



U.S. Department
of Transportation

**Federal Highway
Administration**

Memorandum

Subject: INFORMATION: Guidance on Adjustment of
of Non-conforming Outdoor Advertising Signs

Date: MAR - 8 2005

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HEPR-1

Reply to
Attn. of:

To: Directors of Field Services
Division Administrators
ATTN: Division Realty Professionals

The purpose of this memorandum is to provide guidance on the question whether non-conforming signs may be adjusted where action by the State transportation agency obstructs visibility of the sign from the highway. Consistent with previous guidance on this question, the provisions of the Highway Beautification Act (HBA) and its implementing regulations do not permit such adjustments to non-conforming outdoor advertising signs.

BACKGROUND

With the broader use of noise walls around the country, the conflict between the HBA prohibition against substantial improvement of non-conforming signs and sign owners' demands to maintain sign visibility is arising with increasing frequency. Sign owners typically argue that their investment in the signs, and the economic benefits that flow from the signs, are unfairly lost if a State does anything to inhibit the effectiveness of the signs. Some States see this as a problem of growing significance, with implications for projects involving noise walls, grade changes, and road widening. At least one State perceives a risk that litigation may result in financial liability and in the establishment of a legal "right-to-be viewed" for outdoor advertising signs. That State proposed that the FHWA consider classifying non-conforming sign height adjustments in noise wall cases as an allowable "customary maintenance" activity.

The States where this issue recently arose indicated that sign owners affected by this situation are citing State laws and practices in other States, including an incident in one State where sign height adjustments occurred and the FHWA did not initiate an enforcement action. However, in that unique case, the signs in question became non-conforming as a result of a project location decision. The FHWA concluded that if there had been better coordination between the State and the sign owners about the impacts of the project design, the signs legally could have been raised before they became non-conforming. The FHWA determined that "turning back the clock" to permit adjustment of those signs was an equitable outcome in that case. That special situation raised different issues than the question of permitting adjustments to already non-conforming signs.



ANALYSIS AND GUIDANCE

The purpose of the HBA is to control the erection and maintenance of outdoor advertising signs in areas adjacent to the Interstate System and primary system “in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.” 23 USC Section 131(a). Under the HBA, the use of highway rights-of-way for sign viewsheds is anticipated. However, it is not an unqualified use, and preservation of the sign viewshed within the highway right-of-way cannot be permitted to trump the needs of the highway. The HBA reaches out to regulate adjacent property for the good of the highway facility and its users, not vice versa. It is clear that the creation of a highway corridor is not intended to create any rights in adjacent property owners that are fundamentally at odds with the safe and efficient operation and maintenance of the highway facility.

Current FHWA regulations permit a non-conforming sign to remain “at its particular location for the duration of its normal life subject to customary maintenance.” 23 CFR 750.707(c). The intent of the HBA is to permit a non-conforming sign to continue in place until it is destroyed, abandoned, or discontinued, or is removed by the State (which can use 75 percent Federal funding for the removal of the sign). A non-conforming sign must “remain substantially the same as it was on the effective date of the State law or regulations” adopted to implement the HBA. 23 CFR Section 750.707(d)(5). A height increase is an expansion and improvement of a sign. In addition, increasing sign height to clear a noise wall typically will require new structural measures, such as use of a monopole design, that would be inconsistent with the concept of limiting non-conforming signs to the duration of their normal lives.

State definitions of “customary maintenance” must not exceed the limits allowed by the Federal statutes and regulations. Height adjustments could come within the term “customary maintenance” if the State could demonstrate that its long-established and regular practices previously included allowing alterations to non-conforming sign height to accommodate changes in surrounding conditions. The FHWA believes such a result is unlikely, especially in view of the language in 23 CFR 750.707(d)(5).

The FHWA acknowledges the States’ concern about the possibility that a court may determine that refusal to permit a change in the height of a non-conforming sign is a taking. If such event occurs, then that State will face a decision whether to pay to acquire such signs as a part of its projects. In such instances, the potential acquisition cost for those signs becomes an element in project decision-making just like other aspects such as noise protection and project alignment.

If a State fails to comply with the non-conforming sign provisions of the HBA, it will become necessary to evaluate whether the State is maintaining effective control. The Office of Real Estate Services suggests that the FHWA Divisions review this situation with their State counterparts to determine the status of this issue within the State and whether any corrective action is required.

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).