OUTDOOR ADVERTISING
CASE LAW UPDATE

Kristin White, Associate Legal Counsel, Minnesota DOT
OVERVIEW

1. Zoning
2. Ultra vires
3. Equitable estoppel
4. Digital billboards – upcoming D.C. Appeal
5. Round table topics
   - Billboards that look like traffic signs
   - Certified cities
   - Roving signs
   - Seed signs
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<tr>
<th><strong>23 CFR 750.708</strong></th>
<th><strong>23 USC 131(d)</strong></th>
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<tr>
<td>• Acceptance of state zoning&lt;br&gt;• “...States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes...”</td>
<td>• Customary use&lt;br&gt;• “When a bona fide state, county, or local authority has made a determination of customary use...will be accepted in lieu of controls by agreement”</td>
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REQUIREMENTS

Zoning must be under state statute or constitution

Must be part of comprehensive zoning
• Cannot be primarily to permit outdoor advertising structures
• Spot zoning

If area is not zoned?
Use definition of unzoned commercial or industrial area in Federal-State agreement

Cannot be incidental to other primary land use
SPOT ZONING

- South Dakota v. Volpe (1973)
- SD zones 99.97% I-90 ROW as commercial
- DOT Secretary proposed to withhold 10% funding

- Traditional exercises of zoning authority allowed
- Cannot zone solely to permit billboards
But what happens if the facts are more nuanced?

- Facial validity zoning?
- Does zoning have to be part of comprehensive plan?
- Do we look at zoning ordinance language or actual land use?
**SPOT ZONING – PUBLIC BENEFIT?**

  - “But what if we spot zoned for a good reason?”
  - Goals of highway beautification are:
    - Protect public investment
    - Safety and recreational value of public travel
    - Preserve natural beauty

- **In re Denial of Eller Media Company (2003)**
  - What if billboard helps local city budget deficit?
    - True zoning?
    - Legit commercial activity?
    - Scheme to allow billboards?
ZONING – ANNEXATION? VARIANCE?

- Files v. Arkansas DOT (1996)
  - Can land be annexed and then zoned C&I?
  - No. This was done primarily to permit billboards

  - Is a variance enough?
  - Isn’t agriculture a business and thus commercial?
  - No
ZONING – USE

  - Do we look at zoning ordinance language or actual land use?
  - Interpret broadly: inquiry not limited to zoning ordinance language. Look to actual use.

  - What about conditional use?
  - Conditional use not a variance; “merely a device to permit flexibility”
• Thomas v. Tennessee DOT (2013)
  • What about land with commercial potential but not zoned for specific land use?
  • Isolated areas of commercial potential do not warrant zoning for a specific land use
ZONING – PUBLIC EXEMPTION

  - Public agency exemption from local zoning?
  - “Difference b/t school fundraising and a commercial venture”
  - Can’t use public exemption to extend to commercial activity and then claim commercial activity is public

Site of proposed billboard in Bellevue, Kentucky
Van Wagner/Outfront v. Massachusetts DOT (2014) *pending appeal*

- What kind of discretion do agencies have in enacting ODA rules?
- No permit shall be granted for a sign which the Director, in its *discretion*, determines would not be in *harmony* with or suitable for the surrounding area or would do *significant damage* to the visual environment. In making this determination, the Director may consider,
- *among other factors*, the health, safety and general welfare of the public; the scenic beauty of the area;
- the *physical, environmental, cultural, historical or architectural characteristics* of the location and the area...
ULTRA VIRES

- Plaintiff claimed regulations gave DOT “unbridled discretion;” were ultra vires
- What on earth does that mean?

- Does a state have authority to regulate billboards everywhere, not just interstates?
EQUITABLE ESTOPPEL

- Admar Real Estate v. Wisconsin DOT (2012)
  - Once a permit has been issued, can DOT be estopped from revoking them?
- Equitable estoppel: reasonable reliance to one’s detriment
- Estoppel not available because it would interfere with exercise of police power
DIGITAL BILLBOARDS

Scenic America v. US DOT (2014) pending

Substantive vs. Interpretive Rules

Chevron Deference

Creates new law

Explains existing law

Defer to agency’s interpretation

Memorandum

Subject: INFORMATION: Guidance on Off-Premises Changeable Message Signs

Date: September 25, 2007

Original signed by:
Gloria M. Shephard
Associate Administrator for Planning, Environment, and Realty

Division Administration
Mkt: Division Realty Professionals

Purpose
The purpose of this memorandum is to provide guidance to Division offices concerning off-premises changeable message signs adjacent to routes subject to requirements for effectiveness.
ROUND TABLE TOPICS
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1. Billboards resembling traffic devices
2. Certified cities
3. Roving billboards
4. Seed signs
BILLBOARDS RESEMBLING TRAFFIC CONTROL DEVICES
The Texas Department of Transportation (TxDOT) is charged with the regulatory responsibility for the orderly and effective control of Outdoor Advertising Signs (OAS) along regulated highways within the State of Texas. These regulations allow a city to become "certified" to regulate signs within its city limits, in lieu of state control. Our records indicate that your city currently maintains the referenced certified status with the department.

In order to accomplish this local control, your municipality has certified to the department that the city has established and will enforce within your corporate limits, standards and criteria for size, lighting, and spacing of OAS consistent with the purposes of the Highway Beautification Act of 1965 (HBA), 23 United States Code §131, and with customary use. This requires an annual transmission of your complete existing inventory of OAS, reporting statistics regarding non-conforming signs, resolution of enforcement issues, etc.
ROVING BILLBOARDS
SEED SIGNS
THANK YOU

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