Memorandum

U.S. Department
of Transportation

Federal Highway Administration

Subject: **INFORMATION:** Destroyed Non-Conforming Signs

Date: July 20, 1999

From: Susan B. Lauffer
Director, Office of Real Estate Services

Reply to
Attn of: HEPR

To: Mr. James St. John
Division Administrator
Tallahassee, Florida

As your staff requested, we reviewed the letter to you from Secretary Barry dated June 9, 1999, and questions from Ms. Juanice Hagan of Florida Department of Transportation (FDOT) dated June 28, 1999, concerning Florida House Bill (HB1535). Section 24 of this bill provides that the owners of any nonconforming buildings, houses, business or other appurtenances to real property damaged or destroyed during the June and July 1998 wildfires may elect to repair or rebuild such nonconforming structures.

Secretary Barry's letter expressed concern whether the regulations at 23 CFR §750.707, or any other Federal law, prohibits reconstruction of signs that are totally consumed by fire. Several questions from FDOT have been presented concerning this issue in Florida. Having consulted with Headquarters Chief Council's office our position on this issue is expressed below by addressing the question presented in Secretary Barry's letter and questions from Ms. Hagan.

(1) Does 23 CFR §750.707 prohibit the reconstruction of nonconforming billboards that are destroyed under State law?

> Answer: Yes, the Highway Beautification Act (HBA), in its very first line, includes the congressional finding that the "erection and maintenance of outdoor advertising signs..*should be controlled" to protect the public investment in highways*, to promote safety and recreational value, and to preserve natural beauty (emphasis added). Consequently, the FHWA's regulations on outdoor advertising include portions on maintenance of nonconforming signs. At 23 CFR §750.707 (d) (6), there is a prohibition on the re-erection of destroyed, abandoned or discontinued signs. A State may permit nonconforming signs to be re-erected if they were destroyed due to vandalism or other criminal or tortious acts .

(2) Does the language contained in HB1535 Section 24, fit within the Federal understanding of what a State's right is to control outdoor advertising, or has the State "redefined" its interpretation of "destruction" for these specific 30 structures?

> Answer: It appears a redefinition is attempted here, however, Section 24 states "unless prohibited by Federal law or regulation." FHWA's interpretation of the exception in the regulation at 23 CFR §750.707(d)(6) is defined as criminal acts, not "Acts of God" such as wildfires.

Each State is required to develop criteria to define destruction, abandonment, and discontinuance. One of the possible criteria for destruction is damage to a sign in excess of a certain percentage of its replacement cost (23 CFR §750.707 (d)(6)(i)).

Once a State sets its criteria for destruction, FHWA has authority over the issue of the reasonableness of the criteria of destruction. The FHWA's authority to determine whether a State's law on outdoor advertising meets the HBA's requirements was discussed in South Dakota v. Volpe, 353 F. Supp. 535 (D.S.D. 1973). The court upheld the Secretary's authority to refuse to recognize strip zoning done under State law. In its decision, the court noted that "Congress never intended to subvert the Act's stated purpose to arbitrary actions taken by the individual State legislatures." South Dakota v. Volpe at 340.

(3) If Florida Legislature made a decision that destroyed nonconforming signs can be re-erected, would the FHWA take the position that Florida has violated its control of outdoor advertising?

> Answer: The intent of allowing nonconforming signs to remain in place, has been with the view that if such signs are not purchased, they would eventually be eliminated through natural causes. If a sign is "destroyed" it would cease to exist and therefore lose its nonconforming status and not be allowed to be re-erected. In the Florida situation at hand, if a wildfire obliterates a sign, that sign would certainly seem to be "destroyed." If it somehow is still deemed not "destroyed" under some definition, there is certainly something profoundly wrong with that definition. The FHWA would not be compelled to accept such a definition; indeed, it could not accept such a definition. Therefore, while the States must come up with criteria to define destruction, the FHWA cannot accept unreasonable criteria.

In 1998 Ohio had a similar issue concerning legislation involving weather related destruction of nonconforming signs. For your reference the letter dated September 17, 1998, from Ohio Division Administrator to Ohio Department of Transportation is attached.

HB1535, Section 24 is contrary to the HBA and the intent of regulations at 23 CFR §750.707. If this legislation is enacted and implemented it will prevent FDOT from maintaining effective control. This may subject the State to a sanction of up to 10 percent of its apportioned Federal

funds. We fully understand that FDOT has no control over any action by the Florida Legislature, however we suggest you encourage FDOT to work with the Florida Legislature to resolve this conflict.

Policy questions may be directed to me or Marsha Bayer at 202-366-5853 and legal questions may be directed to Bob Black at 202-366-1359

Attachment

cc. Mr. Steve Fennel, Realty Specialtist