

Reconstruction of Nonconforming Billboards

Message Points

- Nonconforming billboards are common, legal, and deserve the rights and benefits of lawful status
- Routine maintenance and repair are basic land use principles for and nonconforming uses
- Federal regulations mandate that each state establish customary maintenance criteria for nonconforming billboards and define destruction, abandonment, and discontinuance
- Federal policy dealing with nonconforming uses, promulgated in 1972, is out of date and does not reflect contemporary industry practices or technology advances

Background

The Highway Beautification Act (HBA) of 1965 and subsequent regulations mandate that each state develop criteria to determine when customary maintenance on a nonconforming billboard ceases and where a substantial change begins that would terminate the billboard's nonconforming use. Furthermore, the federal regulations mandate that each state develop criteria to define destruction, abandonment, and discontinuance.

Industry Position

With over 35 year old regulations governing nonconforming billboard criteria, there is a clear need to reassess antiquated guidelines. It makes good business sense and is a "win-win" proposition for regulators, advertisers, outdoor companies, and the public to allow the renovation or reconstruction of legal nonconforming billboards. OSHA safety considerations, economic conditions and technology innovations support this policy.

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Nonconforming billboards are legal and deserve the benefits of this lawful status

Nonconforming billboards are legally erected billboards which no longer conform to land-use rules due to conditions beyond the owner's control. In the broader context of real estate and zoning regulation, nonconforming uses are common. For instance, if a community bans gas stations in predominately residential areas, the existing facilities are permitted to remain in place. The new land-use rules and regulations affect the future, and accommodate existing uses that no longer conform. Accordingly, nonconforming should not mean "not conforming to law," but rather not conforming to requirements for the establishment of a new use.

Routine maintenance and repair are basic land use and nonconforming rights

Billboards are subject to many land use regulations at all levels of government. Lawfully erected billboards are property and as such may not be taken without due process of law and the payment of just compensation. One of the principal tenants of the Fifth Amendment's Takings Clause is that private property shall not be taken for public use without just compensation. Furthermore, amortization is not just compensation. The only benefit provided by amortization is that it postpones the taking. It does not eliminate the need for just compensation. Accordingly, the policy of allowing nonconforming uses to continue originated in concerns that the retroactive application of zoning regulations which prohibit maintenance and repair of preexisting uses might be construed as confiscatory and unconstitutional. Accordingly, nonconforming uses are permitted to continue until they are significantly damaged, destroyed or abandoned per state zoning statutes.

The federal regulations mandate that each state establishes customary maintenance criteria for nonconforming billboards and define destruction, abandonment and discontinuance

Customary Maintenance

23 Code of Federal Regulations (CFR) 750.707 states that "[e]ach state shall develop its own criteria to determine when customary maintenance ceases and a **substantial change** has occurred which would terminate nonconforming rights." Based on these broad guidelines, this criteria varies state to state, as it was the Congressional intent that each state's regulations concerning nonconforming billboards would treat billboards similar to other nonconforming uses. Nevertheless, there are some common components contained in the state regulations with regard to what is considered a "substantial change." For instance, most states prohibit extension, enlargement or material changes (i.e., wood to steel) of a nonconforming billboard. Furthermore, most states allow customary maintenance of a billboard as long as the maintenance does not exceed a percentage of the replacement cost of the billboard within a specified period of time. The percentages, replacement cost calculation and time periods vary widely. The chart attached below summarizes these variations by state.

Destruction, abandonment and discontinuance

The regulations flowing from the HBA also requires states to develop criteria to define destruction, abandonment and discontinuance. Nonconforming billboards may continue as long as they are not destroyed, abandoned, or discontinued. The regulations recognize an exception for billboards that are destroyed due to vandalism and other tortuous or criminal acts.

However, FHWA has taken the position that these regulations prohibit the reconstruction of billboards that are destroyed by acts of God. OAAA believes that since FHWA defers to the states to develop their own criteria regarding destroyed billboards and it is silent regarding an exception for acts of God such reconstructions should be permitted. Seven (7) states have longstanding laws or regulations that allow rebuilding of legal nonconforming signs damaged by storms, natural disasters or acts of God. The chart below summarizes the state regulations which allow rebuilding of nonconforming billboards destroyed by acts of God.

On September 9, 2009, FHWA issued a guidance memorandum regarding the state's destroyed sign criteria. In this memorandum, FHWA determined that the following language was one acceptable way to define destroyed signs.

Destroyed” means that (a specified percentage*) or more of the upright supports of a sign structure are physically damaged such that normal repair practices would call for: in the case of wooden sign structures, replacement of the broken supports of, in the case of metal sign structures, replacement of at least (a specified percentage**) of the length above ground of each broken, bent, or twisted support.

*A range of 40 to 60% would be considered effective control.

**A range of 20 to 30% would be considered effective control.

Like customary maintenance, the state regulations governing destruction, abandonment and discontinuance vary widely. The chart below summarizes the differing approaches. Most states allow reconstruction as long as the cost does not exceed a percentage of the replacement cost of the billboard. Additionally, the state regulations usually designate a period of time for which obsolete or blank advertising copy is displayed as a factor for evaluating whether a billboard is abandoned or discontinued.

Federal policy dealing with nonconforming uses, promulgated in 1972, is out of date and does not reflect contemporary industry practices or technology advances

Reconstruction of nonconforming billboards can enhance safety, allow introduction of new technology, and improve aesthetics. The HBA regulations simply state that the billboards must remain “substantially the same” as it was on the effective date of the state regulation. Accordingly, billboard owners should be permitted to add catwalks, ladders and worker tie-offs to provide a safer working environment for employees. FHWA has agreed to this position in an informal memorandum dated November 14, 2000.

Additionally, lighting technology has evolved and the lighting fixtures have become more efficient; thus the lighting fixtures on nonconforming billboards should be modernized to implement energy saving initiatives.

Resources

The Nonconforming Sign Maintenance and Destruction Criteria chart.

The chart below summarizes the state regulations allowing billboards damaged by acts of God to be replaced.

Model language for maintenance standards and for allowing rebuilding of damaged billboards.

FHWA Destroyed Sign Guidance memorandum, September 9, 2009.

FHWA informal guidance regarding the addition of catwalks to nonconforming signs, November 14, 2000.

States Allowing Storm Damage/Acts of God Provisions

State	Regulation Language	Effective Date of Regulation
Ohio	Allows rebuilding of destroyed nonconforming billboards due to acts of God or weather related causes.	March 2, 1998
Arizona	Allows re-erection of nonconforming billboards due to acts of God, such as wind, rain, and flooding.	January 3, 1977
Wyoming	Allows replacement of a nonconforming sign due to fire, wind or other acts of God	March 5, 1971- Removed in 2010
Utah	Allows rebuilding of a nonconforming billboard damaged by casualty or an Act of God.	April 2006
Delaware	Allows rebuilding of nonconforming billboards destroyed by acts of God, provided the rebuilding is substantially the same as in existence on June 30, 1970.	During 1970's as part of routine rules for DELDOT
Michigan	A policy statement that allows a nonconforming billboard that has been damaged or destroyed or is voluntarily abandoned to be re-erected within 60-day period.	June 18, 1974
California	Allows a nonconforming billboard which is destroyed to repair, replace, rebuild or re-erect in kind the damaged display within 60 days.	June 25, 1976 with subsequent amendments in 1999 and 2004.
Minnesota	Allows any nonconforming use to be continued through repair, replacement, restoration or improvement unless discontinued for one year or destroyed by fire greater than 50% of market value.	August, 2004

Model language for maintenance standards and for allowing rebuilding of damaged billboards.

Florida

14-10.007 Maintenance of Nonconforming Signs.

(1) A nonconforming sign must remain substantially the same as it was as of the date it became nonconforming.

(2) Reasonable repair and maintenance of nonconforming signs, including change of advertising message, is permitted and is not a change which would terminate the nonconforming status. Reasonable repair and maintenance means the work necessary to keep the sign structure in a state of good repair, including the replacement in kind of materials in the sign structure. Where the replacement of materials is involved, such replacement may not exceed 50% of the structural materials in the sign within any 24 month period. "Structural materials" are all those materials incorporated into the sign as load-bearing parts, including vertical supports, horizontal stringers, braces, bracing wires, brackets, and catwalks.

Structural materials do not include the sign face, any skirt, any electrical service, or electric lighting, except in cases where such items have been incorporated into the sign as load-bearing parts. The following are examples of modifications which do not constitute reasonable repair or maintenance, and which constitute substantial changes to a nonconforming sign that will result in the loss of nonconforming status:

(a) Modification that changes the structure of, or the type of structure of, the sign, such as conversion of a back-to-back sign to a V-type, or conversion of a wooden sign structure to a metal structure;

1. The Department will authorize structural alterations to a nonconforming sign in instances where the Occupational Safety and Health Administration (OSHA) requirements or other safety related requirements necessitate alterations, provided that the reconstruction shall not be authorized primarily for the purpose of replacement of deteriorated materials. The Department will accept a notice or other writing from OSHA or other regulatory body to the permittee requiring the intended alteration as documentation of safety requirements. If the structural alterations are intended to be made to comply with OSHA regulations, the permittee must submit to the Department a statement in writing citing the OSHA regulation with which it is intending to comply and explaining how the intended alteration is required by the cited OSHA regulation. If the structural alterations are required to be made to comply with building codes applicable to existing structures, the permittee must submit to the Department a statement in writing citing the specific requirement of the building code which the alterations are intended to meet. Structural alterations are allowed only if no alternatives are available which address safety requirements. Documentation of the requirements must be submitted to, and approved by, the Department prior to making any structural alterations. The location, structural configuration, number of faces, size of the sign faces, sign structure height, and the materials used in the sign structure and sign faces must be the same type as those used in the sign prior to approval of the alterations. Structural configuration means the physical arrangement of a sign whether arranged as a single-faced, V-type, back-

- to-back, side-to-side, or stacked sign. During the period of temporary removal for those approved structural alterations, the permittee must permanently display the permit tag at the sign location.
2. The addition of a catwalk or other fall protection device for safety reasons, where the device does not increase the structural integrity of the sign or prolong the life of the sign, is allowed without obtaining prior approval from the Department;
- (b) Modification that changes the area of the sign facing or the HAGL of the sign, however:
1. Reduction in the area of the sign facing or the HAGL of the sign, which reduction is required by an ordinance adopted by a local governmental entity with jurisdiction over the sign, is not a change which would terminate the nonconforming status of the sign, provided like materials are used and no enhancements are made to the visibility of the sign.
 2. Embellishments may be added to nonconforming signs subject to the limitations regarding size of sign facing, and provided they do not exceed 10% of the area of the sign facing prior to the addition of the embellishment;
- (c) Modification that enhances the visibility of the sign's message, or the period of time that the sign's message is visible;
- (d) Modification that adds automatic changeable faces; or
- (e) Modification that adds artificial lighting, or changes the existing lighting such that the illumination to the sign facing is substantially increased.
- (3) Prohibited modifications need not be physically part of the sign if they have the effect of enhancing the sign's message, the visibility of the message, or the period of time that the message is visible. However, in such cases, the modifications will not be considered a modification to the sign if:
- (a) The modification is the result of removal, cutting, or trimming of vegetation in front of the sign pursuant to a permit for such removal, cutting, or trimming from the Department; or
 - (b) The modification only incidentally affects the visibility of the sign's message, and the bona fide purpose of the modification is unrelated to the sign.
- (4) A nonconforming sign may not be disassembled and re-erected at the same location except as provided in paragraph (6)(a), below.
- (5) A nonconforming sign may not be relocated, except to a conforming location.
- (6) A nonconforming sign may continue to exist so long as it is not destroyed, abandoned, or discontinued. "Destroyed," "abandoned," and "discontinued" have the following meanings:
- (a) "Destroyed" means more than 60% of the upright supports of a sign structure are physically damaged such that normal repair practices of the industry would call for, in the case of wooden sign structures, replacement of the broken supports and, in the case of a metal sign structure, replacement of at least 25% of the length above ground of each broken, bent, or twisted support. A sign will not be considered "destroyed" within the meaning of this section where the destruction is caused by vandalism or other criminal or tortious act.
 - (b) A nonconforming sign is "abandoned" or "discontinued" when a sign structure no longer exists at the permitted location or the sign owner fails to operate and maintain the sign for a period of 12 months or longer. Signs displaying bona fide public interest messages are not "abandoned" or "discontinued" within the meaning of this

section. The following conditions shall be considered failure to operate and maintain the sign:

1. Signs displaying only an “available for lease” or similar message,
2. Signs displaying advertising for a product or service which is no longer available,
3. Signs which are blank or do not identify a particular product, service, or facility.

Virginia

§ 33.1-370.2 Maintenance and repair of nonconforming billboard signs.

Notwithstanding any other provision of law, maintenance of and repairs to nonconforming billboard signs shall be governed by this section and any applicable regulations promulgated by the Commonwealth Transportation Commissioner, known as the "Control and Continuance of Nonconforming Signs, Advertisements and Advertising Structure."

Nonconforming billboard signs shall be maintained in a good state of repair and shall be subject to removal for failure to do so, in accordance with § 33.1-375. In order to make repairs to a nonconforming billboard sign, the owner shall make a written request to the Commissioner and submit the documentation required by 24 VAC 30-120-170. The Commissioner shall review the written request and if the Commissioner determines that the cost of requested repairs does not exceed a dollar amount greater than 50 percent of the current replacement cost of the entire billboard sign or structure, the Commissioner shall provide the owner of the billboard sign with a letter approving the billboard sign repairs. However, in no case shall a nonconforming billboard sign be replaced or rebuilt if the cost of the replacement or rebuilding exceeds 50 percent of the current replacement cost. The owner of the billboard sign shall apply for a building permit from the locality in which the billboard sign is located and provide a copy of the approval letter from the Commissioner as part of the application for the building permit. The Commissioner's determination as to whether the owner of the billboard sign has complied with this section shall be binding upon the locality, unless the building official, for good cause shown, submits to the Commissioner documentation objecting to the Commissioner's determination, within 30 days of the building permit application, with a copy of such documentation being provided to the billboard sign owner. The Commissioner shall consider any documentation submitted by the building official and shall reissue a determination in accordance with this section, which determination shall be binding upon the locality.