Legal Opinion as to a State DOT's Responsibility
For Local Zoning Actions for the Erection of Billboards

Attorney Advisor HCC-30

Mr. Brian Telfair
Realty Officer
Florida Division, FHWA

Issue: Can the FHWA hold a State DOT responsible for the actions of a local zoning authority that zones an area commercial or industrial primarily for the erection of billboards?

The Federal Highway Administration (FHWA) is the agency charged with implementing the Highway Beautification Act (HBA). The HBA, codified at 23 U.S.C. ∋131, is a grant-in-aid condition that States must comply with in order to receive full Federal-aid highway funding. The HBA requires States to "effectively control" outdoor advertising along certain Federal-aid highway systems: the Interstate system, the Federal-aid primary system (as it existed on June 1, 1991), and the National Highway System. Under ∋131(b), failure to comply with the HBA can subject a State to the loss of ten percent of its Federal-aid highway funds.

The HBA, similar to every grant-in-aid condition concerning Federal-aid highway funds, is structured upon a direct FHWA-State relationship. This means that the State is responsible for complying with all grant-in-aid conditions, even when the actions are done by a lesser State entity like a city or county.

Outdoor advertising is allowed in valid zoned or unzoned commercial or industrial areas. Section 131(d) acknowledges that "States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard, will be accepted for the purposes of this Act." In January of 1972, the State of Florida and the FHWA entered into an agreement that set forth the size, spacing, and lighting conditions for signs in areas "which are zoned industrial or commercial under authority of State law." In the agreement the State of Florida agreed to "control, or cause to be controlled, the erection and maintenance of outdoor advertising signs..." (Section III, p. 6).

The regulations promulgated by the FHWA to effectuate the HBA include a section on acceptance of state zoning. Under 23 CFR 750.708(b), zoning which is "created primarily to permit outdoor advertising structures" is not recognized by the FHWA as valid zoning. The FHWA has the authority to determine if a zoning action is done solely to permit outdoor advertising. The authority to determine whether a State=s law on outdoor advertising meets the HBA=s requirements was discussed in South Dakota v.

Volpe, 353 F.Supp. 335 (D.S.D.1973). The court upheld the Secretary=s authority to refuse to recognize what amounted to strip zoning done under state law, citing the following as evidence that Congress did not intend that local zoning could not be challenged if it appeared to be "phony zoning":

> "When state or local governments act to zone areas for commercial or industrial purposes, in accordance with the state's *traditional* exercise of authority on zoning, these determinations will be accepted for purpose of billboard or junkyard control. *This language, of course, does not mean that a state or local authority could place a label "zoned commercial or industrial" on land adjacent to the Interstate and primary systems solely to permit billboards or junkyards and thereby frustrate the intent of* Congress stated in section 131(a)"(emphasis added). 353 F.Supp. 335 at 340.

89 Congressional Record 26820 (1965) (remarks of Senator Randolph); *Accord*, 1965 U.S. Code Cong. and Admin. News, pp. 3713-14 (letter of the Secretary of Commerce to John C. Kluczynski).

In 1968, the Secretary of Transportation reiterated this concern about questionable zoning.

> "With respect to unzoned areas, we will recognize local practices on customary use as mutually agreed to by State and Federal agencies. It will be our policy to assume the good faith of the several States in this regard.
> "The only exception to the about would be a situation in which State or local authority might attempt to circumvent the law by zoning an area as 'commercial' for billboard purposes only. We think you will agree that this is a reasonable position, since we know that the Congress does not wish for the law to be deliberately evaded."

(Letter of Secretary of Transportation, Alan S. Boyd, to Rep. John C. Kluczynski, Chairman of the Subcommittee on Roads, Public Works Committee, May 24, 1967, House Report No. 1799, p. 27)

The legislative history of the HBA shows that the Congress and the U.S. Department of Transportation believed that the validity of zoning, either by a State legislature such as South Dakota or by a local zoning authority, is not absolute when it comes to billboards. The FHWA can, and must, look behind suspect zoning actions if the aims of the HBA are to be met.

In determining whether a zoning action is an attempt to circumvent the HBA, the FHWA looks at various factors: the expressed reasons for the zoning change; the zoning for the surrounding area; the actual land uses nearby; the existence of plans for commercial or industrial development; the availability of utilities (such as water, electricity, and sewage) in the newly zoned area; and the existence of access roads, or dedicated access, to the

newly zoned area. No one of the above factors alone is determinative. If a combination of them, however, shows that the zoning action is primarily to allow billboards in areas that have none of the attributes of a commercial or industrial area, the FHWA would not be compelled to accept the zoning action as valid under 23 U.S.C. § 131(d). There would be a lapse in the State's effective control, and the penalty could be enforced against the State under 23 U.S.C. § 131(b).

There are numerous court decisions that have addressed the issue of "phony zoning" and the power of the State DOT to look behind the zoning. State Hwy Dept. v. Headrick Outdoor Advertising, 594 So.2d 1202 (Ala. 1992) (signs in agricultural area that was zoned commercial were nonetheless illegal and the State Highway Dept. could not be estopped from challenge because a "city may not adopt a zoning ordinance that contravenes a state law."(citations omitted),p.1205)); Files v. Arkansas State Highway and Transp. Dept., 925 S.W.2d 404 (Ark.,1996) (land with billboards adjacent to the proposed site had been zoned commercial, one parcel for over ten years, but otherwise were being used only for agricultural purposes, was zoned primarily to allow billboards, and State agency could successfully question local zoning action); L&W Outdoor Adv. Co. v. State, 539 N.E.2d 497 (Ind.App.1989) (discussing what factors for valid rezoning action were amiss, and holding that "local zoning authorities must conform to reality and observe the intent of both the federal and state laws concerning highway beautification."p. 499.); Redpath v. Missouri Highway and Transp. Com'n, 14 S.W.3d 34 (Mo.App.W.D.,1999) ("in Missouri, an area zoned for outdoor advertising that is out of harmony with the zoning classification or uses of surrounding land does not constitute zoned commercial or industrial area for outdoor advertising purposes" p. 41); United Outdoor Advertising Co., Inc. v. Business, Transportation and Housing Agency, 746 P.2d 877 (Cal.,1988) (upholding State denial of billboard permits in a questionable commercial area, "... the zoning must have independent validity. Action that is not part of comprehensive zoning and is intended primarily to permit outdoor advertising structures is not recognized for outdoor advertising control purposes." P.882); Alper v. State ex rel Dept. of Highways., 621 P.2d 492 (Nev., 1980) (areas in the middle of the desert were zoned commercial and industrial in order to allow billboards in circumvention of the federal law and thus were invalidly zoned); Hammond v. FDOT, 493 So.2d 33 (Fla.Ct.App.,1986) (upholding Fla. DOT's finding that city's ordinance that specified that a 100 foot wide strip of newly annexed land along either side of interstate be zoned commercial, with the remainder of the annexed parcel being zoned agricultural was primarily to allow outdoor advertising).

In summary, if a local zoning authority rezoned land primarily to allow outdoor advertising, the FHWA could hold the State DOT responsible for not providing effective control of outdoor advertising as required by the HBA.

Robert J. Black