Outdoor Advertising Statutory and Case Law Review

Barbara M. Wessinger
Assistant Chief Counsel

South Carolina Statutes

1. South Carolina Code Ann. §57-25-190(E):

   Notwithstanding any county or municipal zoning plan, ordinance, or resolution, outdoor advertising signs conforming to Section 57-25-110, *et seq*., affected by state highway projects may be relocated pursuant to the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 USC 4601, *et seq*.) to a position which is perpendicular to the right of way of the original sign site, or may be altered so that no portion of the sign overhangs the right of way.

- §57-25-190(E) (continued)
  - Effective May 26, 2000
  - Applies to on-premise and off-premise signs
  - SCDOT vs. Mr. Sub's /SCDOT vs. Exxon

2. Illegal Activity Policy
   - Purpose to prevent erection of signs through illegal conduct, i.e. illegal vegetation cutting on r/w
   - Consistent with intent of SC Highway Advertising Control Act
   - Predicated on public policy grounds

South Carolina Case Law

1. Junkyards as commercial activities
   - Abbott Outdoor Advertising vs. SCDOT, unpublished opinion – 2001-UP-518 filed November 27, 2001
   - SC Code Ann. §57-25-120(5)(j)
   - 25 SC Code Ann. Regulation 63-342(FF)(6)
   - SCDOT actions consistent with HACA

2. Constitutionality of permitting process
   - SC Code Ann. §57-25-150(D) – authority to promulgate regulations governing issuance of permits
   - 25 SC Code Ann. Reg. 63-349 – criteria for issuance of permits
   - 25 SC Code Ann. Reg. 63-349(L) – right to consider any application for a sign permit for up to 30 days from date the application was submitted.

- Daisy Outdoor Advertising vs. SCDOT and Abbott Sign Company, Memorandum Opinion 2001-MO-017, filed March 8, 2001
  - Not violative of due process
  - Not violative of equal protection
  - Not arbitrarily or capriciously interpreted or applied by SCDOT (Nelson Die Cut, Lanny's Restoration, Byers, Hart)

3. Sham Activities
   - Defined by Regulation 63-342(U) – two prong test:
     - (1) a business created primarily and exclusively to qualify an area
     - (2) which does not conduct any meaningful activity at the activity site
   - Regulation 63-344(G) – if activity determined to be sham, sign is illegal and must be removed at sign owner's or landowner's expense.

- Sham Activities (cont.)
  - Until sign is removed, no permits issued statewide
  - 2 cases on appeal to Court of Appeals
    - Issue – Is sham regulation is unconstitutional?
    - Issue – Can you "tack on" the history of the activity in another location to qualify it?
    - Issue – violation of equal protection – "you're out to GET me" – Did the DOT treat others similarly situated differently than Plaintiff?

- Visible and Readily Recognizable
  - Defined by Regulation 63-342(HH) – two prong test:
    - (1) capable of being seen (whether or not legible)
    - (2) readily recognizable
  - Visibility must be throughout the year (no seasonal exceptions)
  - Measuring visibility from a traveling car vs. standing still at right-of-way line, comports with overall purpose of SC HACA

Case Law Review

1. Visible and Readily Recognizable
   - U.S. Outdoor Advertising, Inc. vs. SCDOT, 481 SE2d 112(1997) – "visibility requirement was reasonably related to the purpose of the SC HACA and furthered the accompanying public policy"
   - Osage Outdoor Advertising vs. MoDOT, 680 SW2d 164 (1984) – "activity is not visible to the degree that it is recognizable as a commercial activity, it should be discounted"
   - Blocher Outdoor Advertising vs. MinnDOT, 347 NW2d 88 (1984) – "requirement that commercial activity be generally recognized"
   - GaDOT vs. Sapp Outdoor Advertising, Co., 171 GA.App 228, 319 SE2d 87 (1984) - "denial of permit based on activities not recognizable as being commercial"

2. Estoppel
   - Flowers vs. SCDOT , 309 SC 76, 419 SE2d 832 (1992) – "failure of DOT to require removal of nonconforming sign over 16 years did not estop DOT from ordering removal of sign as violating HACA"
   - Outdoor Systems, Inc. vs. Arizona DOT, 171 Ariz. 263, 830 P2d 475 (1992) – no vested right in wrongfully issued permit; no estoppel in matters affecting governmental or sovereign functions
   - Trea vs. New York DOT, 695 NYS2d 796, 265 AD2d 847 (1999) – A sign permit is not equivalent to a land use permit that runs with the land – no protected property right in a sign permit
   - Outdoor Media Dimensions Inc. vs. State of Oregon, 331 Or. 634, 20 P3d 180 (Mar. 2001) – On-premise sign changed its message becoming off-premise sign without a permit. Oregon notified that sign had to be removed or corrected within 30 days. DOT employee told Plaintiff that DOT would not remove sign if copy was taken off. But sign illegal regardless of copy because did not have permit. Employee had no authority to depart from terms of statute. However, Plaintiff failed to reliance on advice of employee therefore not protected on appeal. DOT not estopped by actions of employee. Other issues involved conversion of sign, Section 1983 claim for damages for deprivation of constitutional rights, and 1st and 14th Amendment violations of free speech.
   - PNE AOA Media, L.L.C. vs. Jackson County, 2001 WL 1222190 (Oct. 2001)(North Carolina)
     - PNE leased parcel with existing billboard. PNE wanted to build new monopole but had to remove existing old billboard first because they were within 300 feet of each other. PNE argues acted on good faith and had common law vested property right to erect sign because relied on statements of employee. Held, PNE did not act in good faith, no common law vested property right because erected sign without securing permit. Also no statutory vested rights as it had not secured a permit.

3. Zoning issues
   - 23 CFR §750.708 – Acceptance of state zoning
     - States have full authority under their own zoning laws to zone areas for commercial or industrial purposes under the FHBA

- State/local zoning must be taken pursuant to state zoning enabling legislation, i.e. comprehensive zoning/statutory authority, and not created primarily for ODA signs

- If not zoned as part of comprehensive zoning or statutory authority then look to state/fed agreement for definition of commercial area

- A zoning in which limited commercial or industrial activities are permitted as an incident to other primary land uses is not considered to be commercial for ODA purposes

-- Naegele Outdoor Advertising,Inc. vs. Hunt, 121 N.C.App 205, 465 SE2d 549 (1995)
  - Spot Zoning
- Lamar Advertising of Montgomery, Inc. vs. Alabama DOT, 694 So.2d 1256 (1997)
  - City cannot permit that which is forbidden by state law
- Files vs. Arkansas DOT, 325 Ark. 291, 925 SW2d 404 (1996)
  - Land annexed and zoned commercial for sole purpose of erecting billboards violates HBA
- Alper vs. Nevada, 96 Nev. 925, 621 P.2d 492 (1980)
  - DOT zoning inquiry should include reference to actual as well a contemplated land uses
- Wisconsin DOT vs. Office of the Commissioner of Transportation, 135 Wis2d 195, 400 NW2d 15 (1986)
  - A "highway use district" zoning which allows residential and agricultural uses cannot be considered as a "business area" zoned for commercial activities
- Redpath vs. Missouri DOT, 14 SW3d 34 (2000)
  - Landowners' property that was spot zoned for ODA did not amount to a zoned commercial area for the purpose of ODA and DOT properly denied application.

4. Changeable Message Signs

- Alabama State Highway Department vs. Spectacor Management Group, 636So.2d 478 (1994)
  - Electronic sign at City's Civic Center. Court of Appeals held that ads with Coca Cola and Phillip Morris were activities conducted on property so as to make the sign an on-premise sign. Also, announcements informing passerbys of civic activities was public service, therefore, flashing lights were within exception of regulations.
- August 9, 1996 – FHWA policy allowing CMS signs

5. On-premise vs. Off-premise

- Icehouse Cold Storage, Inc. vs. State Hwys and Trans. Comm., 23 SW3d 651 (2000)
  - Missouri DOT sought removal a of signs on basis on-premise sign had changed to off-premise without permit. Court of Appeals held sign was erected prior to 1971, therefore grandfathered nonconforming. Regulations allow change in advertising display of nonconforming signs. Regulation makes no distinction between on-premise and off-premise messages. No requirement by law or regulation that sign must be erected as a specific type of sign and be maintained as that type of sign.

- Kasha vs. Pennsylvania DOT, 2001 WL 867881 (2001)
  - Sign erected in 1970 (pre Act) premise activity. In 1998, off-premise message displayed. DOT required removal of sign. Kasha argued sign was located in zoned commercial area and was grandfathered. Court held it was never a nonconforming sign, therefore could not be grandfathers (always an legal on-premise sign). When it changed messages it became off-premise and required a permit. No permit could be issued as it was not in a "Kerr"commercial area

6. Burden of Proof/Standing Issues

- Overland Outdoor Advertising Company, Inc. vs. Missouri DOT, 877SW2d 158 (1994)
  - Burden of proving exception to general proscription in HBA belongs to sign owner in action challenging finding that billboard was subject to removal without compensation
- Old Broadway Corporation vs. Backes, 450 NW2d 734 (1990)
  - Advertisers on signs have no greater right than those held by sign owner to challenge removal of sign. Here, sign owner had entered into conditional permits that signs could be removed without just compensation. Sign owner had waived its rights to challenge therefore advertiser had no rights
- Maverick Media Group, Inc. vs. Fla.DOT, 791So.2d 491(2001)
  - Media company had standing for formal administrative hearing to challenge denial of permit to erect billboard, on the basis of an existing billboard within 1000 feet, where company challenged validity of existing billboard, and company was a party whose substantial interests would be determined at hearing

• Personal property Issues

- Creative Displays, Inc. vs. SCDOT, 272 SC 68, 248 SE2d 916 (1978)
  - Signs are personal property – lessee not deprived of property for which just compensation should be paid.
- Outdoor Systems Advertising, Inc. vs. Korth, 238 Mich.App. 664, 607 NW2d 729 (2000)
  - Court held entire billboards were trade fixtures and therefore were lessee's personal property

8. Right to be Seen

- No inherent right to be seen
- Billboard is the use of public investment, they are next to public road
- If no roads, no signs
- Moreton Rolleston Jr. Living Trust vs. GADOT, 242 Ga.App. 835, 531 SE2d 719 (2000)
  - Visibility of legal nonconforming northbound reader sign reduced when DOT project lowered northbound land, constructed center wall, and built 16' x 16' signboard over southbound lane. Sign company argued denial of equal protection and taking. Court held no violation of 14th Amendment because nonconforming sign, and no taking under 5th Amendment because impairment shared by public.
- Perlmutter vs. Greene, 259 NY 327, 182 NE 542 (1932)
  - Court specifically denied that billboard owner had an "easement of visibility" over the right of way of public road.
- Adams Outdoor Advertising of Charlotte vs. NCDOT, 112 NCA 120, 434 SE2d 666 (1993)

- Court held that an obstruction of the view of billboard due to vegetation and trees planted by DOT on its right of way as part of beautification project was not a taking and plaintiff failed to state a claim for inverse condemnation.

– Oddo vs. State of Texas, 912 SW2d 831 (1995)
  - Court held loss due to lessened visibility from the new roadway was not a compensable taking to billboard owner.

– State vs. Weiswassser, 149 NJ 320, 693A2d 864 (1997)
  - Court held that critical factor in determining if loss of visibility is compensable element of damages in partial-taking condemnation is whether loss arises from changes occurring on property taken.

– Outdoor Advertising Assn. of Tennessee vs. Shaw, 598 SW2d 783 (1979)
  - Court held that sign owner had no right (either common law, constitutional or statutory) to compel state to trim vegetation or not plant trees so that sign could be seen from road. HBA did not grant such right to be seen to sign owners, therefore no compensation necessary.

– Kelbro, Inc. vs. Myrick, 113 Vt. 64, 30 A2d 527 (1943)
  - Court held that right of owner/occupant of property abutting highway is limited to right appurtenant to that property, and includes right to display on-premise ads, but does not include right to advertise off-premise advertising; hence, billboard company had to right to be seen.

– Murphy, Inc. vs. Town of Westport, 131 Conn. 292, 40 A2d 177 (1944)
  - Contrary opinion - Court held billboards had right to be seen, because issued permit for fee which is an exercise of taxing power of state which entitles them to some use and enjoyment of the property for that purpose

9. Arbitrary and Capricious Standard

– Evansville Outdoor Advertising, Inc. vs. Board of Zoning Appeals, 757 NE2d 151 (Oct. 2001) (Indiana)
  - Commercial billboard company sought judicial review of zoning board decision that 2 improvement permits were null and void. Failure to construct billboards within 6 months of permit issuance. Boards decision upheld. Court held a rule or decision will be found to be arbitrary and capricious only where it is willful and unreasonable, without consideration and in disregard of the facts and circumstances in the case, or without some basis which would lead a reasonable and honest person to the same conclusion.

– Lamar Advertising Co., Inc. vs. City of Orange Beach Board of Adjustments, 2000 WL 1603656 (Oct. 2000) (Alabama)
  - Lamar sued Board challenging constitutionality of zoning ordinance governing removal of nonconforming signs because ordinance was vague, overbroad, ambiguous and arbitrary. After Hurricane George, Board found signs structurally unsound and required removal. Court held "structurally unsound" was not defined and not a clear standard. Even ODA investigators had differing interpretations. Since no uniform, articulatable method in applying standard, held unconstitutional as impermissibly vague and denies Lamar due process to know what it means and how it will be applied.

10. Ordinances vs. State Statutes

– City of Tempe vs. Outdoor Systems, Inc., 32 P3d 31 (Sept. 2001)(Arizona)
  - Sign Company held grandfathered nonconforming sign. New City ordinance sought to prohibit "reasonable repairs or alterations" of those signs. Court held that ordinance was in conflict with state law. When ordinance regulates an area that is also regulated by state statute, the ordinance may parallel the statute or even reach beyond it so long as the ordinance does not conflict with statute. Where there is an actual conflict between the two, the state statute prevails and ordinance is invalid. NOTE: good case on what relevant repairs are: installation of steel shims, painting, wood stringers v. steel stringers, steel cross-bracing; new bolts, replacing catwalks.

- PNE AOA Media, L.L.C. vs. Jackson County, 2001 WL 1222190 (Oct. 2001)(North Carolina)
  - PNE leased parcel with existing billboard. PNE wanted to build new monopole but had to remove existing old billboard first because they were within 300 feet of each other. PNE dismantled old sign, and erected new sign without a new permit. DOT notified sign illegal and must be removed or corrected. Then County passed moratorium. Next day, PNE applied to DOT for permit. It was denied because of moratorium. PNE argues state law preempts local ordinance. It is well settled that state regulation preempts county rules which govern same issue and conflict with state provisions. If there is discord between state provision and county, county provision must give way. Held ordinance does not preempt state law. Other issues: PNE had no vested property right or protected property interest; and estoppel argument.

11. Miscellaneous Issues

- Subdivision Services Corp. vs. Zoning Hearing Board of Charlestown Township, 2001 WL 1194684 (Aug. 2001)(Pennsylvania)
  - Landowner appealed from township zoning hearing board's denial of landowner's application to place signs upon its land. Township failed to present objective evidence to substantiate denial based upon several accidents occurring in vicinity. Since could not tie accidents to billboards presence, Township could not deny applications. No substantial evidence in record case.
- Regional Transportation District vs. Outdoor Systems, Inc., 2001 WL 1402571 (Nov. 2001) (Colorado)
  - Regional Transportation District (RTD) sued billboard lessee for a declaratory judgment on whether Uniform Relocation Assistance and Real Property Acquisition Policy Act (URARPAPA) applied to RTD's purchase of property. Court held URARPAPA did not apply to RTD's purchase of land with billboard on it because it was a voluntary, arms length transition and not coerced or under the threat of condemnation. As such URARPAP does not apply. Therefore, RTD could terminate the sign lease without compensation for taking under lease agreement termination clause. RTD sits as any other landlord/tenant situation.
- SMD, L.L.P. vs. City of Roswell, 2001 WL 1268807 (Oct. 2001) (Georgia)
  - Sign company sued City for deprivation of its rights under 42 USC §1983 for denial of its civil rights for 31month 2 week delay in issuing permits. Plaintiff applied for signs in excess of height and size limitations which were denied. Ordinance was later found unconstitutional and City ordered to issue permits. Court held sign company entitled to damages. But, sign company wanted lost profits, lost investment, and other consequential damages. Court held that since sign company had never erected or operated signs, determination of lost profits speculative and Georgia law precludes lost profits as being speculative. Therefore, claim denied.

THE END