ADVANCED ODA TOPIC DISCUSSION

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DISCUSSION TOPICS

- Should FHWA update regulations on HBA and Junkyard Control?
- Definition of “Business” for un-zoned areas.
- Local Zoning changes on control routes and other issues. Do you receive notice/review? Does FHWA get involved?
- Non-Conforming signs issues. Acq./damages/changes!
- Scenic By-ways!
- Sign Inventory control issues!
- Official and Directional signs, what is allowed and what is not?
SHOULD FHWA UPDATE REGULATIONS ON HBA AND JUNKYARD CONTROL?


BACKGROUND

The regulations at 23 CFR Part 756, Highway Beautification, and Part 751, Junkyard Control and Acquisitions were issued in the mid-1980s to implement provisions in the Highway Beautification Act of 1965 (HBA) and its predecessor, the 1958 Rouke Act. These regulations are approximately 35 years old and do not reflect new technology or other concerns relating to advertising industry standards and the ongoing need to maintain sufficient visual quality of the highway system and tourist areas. Several aspects within the regulations are unclear and have been misinterpreted or misapplied. Therefore, it is recommended that the regulations be carefully reviewed and updated to meet current needs.

PROPOSAL

The purpose of this proposal is to publish an ANPRM to solicit comments from the public and other interested parties to clarify language and ensure clarity regarding how much to be included within the regulations. An FHWA staff team, made up of field and regulatory experts, will conduct extensive public outreach to ensure that the proposed regulation is clear and easy to understand. A comprehensive review of the existing regulations will be conducted to identify areas for improvement.

Although we recommend issuing an ANPRM as an alternative to issuing a Request for Confirmation (RFC), the FHWA staff team identified the following key review areas that need to be included in the proposal:

- Comprehensive Zoning: For a number of years there has been controversy over the wording in the regulation concerning comprehensive zoning. The wording in the regulations is unclear and confusing.
- Unorganized Commercial Areas: New language in the regulation is needed to clarify the definition of unorganized areas.
- New technology: Adding language to the regulations to address new technology such as digital and animation should be included.
- Should the Bonus Program be retired? The Rouke Act included the 1958 Highway Beautification Act bonus funding. Should we consider measures to ensure that the advertisements are consistent with the aesthetic and visual standards?

Comment:

Date: [Signature]

Concurrence is requested for FHWA to proceed to draft an ANPRM.

[Author's name]

[Title]

Concurrence:

[Author's name]

[Title]

Date: [Signature]
SHOULD FHWA UPDATE REGULATIONS ON HBA AND JUNKYARD CONTROL?

Recommendation: FHWA should draft and ANPRM to formally get comments on the need for regulatory update and reform.

Team identified key areas that need to be included in ANPRM:

2. Unzoned Commercial/Industrial Areas – Do we need language in this section that clarifies the definition of an unzoned area?
3. New Technology – adding language in the regulations to address new technology such as tri-vision and full motion video (NOW DIGITAL).
4. Should the Bonus Program be retired – 1958, seek waiver for payback...
5. Acquisition of Outdoor Advertising Signs – Mandatory removal. Changed to discretionary effort.
6. Nonconforming signs – need to provide direction for regulating maintenance of NC signs. States need flexibility to deal with NC signs when they are affected by transportation projects.
7. Advertising within the right-of-way – Add category to address, Living logos, signs on bus shelters.
8. On Premise/Stadium signs – explore control efforts, what type of Federal involvement?
9. Clean-up – removal of no longer needed or redundant language to simplify the regulations.
10. Revise junkyard control policy – clarify program.

Questions/Discussion?
What is your “Definition”?

1. An activity typically recognized by the traveling public as a commercial activity? (A lot of State/Federal Agreements are very weak on this.)

   You must be specific and have some concrete requirements:

   1. Does the activity meet Local Comprehensive Zoning descriptions of a “business”?
   2. The business must be equipped with all customary utilities and must be open to the public during hours typical of that type of business and staffed (8 hrs/day, 5 days/week).
   3. Business license, occupancy permits, sales tax and other records as required by law.
   4. Sufficient inventory of products for immediate sale or delivery. Service, must be available.
   5. The activity must be in active operation for a minimum time frame (6 months/1 year).

   7. Is the property being taxed as a “commercial” tract or another category?
DEFINITION OF “BUSINESS” FOR UNZONED AREAS

You should have a list of Non-Qualifying Activities for Commercial/Industrial Unzoned areas

1. Outdoor advertising activities.
2. Agriculture, forestry, ranching, grazing, farming, and related activities, including but not limited to, wayside fresh produce stands.
3. Transient or temporary activities.
4. Activities more than 600 ‘ from the nearest edge of ROW.
5. Activities conducted in a building principally used as a residence.
6. Railroad tracts and minor sidings.
7. Residential trailer parks, Apartments, any residential use properties.
8. Oil and mineral extraction activities.
9. Schools, churches or cemeteries.
11. Recreational facilities
12. Public park lands or playgrounds.
DEFINITION OF “BUSINESS FOR UNZONED AREAS

Discussion/Questions?
Local zoning changes/issues can take several forms:

Classic problems:
1. Strip zoning
2. Spot zoning

Other issues:
1. Inappropriate zoning
2. “Bogus” zoning
The legislative history of §131(d) clearly demonstrates that Congress thought that outdoor advertising was a valid enterprise but intended it to be permitted in valid commercial or industrial areas.

The zoning actions by the State, or the local governmental entities granted zoning authority by the State are to be accepted by the FHWA. Such acceptance is not absolute, however, and zoning actions that attempt to evade the intent of Congress will not be permitted. The Secretary of Transportation may and should look behind sham zoning to determine if the intent of Congress is being thwarted.

The authority of the Secretary to determine if a zoning action is done primarily to permit outdoor advertising was contested by the State of South Dakota in 1971. The authority to determine whether a State’s law on outdoor advertising meets the HBA=s requirements was a key issue in South Dakota v. Volpe, 353 F.Supp. 335 (D.S.D.1973).

The court upheld the Secretary’s authority to refuse to recognize what amounted to strip zoning done under state law. The decision by the Secretary was based upon the HBA itself and not the HBA zoning regulations later promulgated by the FHWA.

The decision confirmed, however, that the State’s authority to zone for outdoor advertising could be questioned by the Secretary. [cite later cases]
Mr. Harold E. Linnenkohl  
Commissioner  
Georgia Department of Transportation  
No. 2 Capitol Square, S.W.  
Atlanta, Georgia 30334-1002

Subject: Review of Peach County Amended Zoning

Dear Mr. Linnenkohl:

We conducted a field inspection of the above request and have determined that the amended zoning does not “effectively” zone the property for outdoor advertising permitting purposes. Therefore, under the State/Federal agreement the Department should refrain from permitting any outdoor advertising based upon this zoning action for the following reasons:

1. The property is a narrow strip-zoned tract (250’ x 2,600’) along the interstate and appears to be rezoned to C-2 without any consideration to the overall neighborhood land use character. The primary use of the surrounding property is rural agricultural.

2. The property has little or no legal public access that we can determine from the information provided. Legal access from the end of Chapman road and the rail crossing are questionable.

As we indicated in our letter of June 23, 2002, the Department is responsible for maintaining effective control and forwarding recommendations on zoning that are consistent with and fully support the intent of the State/Federal agreement.

Clearly the above request reflects “strip-zoning” and does not meet the test for “effective” comprehensive zoning and should not have been recommended to FHWA for approval. We are returning the current application along with previous material per your request.

If you have any questions, please contact Mr. Clyde Johnson at (404) 562-3854.

Sincerely,

Robert M. Callan, P.E.  
Division Administrator
What is the State and Federal role in local zoning issues?

In a 1975 Memorandum from the Acting General Counsel to the Deputy Secretary (concerning the 1976 amendments to the Act):

1. In areas that are zoned C/I … signs may be built in accordance with agreement reached between the Secretary and a state about the characteristics of signs.

2. In unzoned areas, advertising signs may be erected only if the Secretary and the state agree that the area is used for commercial or industrial purposes.

3. The Secretary’s authority to refuse to recognize “strip zoning” has been upheld.

4. Secretary of Commerce John Connor stated that the Secretary was given a role in the designation of unzoned areas “to make sure that “unzoned” commercial and industrial areal along our primary highways will be defined on the same basis as those which are actually zoned.”
§ 750.706 Sign control in zoned and unzoned commercial and industrial areas

Section 750.706(c)(2) would allow local zoning authorities to establish less restrictive regulations than those contained in the State-Federal agreement unless State law prohibits this. Several comments were received which took exception to the provision for less restrictive regulations. This provision was not revised because 23 U.S.C. 131(d) allows bona fide State, county, or local zoning authorities to make a determination of "customary use," which determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographic jurisdiction of such authority. Thus, "customary use" in a particular community may be less restrictive than the agreement criteria and would have to be accepted.

Section 750.706(c)(5) has been revised to make clear that where local controls have been certified within commercial and industrial zones, pursuant to 23 U.S.C. 131(d), the State remains responsible for the control of those areas within the local jurisdiction which are outside of the commercial and industrial zones. This was done pursuant to a comment that the previous language was too broad.
FHWA April 14, 2004 response where local Municipality created a “strip zone” under comprehensive zoning. FHWA would not accept as valid zoning. Also, provided a good discussion on “spot zoning”!

Key point, “This recognition of the State’s zoning authority is not unconditional”.
LOCAL ZONING CHANGES ON CONTROLLED ROUTES – REVIEW PROCESS WITH FHWA

1. Sign Permit application is received it’s checked to determine if the proposed location falls within city limits/or county boundaries etc.
2. If a zoning plan is involved, checked with DOT approved Zoning list.
3. Requires the following:
   1. Signed copy of the Zoning Ordinance.
   2. Copy of the Zoning Map.
   3. Signed copy of the minutes.
4. State reviews and make determination if zoning or zoning change is acceptable for outdoor advertising permitting purposes. Makes recommendation to FHWA.
5. The complete package is sent to FHWA (Division Office) for their review and concurrence.
6. If FHWA concurs then permit is issues, if not then no permit can be issued due to potential conflict with the HBA.

**Does and State request FHWA review and concurrence?**
Non-Conforming signs have no issues!! Next Topic

Issues:

1. Acquisition - We should allow NC signs to be moved back off required ROW, save administrative cost, time and money!

2. Damages – We have a “suggested” definition, does your state have a good definition? Key is taking out verbiage that is NOT specific!

3. Changes – What type of changes? Cut-outs, Digital ads (are they a part of the copy? Does sign have power? Windmills, solar panels etc…

FHWA has provided Guidance on Adjustment of NC signs, signs destroyed by natural disasters, Wind turbines and Solar Panels etc…[can be provided]!

Questions/Discussion?
SCENIC BY-WAYS!

• NO NEW PERMITS!

• HBA ONLY APPLIES TO SCENIC BY-WAYS ON CONTROLLED ROUTES.

• SEGMENTATION IS OK, BUT FHWA NEEDS TO BE IN LOOP, SEGMENTS MUST NOT HAVE THE QUALIFYING INTRENSIC QUALIFYING CRITERIA.

• CITY LIMITS, NEW C/I ZONING DOESN’T MATTER, SEE 1ST BULLET.

• EXISTING SIGNS ON SCENIC BY-WAY RETAINS THE SAME STATUS AS THEY HAD PRIOR TO THE DESIGNATION, I.E. CONFORMING and NC.

• DOES NOT APPLY TO NEW ON-PREMISE SIGNS.

• CAN ALLOW NEW SIGNS IF YOU DE-DESIGNATE SCENIC BY-WAY.

Question/Discussion?
SIGN INVENTORY CONTROL
ISSUES!

Purpose of regular sign inventory – Identify illegal signs!!

Do you have a current sign inventory that:

1. Identifies the sign’s location (GPS, GIS, LAT/Long, MESS?).
2. Identifies the “status” of the sign, i.e. conforming, NC etc..
3. What is the date of you last “complete” sign inventory?
4. Do you have sufficient staff to conduct an annual sign inventory?
5. How many present outsource their sign inventory program?
6. How many present charge permit fees that offset Administrative cost?

Questions/Discussion?
Directional signs – National Standards set forth in 23 CFR Subpart B – National Standards for Directional and Official Signs

§750.151 – Purpose

Directional and Official signs and notices shall include signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, shall conform to national standards size, lighting and spacing, and such other requirements as may be appropriate to implement.

§750.152 – Application – ...applies to directional and official signs and notices located within six hundred and sixty (660) feet of the right-of-way of the Interstate and Federal-aid primary system and to those located beyond six hundred and sixty (660) feet of the right-of-way on such systems, outside the urban areas, visible from the main travel way....
OFFICIAL AND DIRECTIONAL SIGNS!

§750.153 – Definition – Sign means an outdoor sign, light, display, device, figure, painting, drawing, message, placard, poster, billboard or other thing...

Main traveled way

Interstate System

Primary System

Erect

Maintain – allow to exist (this is the problem, very subjective wording)

Scenic area

Parkland
Directional signs (limited to 150 square feet in area) – only official signs and notices, public utility signs, service club and religious notices (not to exceed 8 square feet in area), public service signs (not to exceed 50 square feet in area) and directional signs.

§750.154 (a) General: signs are prohibited…
   (b) Size…
   (c) Lighting
   (d) Spacing (2,000 feet of an interchange, or intersection at grade along the Interstate or freeway …
   (e) Message content – limited to the identification of the attraction or activity and directional information…
   (f) Selection method and criteria

§750.155 – State standards – typical, can be more restrictive…
Official signs – must be erected and maintained by a recognized governmental entity. [See 23 U.S.C. 131 (c) (1) and 23 CFR 750.153(n)]

1. Sign must be erected and maintained by a public officer or agency.
2. Sign must be erected within the territorial/zoning jurisdiction.
3. The sign must be erected pursuant to direction or authorization contained in Federal, State or local law.
4. The sign must be erected for the purpose of carrying out an official duty or responsibility. The state must determine whether the activity relates to an official duty or responsibility.

Questions/Discussion?
13. Question: What points will the Secretary consider in reaching agreements with the States with regard to size, number and spacing of billboards in zoned or unzoned commercial and industrial areas?

Answer: The Secretary will be guided by what is consistent with customary use, insofar as possible. Certainly, as to lighting, those lighting arrangements which clearly pose a highway safety problem should be curtailed; and with regard to spacing, some regulation is necessary to prevent a conglomeration of signs in the vicinity of intersections or interchanges which might involve a traffic hazard. Concerning size, the standards, insofar as possible, would be consistent with standard sized billboards in customary use.
CUSTOMARY MAINTENANCE GUIDELINES

Purpose and Need

The purpose of regulatory oversight is to maintain effective control of outdoor advertising, not to eliminate or perpetuate nonconforming signs. Federal regulations require that “each state shall develop its own criteria to determine when customary maintenance ceases and a substantial change has occurred which would terminate nonconforming rights.” Project NCHRP 20-7 (247) “Outdoor Advertising Sign Regulation Study, May 5, 2009,” reports that not all states have complied with this requirement. The intent of this guidance is to assist states in formulating criteria, consistent with 23 CFR 750.707(d)(5), that are practical and unambiguous. States may be more restrictive than these criteria.

Customary Maintenance

Customary maintenance, which is allowed, includes:

1. Nailing, cleaning and painting, and replacement of nuts and bolts
2. Replacement of structural components, including vertical supports, with the same material, and consistent with the state’s definition of a destroyed sign
3. Changes in the advertising message
4. Upgrading existing lighting for energy efficiency or worker safety
5. Addition of catwalks or handrails when required to resolve safety concerns
Substantial Change

A nonconforming sign must remain substantially the same as it was on the date it became nonconforming. A substantial change, which would terminate nonconforming rights, includes:

1. Increasing the number of vertical supports or changing the vertical support materials, such as replacing wooden supports with metal, or replacing I-beams with a monopole
2. Increasing the height of the sign
3. **Changing the physical location**
4. Changing the configuration of the sign structure, such as changing a “V” sign to a stacked or back-to-back sign, or a single face sign to a back-to-back sign
5. Increasing the size or dimensions of the sign face, including the addition of a face
6. Adding bracing, guy wires or other reinforcing devices
7. Adding variable or changeable message capability
8. Adding lighting, either attached or unattached, to a sign that previously did not have lights
9. Removing or re-erecting the structure
FINAL QUESTIONS?

Thank you !