



U.S. Department
of Transportation

**Federal Highway
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

April 14, 2004

In Reply

Refer to: HCC-30

Mr. David L. Philips
Assistant Attorney General
State of Minnesota
445 Minnesota Street – Suite 1800
St. Paul, Minnesota 55101-2134

Dear Mr. Phillips:

Thank you for your letter of February 10. You asked if we would provide clarification over the meaning of one of the Federal Highway Administration's (FHWA) regulations. We have done so through the enclosed legal opinion.

Specifically, you asked us about the meaning of 23 CFR §750.708(b), particularly in light of actions by a Minnesota municipality taken to create a strip zone for outdoor advertising under its comprehensive zoning authority. We conclude that §750.708(b) clearly does not allow such zoning actions. We interpret the language of §750.708(b) as differentiating between legitimate commercial or industrial zones and limited purpose areas created primarily to allow outdoor advertising. Actions that are facially part of comprehensive zoning, but in fact are merely schemes to allow outdoor advertising in rural or residential areas, are not accepted by the FHWA as valid zoning for purposes of control of outdoor advertising.

If you have any further questions or want to discuss any points in this memorandum, please contact Robert J. Black on my staff at (202)366-1359.

Sincerely,

D.J. Gribbin
Chief Counsel

Legal Opinion on the FHWA's Interpretation of 23 CFR § 750.708(b), Acceptance of State Zoning for Purposes of the Highway Beautification Act

The State of Minnesota has requested a legal opinion on the interpretation of 23 CFR §750.708(b). More specifically, it has asked the Federal Highway Administration (FHWA) if this section of the Highway Beautification regulations establishes a two-part test regarding local zoning for outdoor advertising whereby comprehensively zoned areas are deemed in compliance with FHWA regulations even if such zoning constitutes "spot zoning" for billboards. The issue was raised in a recent case in the Minnesota Court of Appeals, In re Eller Media Company's Application for Outdoor Advertising Device Permits, 642 N.W.2d 492 (Minn. App. 2002).

The FHWA has never interpreted 23 CFR § 750.708(b) as creating such a two-part test. Rather, the FHWA interprets the language as differentiating between legitimate commercial or industrial zones and limited purpose areas created primarily to allow outdoor advertising. Actions that are facially part of comprehensive zoning, but in fact are merely schemes to allow outdoor advertising in rural or residential areas, are not accepted by the FHWA as valid zoning for purposes of control of outdoor advertising.

To explain the FHWA's interpretation, a quick review of the Highway Beautification Act (HBA) and the FHWA's role in enforcing it would be helpful. The part of the HBA that deals with zoning and the congressional intent behind that section is the key in understanding the FHWA's HBA regulations on zoning.

Zoning and the HBA: Congress's Intent

The Highway Beautification Act (HBA), codified at 23 U.S.C. §131, is a grant-in-aid condition that States must comply with in order to receive full Federal-aid highway funding. The FHWA is the agency charged with implementing the HBA. See 49 CFR §1.48(b)(21). The HBA requires States to "effectively control" outdoor advertising along certain Federal-aid highway systems. These highway systems are the Interstate system, the Federal-aid primary system (as it existed on June 1, 1991), and the National Highway System. Under §131(b), the failure to comply with the HBA can subject a State to the loss of ten percent of its Federal-aid highway funds.

The purposes of the HBA are set forth in 23 U.S.C. § 131(a): to protect the public investment in highways; to promote the safety and recreational value of public travel; and to preserve natural beauty. Outdoor advertising is not banned outright by the HBA. Congress specifically allowed outdoor advertising in valid zoned or unzoned commercial

or industrial areas. Section 131(d) acknowledges that “States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard, will be accepted for the purposes of this Act.”

This recognition of the States’ zoning authority is not unconditional. The sentence does not constitute a complete abnegation of the Secretary’s role in ensuring that in such areas the congressional purposes of the HBA will be followed. The Congress has expressed concern several times about the possibility of “sham or phony zoning” which is done primarily to allow outdoor advertising in questionable areas. This concern over the problem and the intent to deal with it was expressed in the Senate Report accompanying the first Senate bill that was the basis of the HBA of 1965:

“Some witnesses...speculated that the States, if left to themselves in this matter, would engage in ‘strip zoning’ and thus zone large stretches of highways as industrial solely for the purpose of outdoor advertising.

“The committee notes the qualifying clause quoted above ‘which shall be consistent with the purpose of this section.’ The purpose of this act is to preserve and develop the recreational and esthetic values of the interstate and primary highway systems, and it would be wholly inconsistent with this purpose for a State to engage in such strip zoning.”¹

Senate Report No. 709, September 14, 1965, p 6.

In the floor discussion of the final version of the HBA, the key Senate sponsor, Senator Jennings Randolph quoted approvingly from the above September 14, 1965, letter from the Secretary of Commerce to the chairman of the House Subcommittee on Roads, and clarified what he believed were the extent of the zoning powers of the State:

“When state or local governments act to zone areas for commercial or industrial purposes, in accordance with the state's traditional exercise of authority on zoning, these determinations will be accepted for purpose of billboard or junkyard control. This language, of course, does not mean that a state or local authority could place a label ‘zoned commercial or industrial’ on land adjacent to the Interstate and primary systems solely to permit billboards or junkyards and thereby frustrate the intent of Congress stated in section 131(a).”

89 Congressional Record 26820 (1965) (remarks of Senator Randolph); *Accord*, 1965 U.S. Code Cong. and Admin. News, pp. 3713-14 (letter of the Secretary of Commerce to John C. Kluczynski).

¹ The quoted section on zoning in S. 2084 read:

“(e) Notwithstanding any provision of this section, signs, displays, and devices may be erected and maintained within areas adjacent to the Interstate System and the primary system within six hundred and sixty feet of the nearest edge of the right-of-way which are zoned industrial or commercial under authority of State law, or which are not zoned under authority of State law, but are based for industrial or commercial activities, as determined in accordance with provisions established by the legislatures of the several States, *which shall be consistent with the purposes of this section....*” (emphasis added).

In later amendments to the HBA, Congress expressed continuing concern over sham zoning. In the legislative history of what resulted in the 1968 amendment to the HBA, we find Congressional approval for how the Secretary of Transportation proposed to administer the “customary use” provision of 23 U.S.C. § 131(d):

“With respect to unzoned areas, we will recognize local practices on customary use as mutually agreed to by State and Federal agencies. It will be our policy to assume the good faith of the several States in this regard.

“The only exception to the above would be a situation in which State or local authority might attempt to circumvent the law by zoning an area as ‘commercial’ for billboard purposes only. We think you will agree that this is a reasonable position, since we know that the Congress does not wish for the law to be deliberately evaded.”

(Letter of Secretary of Transportation, Alan S. Boyd, to Rep. John C. Kluczynski, Chairman of the Subcommittee on Roads, Public Works Committee, May 24, 1967, Conference Report No. 1799, 1968 U.S. Code Cong. and Admin. News, pp. 3713)

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:

“I find nothing within the legislative history which precludes the Secretary’s overall supervision and exercise of power where local authorities have failed to measure up to the objectives of the Act. The Secretary has the responsibility to police performance of the agreements, to promote the reasonable, orderly and effective display of outdoor advertising adjacent to our federally assisted highways.” 353 F.Supp. at 344.

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 that the State’s authority to zone for outdoor advertising could be questioned by the Secretary.

The FHWA's Application of the Intent of Congress

The present HBA regulations were promulgated nearly thirty years ago and include a section on acceptance of state zoning. This section, 23 CFR § 750.708, puts into regulation the intent of the Congress that commercial and industrial areas be validly zoned for purposes of erecting outdoor advertising. Subsection (a) essentially restates the statutory basis for the regulation found in §131(d). Subsection (c) says that local zoning efforts not in accordance with the State's grant of zoning authority will be treated as unzoned commercial and industrial areas. Subsection (d) states that limited commercial or industrial activities do not make a zone a valid area for billboards if the primary land use is not also commercial or industrial. Under 23 CFR § 750.708(b), zoning which is "created primarily to permit outdoor advertising structures" is not recognized by the FHWA as valid zoning. Subsection (b) reads:

"State and local zoning actions must be taken pursuant to the State's zoning enabling statute or constitutional authority and in accordance therewith. Action which is not a part of comprehensive zoning and is created primarily to permit outdoor advertising structures, is not recognized as zoning for outdoor advertising control purposes."

In promulgating §750.708, the FHWA does three things: First, it differentiates between legitimate, comprehensive zoning authorized by law and actions that are not true zoning. Second, it differentiates between legitimate commercial and industrial zones and limited purpose areas created primarily to allow outdoor advertising. Third, it identifies actions that are facially part of comprehensive zoning but in fact are merely schemes to allow outdoor advertising.

The intent of § 750.708 is the same as expressed by Congress in the legislative histories cited above. In the preamble to the final rule, the FHWA explained that "[s]ections 750.708(b) and (d) are essential to assure the recognition of only bona fide commercial and industrial zones, rather than rural or residential zoning classifications or attempts to circumvent the intent of Congress." 40 Fed. Reg. 42843 (September 16, 1975).

As the agency charged with the implementation of the Highway Beautification Act, the FHWA's interpretation of the act is accorded deference by the courts. It is well settled that great deference is paid to an agency's interpretation of its own regulations. Thomas Jefferson University v. Shalala, 512 U.S.504, (1994); City of Alexandria, Va. v. Federal Highway Admin., 756 F.2d 1014, 1021 (4th Cir. 1985). While the FHWA has not had occasion to formally render an interpretation of §750.708(b), I can find no legal memoranda or letters in FHWA files where the FHWA has ever interpreted § 750.708 to mean that sham zoning is permissible if is done through comprehensive zoning. During the promulgation of the HBA regulations, the FHWA explained what the aim of 750.708 was: "Sections 750.708(b) and (d) are essential to assure the recognition of only bona fide commercial and industrial zones, rather than rural or residential zoning classifications or attempts to circumvent the intent of Congress." 40 Fed. Reg. 42843 (Sept. 16, 1975).

Thus, a more reasonable interpretation of § 750.708(b) is that it directs the careful examination of a zoning action to make certain that it is a legitimate exercise of zoning powers in furtherance of community-wide planning goals, rather than an attempt to use zoning for the primary purpose of opening up areas for outdoor advertising uses. “[A] comprehensive zoning plan is a scheme or formula that reasonably relates the regulation and restriction of land uses, including the establishment of districts therefore, to the health, safety, and welfare of the public, and thus to the police power, and the exercise of the zoning power is limited thereby.” 101A C.J.S. *Zoning and Planning* § 39 (1979). Comprehensiveness in the zoning context requires a carefully thought-out plan that is broad in both its purposes and its geographic scope.

Zoning actions pursuant to a comprehensive plan, as envisioned by § 750.708(b), stand in stark contrast to “spot zoning” or “sham zoning.” The term “spot zoning” “commonly refers to the singling out of one lot or other small area for a zoning classification that is different from that accorded similar surrounding land, usually for the benefit of the owner and to the detriment of the community.” Mark S. Dennison, Annotation, *Determining Whether Zoning or Rezoning of Particular Parcel Constitutes Illegal Spot Zoning*, 73 ALR 5th 223, 257 (1999). See also *State v. City of Rochester*, 268 N.W. 2d 885, 889-90 (Minn. 1978): “[t]he term applies to zoning changes, typically limited to small plots of land, which establish a use classification inconsistent with surrounding uses and create an island of nonconforming use within a larger zoned district.” (Citations omitted). If a city or county takes a zoning action that creates spots or strips of land along busy highways zoned “commercial or industrial” when there is no nearby commercial or industrial activity, a suspicion is created that the zoning was done primarily to allow outdoor advertising.

The Minnesota Court of Appeals has concluded that the plain meaning of § 750.708(b) is that *any* action taken as part of comprehensive zoning, even strip zoning to allow outdoor advertising, is consistent with the regulations. See *In re Eller Media*, 642 N.W. 2d at 502. This view of the FHWA regulations is incorrect.

The FHWA has never interpreted 23 CFR 750.708(b) as establishing a two-part test. The section does not mean that if there is comprehensive zoning in an area, there can be no further inquiry about zoning that allows billboards in areas that have no commercial or industrial uses. Under this interpretation, a city could enact a comprehensive zoning plan that establishes in a residential area a long, narrow strip along a busy highway, label it an “outdoor advertising only” zone, and claim that it was complying with the HBA because it had “comprehensive zoning.” This would be jarringly inconsistent with the intent of Congress and the FHWA to permit billboards in appropriate zones.

Even if a city’s action does reflect zoning pursuant to a comprehensive plan, that does not conclusively settle the issue of phony or sham zoning. It creates a rebuttable presumption that the comprehensive plan and zoning decisions pursuant to that plan are valid for purposes of allowing outdoor advertising. A comprehensively zoned area can

still, however, contain pockets zoned “commercial or industrial” where the only expected commercial or industrial activity is outdoor advertising. The important decision of South Dakota v. Volpe , cited above, dealt with what was essentially comprehensive zoning on a State level. The state legislature zoned commercial corridors through the State that corresponded to the Interstate and Federal-aid primary systems, which allowed billboards in the midst of obviously agricultural areas. The trial court noted that “under the South Dakota law existing as of January 1, 1972, on Interstate 90, crossing the State east to west, there would be only two short segments from one border to the other in which billboards would not be permitted. Each of these excepted segments would have been approximately two miles long. The Secretary reasonably concluded that these provisions were obviously inconsistent with the Act's purpose.” South Dakota v. Volpe 353 F.Supp. at 340. The purpose behind this statewide zoning was to allow billboards along interstate highways even in areas that had no existing or foreseeable commercial or industrial use.

To determine whether a zoning action is an attempt to circumvent the HBA, the FHWA would look at various factors: the expressed reasons for the zoning change; the zoning for the surrounding area; the actual land uses nearby; the existence of plans for commercial or industrial development; the availability of utilities (such as water, electricity, and sewage) in the newly zoned area; and the existence of access roads, or dedicated access, to the newly zoned area. No one of the above factors alone is determinative. If a combination of them, however, shows that the zoning action is primarily to allow billboards in areas that have none of the attributes of a commercial or industrial area, the FHWA would not be compelled to accept the zoning action as valid under 23 U.S.C. § 131(d).