HQ RESPONSE DRAFT

INFORMATION: Arizona Bill - On-property Advertising Signs

March 31, 2005

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Director, Office of Real Estate Services

HEPR-1

Robert E. Hollis
Arizona Division Administrator

The purpose of this memorandum is to provide feedback to your February 16, 2005 request to Robert Black of our Chief Counsel's office (HCC) on pending Arizona legislation affecting "on-premise" signs. The intent of that legislation appears to be to permit the display of individual business unit signs on any part of a large property that is jointly owned and marketed. HCC may have some additional points later, but we believe that the main issues discussed here are our mutual concerns and due to the pressure of time to respond to these legislative proposals, we are sending this preliminary evaluation and suggestions for legislative language accuracy improvements. We have been working closely with Mr. Black and Layne Patton of your Division to evaluate this proposed legislation. We are available to work with your Office on further developments, as this issue may have substantial national Outdoor Advertising Control implications.

BACKGROUND

The Highway Beautification Act (HBA) provides that on-property signs must advertise activities conducted on the property on which they are located. The term "property" is not specifically defined in the HBA and the Federal Highway Administration (FHWA) has considered that the terms "property" and "premises" under the HBA mean, at a minimum, land that is under the same ownership and has contiguity. Under 23 CFR 750.709(d), States are to establish criteria to determine which signs meet the on-premise or on-property exemptions. State and local controls may be more restrictive than the Federal law, but not less restrictive.

As FHWA understands Arizona House Bill 2462 of the First Regular Session of the 47th Legislature, the pending legislation proposes to define as a single "property" or "premises" for purposes of sign control laws any comprehensive development that has a common ownership plan, whereby all of the owners have the right to use all common areas such as parking. Such developments would include situations where there are multiple businesses and multiple ownerships. Under the proposal, any signs advertising the activities conducted within that comprehensive development would be on-premise signs and exempt from controls under the HBA. State and local laws or regulations might apply, but the Federal HBA interest would not exist.

The FHWA agrees, in concept, that it is possible for multiple commercial or industrial businesses or activities developed as a "unified commercial development" (hereinafter referred to as

"UCD") to be viewed as a single premises for HBA purposes under certain conditions. The UCD criteria would include:

1. There is a common development and ownership plan that includes common and/or limited common areas such as sidewalks, roadways, gardens, parking, storage, and service areas, to which all constituent businesses have irrevocable shared ownership and use rights, and for which they have irrevocable shared obligations.

2. The UCD operates through an underlying common association or other entity, actively managed and maintained, through which all owners have irrevocable rights and obligations with respect to the UCD and its common/limited common areas.

3. The contiguity requirement is met because no part of the development is separated from the other part(s) by a controlled route, as defined in 23 USC §131. All parts of the UCD are on the same side of a controlled route and are contiguous except for roadways or driveways that provide access to the development and are not themselves controlled routes.

4. The UCD and its constituent businesses hold themselves out to the public as a common development through their signage and other marketing efforts.

5. The "common areas" or "limited common areas" of the UCD have necessary and true value to the constituent businesses' regular operations. That is, common areas are not created purely for the purpose of establishing eligibility for on-premise signing or other non-operational purposes.

A development that involves merely reciprocal easements or use agreements among individual properties would not meet the UCD test. The significant difference we are recognizing with UCDs is that, based on the characteristics discussed above, a UCD satisfies the primary intent underlying the concept of on-premise signs. Similarly, if the owners in a UCD were to subdivide the UCD into individual lots that do not meet the above criteria, that action would destroy the basis for defining activities as a single "premises" for sign control purposes.

The FHWA believes there are some areas of the proposed legislation, as passed by the House, that appear to be inconsistent with the Federal requirements described above. Suggested revisions to the legislation's proposed definitions of "comprehensive development" and "scheme of common ownership" that the FHWA believes would help eliminate the potential conflicts appear below. These suggestions are provided with the caveat that action by the Arizona Legislature in adopting revised language will not remove the need for the State to interpret and apply the law in a manner that is consistent with the HBA.

1. Section 28-7901, Subsection 2(a): Remove the word "primarily" and add *"approved as a common plan of development and operation by an authorized zoning authority."* The sentence

would read "*The activity is comprised of individual commercial or industrial activities approved as a common plan of development and operation by an authorized zoning authority.*"

The suggested revision would clarify the unified nature of the common development. This change also would resolve an implication in the pending legislation that a UCD could include residential uses. If there were, for example, apartment complexes within a large retail area, such residential areas could not be deemed as part of the commercial or industrial development.

2. Section 28-7901, Subsection 2(b): Replace the word "highway" with the term "*controlled route*" and add a definition for a "controlled route." The revised sentence would read *"only on one side of a controlled route."* The new definition would read as follows:

> "*Controlled route*" means any freeway, highway, roadway or street located in this state that has been officially designated by the board and approved by the United States Secretary of Transportation, under Title 23 of the United States Code, as a part of the Federal Interstate System, the Primary System as of June 1, 1991, or the National Highway System, as described in the Federal Highway Beautification Act, 23 USC §131, as amended.

The FHWA suggests this revision because of apparent conflicts among terms and definitions appearing in the pending legislation and existing Arizona law. In the pending bill, the definition of "comprehensive development" in 2(b) says that such development is located "only on one side of the highway." However, in 2(c), the bill provides that the development can contain "roadways or driveways, whether public or private, that provide access to the development." In Arizona Revised Statutes Section 28-101(52), a highway and a street have the same meaning. This situation could result in confusions and inconsistent application of the legislation, if adopted.

3. Section 28-7901, Subsection 2(f): Change the word "scheme" to the phrase "*an approved plan.*" The revised sentence would read: "*The activity has an approved plan of common ownership that actively provides for the management and maintenance of common areas within the development.*"

This revision would help reinforce the required relationship between individual owners and the development as a whole.

4. Section 28-7901, Subsection 2(g): Add *"necessary"* to the subsection (iii) term "storage and service areas." This portion would read: *"necessary storage and services areas."* Also remove subsection (iv), "streets." Also add at the end of the phrase "...or to be used or occupied for the activity...." the phrase "*that has been approved by the authorized zoning authority.*" The revised sentence would read *"The premises includes all land used or to be used or occupied for the activity that has been approved by the authorized zoning authority."*

The FHWA suggests these modifications to clarify that the development components must be integrated parts of the constituent businesses' operations, and that the entire UCD must be

approved as a UCD by the local zoning authority. Uses of land that serve no reasonable or integrated purpose related to the primary business operations, especially those that may be merely an attempt to qualify the land for signing purposes, are not part of a legitimate UCD. With respect to the deletion of "streets," a sign would not be placed in a street within a development for safety reasons.

5. Section 28-7901, Subsection 10: Replace the word "Scheme of common ownership" with *"Approved plan of common ownership"* and revise the definition to read:

> "*Approved plan of common ownership*" means a comprehensive or master plan that establishes a cohesive commercial or industrial development involving land ownerships that are a part of a larger commercial planned development, and has an underlying common association or other entity responsible for common elements, and all the owners have recorded irrevocable rights and obligations with respect to all common areas, and such development has been approved by the authorized zoning authority.

Thank you for the opportunity to provide comments. If the suggested modifications are implemented, the FHWA feels the language of the proposed legislation would not conflict with the HBA. As indicated above, it will be important for the application of any such law to meet the intent of the HBA as well. The Office of Real Estate Services suggests that Arizona Division continue to review the law and assist in developing implementing regulations with their State counterparts if the legislation is enacted. We are available to assist in the review process.

Questions on this guidance may be directed to Janis Gramatins at (202) 366-2030 (e-mail Janis.Gramatins@fhwa.dot.gov), or Janet Myers at (202)-366-2019 (e-mail Janet.Myers@fhwa.dot.gov).

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