfolk Airport Auth.*, 352 F. Supp. 2d 688, 703 (E.D. Va. 2004). For the purposes of this Opinion, it is assumed that the commercial speech in question is lawful and not misleading.

¹² *Atlanta Journal & Constitution v. City of Atlanta Dep’t of Aviation*, 322 F.3d 1298, 1312 (11th Cir. 2003) (emphasis in original). *See also Gannett Satellite Info. Network, Inc. v. Metro Transp. Auth.*, 745 F.2d 767, 772 (2d Cir. 1984) (“[B]ecause licensing fees serve the significant governmental interest of raising revenue for the efficient, self-sufficient operation of the rail lines, we hold that they can be valid ... restrictions on Gannett’s right to place its newsracks in those areas.”).

¹³ *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44-49 (1983); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1974).

¹⁴ *Perry*, 460 U.S. at 45.

¹⁵ *Id.* at 46.

¹⁶ *See, e.g., Int’l Soc’y for Krishna Consciousness, Inc. (ISKON) v. Lee*, 505 U.S. 672, 680-83 (1992) (solicitation in an airport terminal); *Lehman*, 418 U.S. at 303-04 (advertising space in the transit vehicles of a city transit system); *ACLU v. Mineta*, 319 F. Supp. 2d 69, 81-83 (D. D.C. 2004) (advertising in buses, subway cars and subway stations); *James v. Washington Metro. Area Transit Auth.*, 649 F. Supp. 2d 424, 429 (D. Md. 2009) (campaign activities and advertising in subway stations); *Sanders v. City of Seattle*, 156 P.3d 874, 884-85 (Wash. 2007) (easement through shopping mall to city’s monorail platform).

¹⁷ *Sentinel Commc’ns Co. v. Watts*, 936 F.2d 1189, 1203-04 (11th Cir. 1991).

I concur with this determination. Interstate highways are limited access road systems that are designed to connect “principal metropolitan areas, cities, and industrial centers ... to serve the national defense; and ... to connect ... routes of continental importance.”¹⁸ A safety rest area is a component of the interstate system, defined as a “roadside facility safely removed from the traveled way with parking and such facilities for the motorist deemed necessary for his rest, relaxation, comfort and information needs.”¹⁹ As limited access facilities on interstate highways designed to provide toilets, food, drink, picnic areas and other restorative opportunities for motorists, safety rest areas “have never existed independently of the Interstate System” and “are hardly the kind of public property that has by ‘long tradition or by government fiat ... been devoted to assembly and debate.’”²⁰

The United States Supreme Court has held that the state has “no constitutional obligation *per se* to let any organization use [a non-public forum].”²¹ “[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government.”²² Governmental imposition upon expressive activity in a non-public forum is permissible if it is “reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”²³ Courts will examine the imposition “for reasonableness given the surrounding circumstances. Restrictions must only be reasonable; [they] need not be the most reasonable or the only reasonable” method of governing the expressive activity.²⁴ Courts have applied the “reasonableness” standard of review in a variety of circumstances involving such issues as: the imposition of fees,²⁵ the sufficiency of written procedural safeguards,²⁶ and the nexus between the regulation and the purpose of the non-public forum.²⁷ As to the permissibility of profit-conscious fees, courts have ruled that when a governmental entity acts reasonably and in a proprietary capacity in a non-public forum, it is constitutionally permissible to charge “profit-conscious fees for access for expressive conduct, in a manner similar to fees that would be charged if the forum was owned by a private party.”²⁸

¹⁸ 23 U.S.C. § 103(c)(1)(C).

¹⁹ 23 C.F.R. § 752.3(a).

²⁰ *Sentinel Commc'ns*, 936 F.2d at 1203 (quoting *Perry*, 460 U.S. at 45). *See also James*, 649 F. Supp. 2d at 429 (“[below-ground areas of subway stations] are not public fora because they are not expressly dedicated to free speech activities.”).

²¹ *Perry*, 460 U.S. at 48 (internal quotations omitted).

²² *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981).

²³ *Perry*, 460 U.S. at 46.

²⁴ *Atlanta Journal*, 322 F.2d at 1307 (citing *ISKON*, 505 U.S. at 683) (internal quotations omitted).

²⁵ *Atlanta Journal*, 322 F.2d at 1309.

²⁶ *Id.* at 1310-11; *Sentinel Commc'ns*, 936 F.2d at 1196-1200 (the manner of regulating distribution must include clear written standards to limit officials' unbridled discretion).

²⁷ *Perry*, 460 U.S. at 49; *Shopco*, 885 F.2d at 174; *Park Shuttle N Fly*, 352 F. Supp. 2d at 706; *James*, 649 F. Supp. 2d at 429; *ISKON*, 505 U.S. at 683-85 (governmental policies must be reasonable in light of the purpose served by the non-public forum).

²⁸ *Atlanta Journal*, 322 F.3d at 1309. *See also Gannett*, 745 F.2d at 775 (“If Gannett were to place its newsracks on privately owned business property it undoubtedly would have to pay rent to the owner of the property. The fact that the business property in question is owned by the Metro Transportation Authority should confer no special benefit on Gannett.”).

Conclusion

Accordingly, it is my opinion that the First Amendment protection of free speech does not prohibit VDOT, when it is acting reasonably and in a proprietary capacity, from negotiating commercially reasonable, profit-conscious contracts for advertising and distributing written materials at its Rest Areas.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Ken C II". The signature is stylized, with the first name "Ken" and the last name "C" being prominent, followed by "II" in a smaller font.

Kenneth T. Cuccinelli, II
Attorney General