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Dear Mr. Huyler:

Thank you for the opportunity to send written comments on the final draft report produced as a result of the November 17 and November 18, 2009 meeting held in Denver and attended by nine people representing the DOT and FHWA and conducted by the Osprey Group and the U.S. Institute for Environmental Conflict Resolution.

Workshop Participants included three representatives from the Federal Highway Administration, and six representatives from selected state DOT's (Texas, Oregon, Florida, Utah, Missouri, and Nebraska). This nine member group produced a suggested definition of customary maintenance.

We are in agreement with the proposed criteria numbered 1, 3, and 4 (upon clarification) for the phrase "Customary Maintenance." We are in agreement with the proposed criteria numbered 1 (with clarification), 2, 3, 4, 5, 6, 7, 8, and 9 for the phrase "Substantial Change." The need for clarification for the two above-referenced criteria is explained below.

We are not in agreement with the proposed criteria numbered 2 and 5 for the phrase "Customary Maintenance." The reason for our disagreement is based upon the HBA regulations as originally adopted in 1975. Our recommended deletion of those proposed criteria combined with the suggested clarifications will assist in the formulation of a final product that will truly be practical and unambiguous.

DISCUSSION

While the intent is to provide a foundation for better federal guidance to the states as they perform their regulatory oversight role, this draft report actually attempts to re-write Federal law in several respects. The paragraph in question is:

23 CFR 750.707(d)(5)

(d) Maintenance and continuance. In order to maintain and continue a nonconforming sign , the following conditions apply:

* * *

*(5) The sign must remain substantially the same as it was on the effective date of the State law or regulations. Reasonable repair and maintenance of the sign, including a change of advertising message, is not a change which would terminate nonconforming rights. Each State shall develop its own criteria to determine when **customary maintenance** ceases and a substantial change has occurred which would terminate nonconforming rights.*

The key is the first sentence which establishes the standard for non conforming billboards to be maintained. The focus of the billboard industry and this new panel has been on the second sentence, which provides a limited exception to the standard. The third sentence requires each State to establish the detailed criteria for the enforcement of the standard with the limited exception.

There is further clarification of the intent of the standard in this paragraph in the immediately preceding paragraph, 23 CFR 750.707(c), which provides:

*(c) Grandfather clause. At the option of the State, the agreement may contain a grandfather clause under which criteria relative to size, lighting, and spacing of signs in zoned and unzoned commercial and industrial areas within 660 feet of the nearest edge of the right-of-way apply only to new signs to be erected after the date specified in the agreement. Any sign lawfully in existence in a commercial or industrial area on such date may remain even though it may not comply with the size, lighting, or spacing criteria. **This clause only allows an individual sign at its particular location for the duration of its normal life** subject to **customary maintenance**. Pre-existing signs covered by a grandfather clause, which do not comply with the agreement criteria, have the status of nonconforming signs.*

This paragraph clearly sets forth the premise that a nonconforming sign can only exist at its original location for a limited period of time – its normal. **It cannot be moved and it cannot have its life extended beyond what is normal.** The phrase “customary maintenance” appears in both paragraphs, and it makes no sense to give this phrase an interpretation that would extend “customary maintenance” to the replacement of vertical supports and the erection of a new sign to replace the preexisting nonconforming sign.

Other requirements regarding the use and condition of “the [nonconforming] sign”:

23 CFR 750.707 (d) (6) *The sign may continue as long as it is not destroyed, abandoned, or discontinued. If permitted by State law and reerected in kind, exception may be made for signs destroyed due to vandalism and other criminal or tortuous acts.*

Several years ago, there was an erroneous suggestion that an existing nonconforming sign could be entirely replaced one board at a time with the result of having a new, or substantially new, sign erected in place of a former nonconforming sign. This unfortunate suggestion ignored the fact that the federal regulations limit maintenance to “customary” maintenance. The regulations never provided for the wholesale replacement of structural supports so as to erect a new sign, or substantially new sign, over time in a nonconforming area. The law of nonconforming uses was clearly contemplated when the regulations were adopted in 1975. Under traditional principles of land use law, it is understood that nonconforming uses are terminated by natural attrition in the normal course of events; therefore, new signs, or even substantially new signs, must be located in conforming areas. We presume that no one would disagree with the foregoing statement.

Federal Agencies Addressing the Issue

The FHWA has already addressed the issue of customary maintenance and reasonable repairs under the Highway Beautification Act (HBA) numerous times. So did their predecessor the Bureau of Public Roads under the Bonus Act.

- One of the most recent FHWA Memorandum on a limited basis was written for such issues as sound walls and increasing the height of a billboard: See <http://www.fhwa.dot.gov/realestate/oaadguid.htm>
- And re-erection due to fire or casualty, See: [http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/FE480F640B0E19E98525726E00741610/\\$FILE/080598%20DESTROYED%20NC%20SIGNS%20-%20NC.pdf](http://knowledge.fhwa.dot.gov/cops/rex.nsf/All+Documents/FE480F640B0E19E98525726E00741610/$FILE/080598%20DESTROYED%20NC%20SIGNS%20-%20NC.pdf)
- The building and fire codes as well as a myriad of state and local zoning laws have addressed non-conforming buildings, structures or land use for well over 100 years. These contain key elements that have not been reviewed and addressed by the FHWA and this panel.
- Building and fire codes consider 180 days as the threshold for determining whether a structure or building is conforming or not, or is permanent or temporary. Other criteria may include being connected to utilities such as electricity, gas, water and sewer.
- This threshold is important because when it comes to nonconforming signs and their being discontinued or abandoned, state and many municipal laws have a much lower threshold it is often much longer than that – up to a year. Building and fire codes also address nonconforming buildings and structures, often with detailed limits on what repairs or improvements can be performed.
- Generally when a conforming building, structure or land use is declared non-conforming by the authority having jurisdiction, the existing building, structure or land use is allowed to be ‘maintained’ – that is it can stay where it is, as it is with customary maintenance and reasonable repairs; but it cannot be improved, moved, raised, enlarged, enhanced, added to, changed, or replaced.

Existing Standards for Customary vs Substantial Maintenance of Non-Conforming Buildings, Structures or Land Use

- Customary maintenance and reasonable repairs usually are “cosmetic” changes and include such things as applying fresh paint, pounding loose nails back in or tightening loose screws and nuts and bolts, fixing broken window glass and screens, changing light bulbs and fuses, sealing leaks and holes, clearing drains and chimneys, mowing the grass and shoveling the snow, etc. – **essentially things that are not permanent or that prolong the life of the building or structure.**
- **Substantial maintenance and repairs** usually are “structural” and include such things as replacing structural components, electrical, plumbing or HVAC fixtures, doors, windows, roofing or siding materials, etc. – essentially things that are permanent or that prolong the life of the building or structure.
- Many state and municipal laws require conditional use permits (CUPs) for non conforming buildings or structures. These can have more detailed limits on the use as well as what maintenance and repairs are permitted.
- Just as with non -conforming signs, the building and fire codes have the same expectation that over time, it will become so weathered, worn and dilapidated that it will no longer be usable and/or structurally viable, and at that point in time, it will be removed by the owner - with no just compensation due from the authority having jurisdiction.

The expectation is also owner will have had the benefit of the use over this period of time and have received a reasonable return on their investment.

Building and fire codes also set safety standards that must be met, and if they are not – such as being safe for human habitation or there are potential serious safety to life or fire hazards - the building or structure can be ordered removed - with no just compensation due from the authority having jurisdiction.

If the existing use is discontinued within a specific time frame, the non-conforming the building or structure can be ordered removed - with no just compensation due from the authority having jurisdiction.

In some jurisdictions, if the building or structure is damaged by fire or some other casualty beyond 50% of its value - the non-conforming building or structure can be ordered removed - with no just compensation due from the authority having jurisdiction.

Case law in every state has many examples of what goes above and beyond customary maintenance and reasonable repairs. I’m sure there are also some cases in Federal law regarding non conforming buildings and structures on public lands.

National Consensus Standards

One of the facets the FHWA has failed to understand is that Federal agencies must consider national consensus standards when developing or interpreting regulations. The two national consensus standards for buildings and structures are:

National Fire Protection Assoc (NFPA)

- National Fire Code
- National Building Code
- National Electrical Code
- See www.nfpa.org

International Code Council (ICC)

- International Building Code
- International Fire Code
- See www.iccsafe.org

The final draft recommendations for customary maintenance include:

1. Nailing, cleaning and painting, and replacement of nuts and bolts
2. Replacement of structural components, including vertical supports, with the same material, and consistent with the state's definition of a destroyed sign
3. Changes in the advertising message
4. Upgrading existing lighting for energy efficiency or worker safety
5. Addition of catwalks or handrails when required to resolve safety concerns

Number 2 is not customary maintenance; rather it allows structural replacements with the primary purpose or the actual effect of extending the life of a nonconforming sign beyond its "normal life," and would effectively allow a new sign, or a substantially new sign, to be located in a nonconforming location or area.. This is contrary to 23 CFR 750.707(d)(5) and 23 CFR 750.707(c), and this totally ignores the standard set by the first sentence, *i.e.*, "The sign must remain substantially the same as it was on the effective date of the State law or regulations." Number 4 should be clarified. Number 5 should be deleted, or at the very least limited to situations where federal law mandates that there is no alternative means of fall protection.

Replacement of Structural Components

If a structural component has failed or is so dilapidated that the structural integrity of the billboard structure is compromised, then the sign has reached the end of its normal life and the billboard structure itself (or a portion thereof) should be removed by the owner with no just compensation due. To do otherwise means the non-conforming structure can be structurally replaced a piece at a time virtually forever. The reference to the normal life of a nonconforming sign would be rendered a nullity and the reference to "customary maintenance" would be expanded to allow for wholesale replacement and erection of a new sign, or substantially new sign, at a nonconforming location.

Further, this proposal is also almost impossible to enforce unless there are permits and inspections every step of the way. Further, does the reference to "same material" refer to replacing a No. 1 wood pole with a thicker No. 2 wood pole? Does the proposal allow concrete footers or other enhancements to be added to a structure without an existing concrete base as part of the replacement of a structural support because the local building code requires that upgrade? There appears to be no end to the slippery slope that this proposal would allow, or perhaps codify to the extent that this type of activity goes on

today as part of an ongoing effort to evade the intent and purpose of the HBA and its regulations. *See, e.g.*, 40 FR 42842-42844.

Number 2 should be deleted, and the phrase “Substantial change” should include the replacement of a vertical support whether or not it is the same material.

Lighting Improvements

This should be clarified that it only permits changes in nonstructural external light fixtures.

Installing Catwalks or Handrails

There has been an effort in the past to use “purported” OSHA requirements to rebuild brand new steel structures. We understand that there are more than one way to provide for fall protection and worker safety other than catwalks or handrails. At all times, the outdoor advertising industry should comply with OSHA standards, and enforcement of OSHA standards should be vigorous. However, the proposal for the addition of catwalks or handrails when required to resolve safety concerns will likely become problematic in enforcement and application. It has never been established to our knowledge that catwalks and/or handrails are the “only” method of providing for fall protection. Therefore, in the absence of proof that these devices are the only method to address OSHA safety requirements, this proposal should be deleted.

We know that the industry has attempted to add steel catwalks to wood structures in an effort to make the same incapable of being deemed “destroyed” if a cost methodology for defining “destruction” is adopted and if the steel catwalk is deemed part of the structure or part of the sign. The proposal sets the stage for this scheme to continue or resurface. Who determines whether or not steel catwalks are required “to resolve safety concerns”?

It is quite clear that the outdoor advertising industry will simply argue that there is no “resolution” of the safety concerns unless and until the steel catwalks are added. The “safety” issues are a smoke screen. If it is no longer safe to use a structure as is, then the use should be discontinued and/or should be removed by the owner with no just compensation due. There are many, many legal precedents on non-conforming buildings, structures and uses – including billboards in state courts.

Enforcement and Administrative Oversight

If there is no permit and inspection, then essentially the billboard companies can do almost anything they want and it will then be up to the DOT to catch them and then try to adjudicate after the fact. The history of the billboard industry is to break every rule and regulation they can get away with, so giving them the benefit of the doubt is just inviting further abuse. We urge that sign inventories be placed online with digital photos of all aspects of a sign structure, including the sign base, the sign supports, and the immediate surroundings. We also urge more effective enforcement through loss of permits and/or licenses for violations of regulatory provisions, and the mandatory removal of signs erected in violation of state-federal agreements.

Conclusion

We have endeavored to be constructive in our review and comments. We hope the constructive nature of our recommendations will be fully accepted. If you would like any further information or explanation as to any of our recommendations or comments, please feel free to call. Thank you for including us in this important endeavor to strengthen the implementation of the Highway **Beautification** Act.

Thank you,

Mary Tracy
President