

# **Tompkins Consolidated Area Transit, Inc.**

## **Meeting of the Board of Directors**

### **August 31, 2021 | 1:00pm via Zoom**

#### **Attendees**

Board Members: Bridgette Brady; Deborah Dawson; Dan Klein; Laura Lewis; Ducson Nguyen; Frank Proto; Gary Stewart; Denise Thompson

TCAT Staff: Susan Brock; Raymond Lalley; Patty Poist; Pamela Torelli; Scot Vanderpool

#### **Call to Order**

Chair Dan Klein called the meeting to order.

A motion to take off the table **Resolution 2021-14 -- Approve the TCAT Advertising Policy** was made by D. Dawson, seconded L. Lewis. With a vote of 8-0-0 the Resolution and policy were discussed.

D. Dawson: As an attorney, it seems to me you can't take a position for or against anything.

S. Brock: The problem with policies that have been stricken down for impermissible viewpoint discrimination, is that they all prohibit expressions that are on one side of an issue, they all prohibit negative speech about something.

D. Dawson: But not positive?

S. Brock: Exactly. So, you can't have speech that demeans an individual or group, but you can have speech that says good things about an individual or group - that's the viewpoint discrimination.

D. Dawson: So, under B 1 that says "involving, promoting or opposing" is designed to shield us from running afoul of that impermissible viewpoint discrimination problem?

S. Brock: Yes, it does that.

D. Dawson: Thank you. That was my only question.

D. Klein: Other questions or comments?

L. Lewis: I am not a lawyer so I am reading this very much through the eyes of a layperson and I am just asking for clarification and definition of number 16 on Prohibited "...employs or implies vulgarity." How is "vulgarity" defined?

S. Brock: It's not defined here, but one ad I was thinking of that would fall under that, in the past, the company did laser hair removal, and they had a graphic and a name which together were suggestive of a female anatomical part; it implied that part. I think something like that would be the grounds where that type of ad would be prohibited. It's not obscene, which is sort of a different level. It isn't defined, though, so that is something that will have to be determined on a case-by-case basis as to whether something is vulgar or not. The point here is we have young people riding our system, and we also have a certain image of our system. If the First Amendment even applies to us - because we're private, but if

it does - we're not required to open up to all-comers, which is why we're allowed to have prohibitions in the first place.

D. Dawson: We're a non-public forum.

S. Brock: Yes. Which allows us to limit advertising to certain categories within Constitutional constraints, again, if the Constitution applies to us.

D. Dawson: And we're not subject to the "void for vagueness" thing?

S. Brock: Because we're a non-public forum, there are more relaxed standards, we're not under strict scrutiny, so there's a more relaxed standard that would apply. I think I'm just going to leave it at that unless you want to go into closed session to talk about this kind of thing.

D. Dawson: I thought the vulgarity and number 20, "aesthetically inappropriate" were kind of questionable if we were subject to void for vagueness.

S. Brock: With the First Amendment jurisprudence, you never know what you're going to get with a court, and things that previously were OK all of a sudden aren't; some decision comes down and the ground changes under your feet all the time with the First Amendment, starting with the US Supreme Court on down. That one is a type of regulation that has been upheld a lot in municipal regulations of signs, that this is not content-based at all, it's looking solely at size, color, design, that type of thing, so there's really no First Amendment expression in that either. Maybe somebody could make an argument based on certain elements, but, based on current case law, I don't have concerns about that.

D. Dawson: Ok.

S. Brock: The caveat is, we do the best we can with the information we have today and things could change, so, any lawyer would be foolish to say "this absolutely will not be subject to attack, and even if we are attacked, we will win"...I cannot say that, but I looked at all the recent case law, I looked at other transit agencies' policies, I tried to take what I thought were the best elements of them and put them together into something rational. Again, I did provide a long list, and if you want to pull some things out of the list that's fine, I just put them all together, so feel free to work on that list however you see fit.

L. Lewis: A tremendous thank you to Susan for this research and for guiding this. I did have a question about number 17, tobacco use and cannabis products, with the change in the law, is that to be included? Cannabis?

S. Brock: Is your question because cannabis is going to be legalized, should we include it or not?

L. Lewis: Correct.

S. Brock: Tobacco and alcohol are also legal, so it's up to you; the change in the law doesn't have anything to do with it, you can decide you do or don't want this type of ad, and I do have maybe a suggested change, at least for the alcoholic beverage product one, in light of the fact that we sometimes had a winery or two advertising on our buses. If you feel that's an inappropriate type of ad, we could say at the end, any establishment that sells these products is not prohibited so that if a winery wants to advertise with their name without showing the wine itself, it's up to you. You might decide you just don't even want 17 in here at all, it's really up to you as to what kinds of ads you feel are appropriate to be on our system. That's a policy decision, so I don't have a recommendation for you. Are you OK if

there's an ad for beer? You may say, "OK, that's great" or "bad", or an ad for cigarettes, or maybe you're going to allow some of these but not others, it's really up to you to decide what you think is appropriate, given the purposes of this law.

D. Thompson: My concern is, if we were given notice that the laws were changing and you could carry x-amount of whatever; I personally would like to have that type of information posed on our buses because not everybody is going to have access to the information we have access to; we're a connection for our community and to be able to connect the community with appropriate laws, if that is something that is sent to us to be publicized. Now that it's legal to carry however-much marijuana, would we, by having this in there, would we be limiting our ability to have a public service announcement regarding it?

D. Dawson: That's not sale or rental distribution. It could be considered availability, but it seems like it could also be covered under A 2, Governmental Advertising because it would be advising people what the limits of the law is. I mean, that's the problem with policies like this. I think we need one, but I think it should be as limited as possible so we don't get into trouble contradicting ourselves.

D. Klein: How would this policy enable us to say "No" to the last advertisement that was submitted?

S. Brock: That's something that we should probably go into closed session to seek advice of council on.

D. Klein: OK, then I withdraw the question for now. I'm going to vote "No" on this. I appreciate all the work that went into this - a couple of thoughts - one is that there's no way to define every situation and we can see in this conversation we're having right now how confounding that can get, and the other thing that I would say is that I'm comfortable with the advertising policy the way it is, I am not concerned about getting sued, and that's how I would leave it, as it is currently, so I'm going to be voting "No". Other thoughts?

L. Lewis: Just a point of clarification, Dan, you're voting "No" on the policy or you're voting "No" on some aspects of the policy?

D. Klein: The policy.

L. Lewis: OK, because we do not have a policy at the moment.

D. Klein: I think we do, Susan or Patty, do you want to help me out on this, what it currently is, is that it's just subject to Board approval?

P. Poist: That's in the contract that we have with Cayuga Radio Group.

D. Klein: Yeah. I'm comfortable with that.

B. Brady: I am absolutely concerned about being sued and I think that this policy is absolutely necessary. I do support it as written. I think that we need to start somewhere and it's structured well enough that the Board doesn't have to get involved with every decision to put something on a bus. I really don't think it's the Board's place. I do have one question about the aesthetics, I was going to take this off-line, but it looks like it's covered in the policy. I haven't made it a secret that I can't stand that some of our buses are fully wrapped in a vehicle sales ad, promoting single-occupancy vehicles; we are transit - we are trying to promote sustainability, so it's in absolute contradiction to part of our mission. It's a line item in this policy that I think we should revisit. Is it a grandfather clause?... so, but otherwise,

I think this is a good place to start. I would add as far as when we were talking about cannabis, alcohol and firearms, although these could be harmful, I would also add gambling. Those are my suggestions on what we have so far.

F. Proto: I need a little clarification. Patty put up a chat that says we have permitted CBD to be advertised; there's a difference, while tobacco is not illegal, we have a very active health department program that doesn't support smoking, however, Mayer's Smoke Shop has an ad, and the CBD shop has an ad that just says it's available. It doesn't mean they're promoting the smoking...you're just advertising a shop; in my opinion, that's different than advocating or giving the impression that you're advocating for the use. I go back to something Dan said, I don't think we're going to be able to cover every single detail of every single aspect, and the committee that Scot was talking about forming to review ads that raise a question, that's probably a good idea because Patty will go nuts trying to decide what ads to permit and what ads to not to permit, and I simply don't think we're going to be able to cover every single instance, so I would like to talk about the existing policy and go back to where we are now and how a decision is made now and where it becomes a sticky wicket and where we might invoke this special committee to review an ad.

D. Klein: You were cutting out a little bit. Are you asking for that explanation now? I wasn't sure...

F. Proto: Yes.

D. Klein: OK, thank you. Let's just put that on hold for a minute, we'll get right back to it, Laura's had her hand up for a while...

L. Lewis: Thanks, Dan. It is unfortunate, but in these very litigious times, I do think there's value in having an advertising policy. I agree there will need to be changes, and yet we owe it to the public to make clear what TCAT permits in terms of advertising, and it also makes it clear to Patty and to the Board what is permissible. Obviously everything won't come to the Board, Patty has been approving ads in the past and would continue to do so, it would only be when there are questions of non-compliance with the advertising policy that it would then go to an ad hoc advertising review committee. I don't know, and maybe Patty you can give a guesstimate based on your past experience, how many such non-compliant ads might be referred to such a review board. That being said, I do think a policy gives the public and our organization the necessary information and cover.

D. Klein: So, Patty, we'd like to hear from you. I think Laura and Frank's question were similar, but if after you speak, if one of them didn't quite get their question answered, they can ask.

P. Poist: Yeah, I base it off of what's in the contract now, anything I think has something to the effect of profanity, vulgarity, alcohol, substances that are harmful, anything that may collide with our community's sensibilities, I take it to the Board. I would say there's been about 5 over the course of my 12 years here. One that sticks in my mind is the Union representing nurses at Cayuga Medical Center; they were critical of Cayuga Medical Center management and I think the concern there was, Cayuga Medical Center is a big advertiser, but it could be deemed contentious. So, ads that might raise eyebrows, and you know, everybody's sensibilities are different, I try to gauge what our local sensibilities are and maybe I'm a little over-cautious, but anything that might hint at controversy, I will not approve. One thing that got through before I required everything to be approved was the guns that the Ithaca City Police Department demonstrated in an ad for hiring; a lot of people in our community found that offensive, but I can say about 5 -- Susan, I guesstimate about 5 over the past decade or so?

S. Brock: I agree. I think it's been about that.

D. Klein: Laura, Frank, did that answer your questions?

F. Proto: Yeah, the frequency, but the current policy certainly doesn't answer or address every single instance, and I think Laura just said it as well, that we should have this special committee to review those instances and perhaps we can have some guidelines for that. It's a very fine line. There are community standards and personal proclivities and whether we like liquor or not, we choose not to permit liquor advertising, and I guess that's ok. It's not illegal, and I think that's part of what our concern should be. Are we going to adhere to community standards all the time? There may be some ads that are a little sensitive, and that could be up for review by this special committee.

D. Dawson: It's just difficult for me to start drawing lines, once you've established that we'll accept advertising for commercial ventures and commercial products and commercial institutions, and then we go back and start slicing and dicing which kinds of institutions and products we'll allow and which ones we don't. We're allowed as a non-profit organization to set our own standards of what we find acceptable and what we don't, and there are some community standards that are fairly clear-- obscenity, illegality, vulgarity, you know, the Kuma Charmers place down there on 79 and maybe alcohol? Tobacco and vaping, yes, only because of all the research that's come out and what was considered when we did the T21, about how unhealthy that was for kids under a certain age, but you know, when Bridgette mentioned we're taking ads for single passenger use and we shouldn't be doing that because that's against our policy as a public transit agency, I mean, I'm uncomfortable with that. I don't know where the line is between the stuff that's clearly unacceptable by long-standing community standards and the stuff that we might personally find distasteful or undesirable or that somebody might get offended by, because let's face it, we live in a time and in a community when you can find somebody who is going to get offended by just about anything. So, I understand that we need a policy, and I don't share Dan's devil-may-care attitude about litigation. I guess that's just a function of having spent over 30 years litigating, but I just caution us to not put too many limitations on what kind of products we're going to accept and which we're not. I guess that's my two cents here.

S. Vanderpool: I just want to go back to something that Susan put in her email, not the policy itself, but she talked about an option that would make it less likely that controversial ads would be submitted. It's the tightening up the 501(c)(3) -- that advertisements would basically have to serve the needs of TCAT passengers. But that's a pretty broad spectrum, isn't it? To serve the needs of TCAT passengers, and is that something we even want to talk about?

F. Proto: Scot, the example that I remember Susan using was related to the list just distributed yesterday or earlier today, that if we go by that, providing a social service, the Re-Use Center, I think that was the example you used, the Re-Use Center would not be able to advertise because they don't fit that category, even though they are a 501(c)(3). That's what I was getting at before, and I think that may be where Dan was going, although I don't think we're going to be able to address every single situation. There's a certain amount of discretion that needs to be applied, and I think Deborah said it too, you don't have to have a script to know what's vulgar and what isn't. There are certain things that are clearly not appropriate to put on the side of a bus or the side of a car, I mean, we get offended by bumper stickers...

B. Brady: Deborah, I guess my point was, with the Simmons Rockwell thing - I wouldn't discriminate against that or ask that it's taken off, I just don't want it to be the entire bus. That was my point. That comes into the aesthetics, and I mean, I drive a car...

DD: Fair enough!

S. Brock: For many years, the Board said they didn't want bus wraps, so that is something you can do. You can give Patty direction to give the advertising contractors permissible sizes and, where and how they're placed on the bus-- but that doesn't have to be in this policy.

R. Lalley: Just a quick comment - the new policy that Susan has worked on does address things that were not a problem back in the day. For example, on line 19, "directs viewers to internet addresses"... a good example may be, "Protect your family" and have a picture of a nice, beautiful Earth and blue skies and it has a QR code, and then it sends you off to Smith & Wesson... I think that this does address some of the newer issues that will come up, and I think having a written policy really helps the advertisers to not bring stuff forward that may be a concern. That's just my 2 cents.

D. Nguyen: So, I kind of want to move "Yes" on policy, but I don't think I want to take this as is. In particular, I don't know that I have a problem with CBD ads if we've done them in the past, so I don't know how I feel about 17 as it's written. But I also don't know if I want to strike cannabis completely in its smoking form. Does anyone have any thoughts on that, or is everyone OK with just banning cannabis ads?

D. Dawson: I think community standards with respect to cannabis in Tompkins County are wildly divergent.

D. Nguyen: Yes. Yes they are.

L. Lewis: I'm more concerned with the health of inhaling smoke. In the City we've just revised the no smoking policy to include essentially banning products that would be inhaled into the lungs, whether that is tobacco, vaping, cannabis -- no smoking in public places.

D. Dawson: Eatables good, smoking bad...

S. Brock: So would you like it to say, "any inhalable tobacco product and any inhalable cannabis product"? Would you like me to modify it that way, by putting the word "inhalable" before the word "tobacco" and before the word "cannabis"?

L. Lewis: I would be more comfortable with that, and it is consistent with the policy that we've adopted in the city.

S. Brock: So chewing tobacco would be allowed then?

D. Nguyen: For me, I'd be fine with it. It's the second-hand effect that I'm concerned with, personally. I'd move for that change.

D. Dawson and L. Lewis concurrently: I'll second that.

D. Klein: Ok, so we have an amendment to add the word "inhalable" that has been moved and seconded. Ok, so we are now discussing the amendment that is to add the word "inhalable" or not. Does anybody want to speak to that? <no response> Ok, in that case, we're going to vote on the amendment, and if that passes, that means that we still haven't passed the policy, we're just adding the word "inhalable," then we will vote on the policy. Any questions about the process?

A vote was taken - the amendment passed with 5 yes votes; D. Klein and B. Brady voted no; D. Thompson abstained.

D. Klein: Now, the new motion is to vote on the policy that now includes the word "inhalable".

S. Brock: Bridgette, did you want to request that the word "gambling" to be added? It wasn't clear to me if the whole Board acquiesced on that or if you want to have a formal vote on that to amend the policy?

B. Brady: No, I'm fine as it is. If it becomes an issue, then we can add it.

S. Brock: Ok. And then, I had suggested that at the end of that, if you want, we can say, "except the names of establishments selling or providing such products are allowed" so that you can have a winery, you can have a place that...

D. Dawson: The vape shops on the Commons? I don't see much difference between not promoting or advertising the distribution of alcohol but allowing a winery to advertise, so now the question is, do you stick with your principles, or do you make an exception for the money?

S. Brock: It's up to you. It just depends. If you think there's a difference between showing beer or wine versus just having the name of an establishment that sells it, the name of a bar, it's just up to you. If you don't want that, that's fine. I just wanted to at least know that you've considered that, and it's absolutely fine if you don't want to do it.

L. Lewis: There are a number of breweries and wineries that also include restaurants. That include gift shops and cafes, and for that reason I would be fine with the name of establishments that provide such.

D. Dawson: Well, the solution to that is, there's obviously an exception for establishments that serve food without regard to whether or not they also serve alcohol. But, to make a blanket exception for any purveyor of any of these products, to me, is a distinction without a difference and ends up completely obviating the entire paragraph.

L. Lewis: I'd be fine without including it. That may be one of those discretionary areas.

D. Thompson: But if a vape shop sells an eatable, we're going to let them advertise?

S. Brock: It's only the inhalable products that you're not allowing now.

D. Dawson: Why do we have to be specific about it?

There was no response.

D. Klein: Ok, does anybody want to make a motion to amend the policy as we currently have it, to modify the section on alcohol or marijuana or whatever it is we're discussing at this moment? Does anyone want to make a motion to amend?

F. Proto: Can you put that section up, please?

S. Brock displayed the policy as it stands after the amendment to add "inhalable" was added.

F. Proto: So, going back to what Susan was talking about in item 17, the alcoholic beverage product, are we then saying we can't let a winery advertise as a winery without their promoting a particular brand? They can promote their business, or does this prohibit that as well?

S. Brock: I'm not sure I understood your question - advertising that promotes an alcoholic beverage product - we could reasonably conclude that the name of a winery or brewery or distillery - as an ad that does promote their product, so that would be prohibited.

F. Proto: That would be prohibited...

S. Brock: The way this is worded right now...

F. Proto: Even the new cider places that are popping up would be banned from advertising?

S. Brock: If there's any alcoholic content, yes. If it's a place that sells many things, so they're just advertising their name - Wegman's, Tops - no, that doesn't promote an alcoholic beverage product, but if Six Mile Creek *Winery* wants to advertise, I would assume that "advertising that promotes an alcoholic beverage product", would prevent them from advertising because that's their main product. They're promoting their wine by putting their name out there.

F. Proto: So, suppose the Six Mile Creek Winery advertises their gift shop, the way Laura was describing it before, but not their wine, would they be permitted to advertise?

S. Brock: If you used the wording I had suggested, yes, they would be allowed to.

B. Brady: So, are you looking for a motion to amend the amendments in 17?

D. Klein: If somebody so desires, yes.

B. Brady: You'd asked for a motion so I was curious as to what it was we're amending - it's been lost to me.

D. Klein: I believe what they are discussing is the addition or an exception that it's ok to say the name of the business, as long as it doesn't specifically say "Six Mile Creek *Wine*" or "King's *Cannabis* Company" it just says "Kings". I believe that's the discussion.

F. Proto: So, Six Mile Creek *Vineyard* would be OK?

B. Brady: To be honest with you, I think we're starting to split a bunch of hairs to the point where we're not going to get this vote if we don't do something within the time we have today.

S. Vanderpool: Can't we allow these places, Finger Lakes Winery for example, who wants to advertise just their name, wouldn't we allow it as long as they didn't promote a particular wine product or picture of their product?

F. Proto: Actually, that's where I was going before with my description of tobacco, Mayer's Smoke Shop not promoting any particular tobacco, and the CBD shop - if they just did their name, I asked that question before. Wouldn't they be permitted? And I agree with Scot's offer.



D. Klein: I guess the question is, does this policy make that clear? I don't believe it makes that clear; I believe Six Mile Creek is banned under the current policy as I read it. I think most other people are reading it that way. It promotes wine.

F. Proto: I don't think it makes it clear, that's why I'm asking.

S. Brock: The Board can vote on this policy now; if it passes, then this specific item can be the subject of further review with various options provided to the Board for its next regular meeting in September. Then the Board can decide if it wants to amend this particular item at that time, with various options with specific wording spelled out.

D. Klein: That's true. Thank you, Susan. We can vote now and any amendment can be made at any time going into the future. So, any amendments want to be proposed right now?

S. Brock: Just to make it very clear, under Section 7, effective date, I changed both August 27th dates to September 1st. Just so everybody is very clear about that.

D. Klein: Ok. Last chance for comments, questions, debates, future things to think about...Ok, let's have a vote.

By a vote of 7-1-0 (D. Klein voting no) Resolution 2021-14 - Accept the TCAT Advertising Policy - was approved as follows:

**RESOLUTION 2021 – 14  
ADOPT ADVERTISING POLICY**

WHEREAS, Tompkins Consolidated Area Transit, Inc. ("TCAT, Inc.") wishes to revise the standards and process by which proposed advertising on TCAT buses and facilities is accepted or rejected,

NOW, THEREFORE, be it RESOLVED that the TCAT, Inc. Board of Directors hereby approves and adopts the attached TCAT, Inc. Advertising Policy, with an effective date of September 1, 2021.

Adopted by the TCAT, Inc. Board of Directors on this 31<sup>st</sup> day of August 2021.

D. Klein: Any other business?

F. Proto: We have an opportunity to revisit some of this is what I heard you say.

D. Klein: We always have an opportunity to revisit any policy any time, that is always our prerogative.

F. Proto: Thank you.

D. Klein: You're welcome. Any last business for today?

S. Brock: Did you still want that closed session, or do you want to do that at the regular Board meeting?

D. Klein: Are you recommending a closed session to discuss it?

S. Brock: You had asked a question and I had said I could answer it in a closed session.

D. Klein: No, thank you. I'm done.

S. Brock: Anybody can call me at any time of course before the meeting too, with any questions you may have, and I'd be happy to talk to you about them.

The meeting was adjourned.

*Minutes respectfully submitted by Pamela Torelli, Recording Secretary, September 23, 2021.*