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Assistant Attorney General
800 Lincoln Way
Ames, IA 50010

Re: Immaculate Conception Corp. and Don Bosco High School
v. Iowa Department of Transportation
No. 02-1449

Dear Mr. Hunacek:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk

No. 02-1449

In The

Supreme Court of the United States

IMMACULATE CONCEPTION CORP.,
and DON BOSCO HIGH SCHOOL,

Petitioners,

v.

IOWA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should not this Court deny certiorari where: (1) this Court has already approved the constitutionality of a total ban on offsite commercial billboards, (2) this Court has, in the context of billboard regulation, deferred to legislative judgments concerning esthetics and safety, and (3) petitioners' own testimony establishes a basis for the statute?

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SUMMARY OF ARGUMENT

Petitioners' argument that the state of Iowa was somehow required to produce studies or expert testimony justifying the statutory prohibition against advertising signs visible from a primary highway, Iowa Code § 306C.11, and did not do so, misreads the record and is wrong on the law. The prior opinions of this Court, and lower courts, demonstrate that a State does not need to produce studies or expert testimony regarding the efficacy of a billboard prohibition statute; any showing that the State must make can be done with common sense or legal precedent. Moreover, *petitioners' own witness* "helped explain why state law prohibits [the signs]" (App. 3-4): asked whether the signs could be read, this witness answered that it depended on "how fast you were going and if you want to have an accident or not by looking at the signs instead of at the road."

STATEMENT OF THE CASE

Don Bosco High School has baseball and softball diamonds located on school property in the city limits of Gilbertville, Iowa. Thirty-seven "booster signs" of local businesses who have contributed money to sponsor the ball teams are attached to the outfield fences of these ball fields, and are visible from a primary highway. Since these signs run afoul of Iowa Code § 306C.11, a statute which, with exceptions not relevant here, prohibits advertising that is visible from a primary highway, the DOT required their removal. After administrative proceedings resulted in affirmance of the removal order (App. 23, 24-31), petitioners sought judicial review.

The district court found three separate constitutional impediments to Iowa Code § 306C.11, two of which were not ever raised by petitioner. After summary affirmance by the Iowa Court of Appeals, the Iowa Supreme Court reversed the district court, pointing out that that court erred by considering constitutional issues not raised, and erred as well on the First Amendment issues.

REASONS FOR DENYING THE WRIT

PETITIONERS' ARGUMENT THAT THE STATE IS REQUIRED TO PRODUCE STUDIES, STATISTICS OR EXPERT TESTIMONY REGARDING THE EFFICACY OF THE ADVERTISING PROHIBITION STATUTE, HAS ALREADY BEEN REJECTED BY THIS COURT AND OTHER COURTS. IN ANY EVENT, EVEN IF SUCH A REQUIREMENT EXISTED, SUCH EVIDENCE WAS PRODUCED BY PETITIONERS' OWN WITNESS.

This case is controlled by *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), a case which, inexplicably, is neither cited nor discussed in the Petition for Writ of Certiorari. In *Metromedia*, "seven Justices agreed that San Diego's legislative judgment that billboards contribute to traffic hazards and visual blight sufficed to justify a complete ban on off site commercial billboards. *See Metromedia*, 453 U.S. at 510, 101 S.Ct. at 2893-94 (plurality); *id.* at 549-53, 101 S.Ct. at 2913-16 (Stevens, J., dissenting in part); *id.* at 560-61, 101 S.Ct. at 2919-20 (Burger, C.J., dissenting); *id.* at 570, 101 S.Ct. at 2924-25 (Rehnquist, J., dissenting)." *Ackerley Communications of Northwest v. Krochalis*, 108 F.3d 1095, 1099 n. 5 (9th Cir. 1997).

The *Metromedia* opinion makes clear that a state does not need statistics to show that advertising devices may be considered a safety hazard. After noting that other courts have reached this conclusion, this Court stated:

> We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable. As we said in a different context: "We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false."

Id. at 509, 101 S.Ct. at 2893 (footnote omitted). A similar conclusion holds with respect to esthetic interests:

> It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as "esthetic harm." San Diego, like many States and other municipalities, has chosen to minimize the presence of such structures. Such esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose. But there is no claim in this case that San Diego has as an ulterior motive the suppression of speech, and the judgment involved here is not so unusual as to raise suspicions in itself.

Id. at 510, 101 S.Ct. at 2893-94 (footnotes omitted).

Relying on *Metromedia*, lower courts have specifically rejected the argument that the government must make some sort of evidentiary showing regarding the efficacy of a billboard control statute or ordinance. In *Ackerley Communications*, for example, an outdoor advertising business sought to invalidate a regulation limiting the construction and relocation of billboards "because Seattle made no factual showing that the ordinance advances its goals to a material degree." *Id.* at 1097. Rejecting this argument, the court held that: "As a matter of law Seattle's ordinance, enacted to further the city's interest in esthetics and safety, is a constitutional restriction on commercial speech without detailed proof that the billboard regulation will in fact advance the city's interest." *Id.* at 1099-1100. Likewise, in *Outdoor Systems, Inc. v. City of Lenexa, Kansas*, 67 F. Supp. 2d 1231 (D. Kan. 1999), the court reached the same conclusion, specifically pointing out that plaintiff's reliance on *Edenfield v. Fane*, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), the same case relied on by petitioners here, was misplaced. The court pointed out that "in *Edenfield*, however, the Supreme Court did not alter the *Central Hudson* test. . . . Although the government is required to make the above showings, it may do so with common sense and/or legal precedent." *Id.* at 1238-39.

Petitioners' argument seems to be that these particular 37 signs do not pose a threat to traffic safety or esthetics. This Court, however, held in *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993), that this kind of individualistic "as applied" analysis was erroneous, because "it is readily apparent that this question [whether the regulation directly advances the governmental interest] cannot be

answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to the single person or entity." 509 U.S. at 427. Instead, the "validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case." *Id.* at 430. *See also Lavey v. Two Rivers*, 171 F.3d 1110, 1115 n. 18 (7th Cir. 1999).

Even if some sort of particularized evidentiary showing *was* required, that showing has been made in the present case as a result of the "revealing testimony" (App. at 3) of petitioners' own witness, who, asked whether a sign could be read, stated that it depended on "[h]ow fast you were going and if you want to have an accident or not by looking at the signs instead of at the road." App. at 3-4. Thus, even petitioners' own witness recognized the common-sense view that distracting signs can reasonably be viewed as a threat to traffic safety.

CONCLUSION

It would be inappropriate to grant certiorari on an issue that has already been resolved adversely to petitioners by this Court, and by other lower courts. The decision of the Iowa Supreme Court is unquestionably correct and should not be disturbed.

Respectfully submitted,

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IN THE SUPREME COURT OF IOWA

No. 174 / 01-1493

Filed January 23, 2003

IMMACULATE CONCEPTION CORP. and DON BOSCO HIGH SCHOOL,

Appellees,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,

Appellant.

On review from the Iowa Court of Appeals.

Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister, Judge.

High school challenges agency order to remove advertising signs from athletic field fence adjoining state highway. **DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT REVERSED AND REMANDED WITH INSTRUCTIONS.**

Thomas J. Miller, Attorney General, David A. Ferree, Special Assistant Attorney General, and Mark Hunacek, Assistant Attorney General, for appellant.

John W. Holmes of Holmes & Holmes, Waterloo, for appellees.

NEUMAN, Justice.

This appeal concerns Iowa Code section 306C.11 (1999), the statute that regulates outdoor advertising devices along Iowa's primary highways. The Iowa Department of Transportation (DOT) enforced the statute against Don Bosco High School, requiring it to remove thirty-seven "booster

signs" visible to the traveled portion of highway 297. The district court reversed the agency's decision, finding that either an on-premise exception applied or the statute is unconstitutional. On the DOT's appeal of the ruling, the court of appeals affirmed without opinion. *See* Iowa R. App. P. 6.24.

We granted the DOT's petition for further review. For the reasons that follow, we vacate the court of appeals' decision, reverse the district court and remand for an order upholding the agency's order to remove the signs.

I. Background.

The facts are undisputed. Don Bosco High School's baseball and softball diamonds are located within the city limits of Gilbertville, Iowa. Along the outfield fences of the ball diamonds, facing home plate, hang thirty-seven signs purchased by "boosters" whose local businesses support the high school's athletic activities. The plywood placards are four-by-eight feet in size. Each displays the name of the booster. Most contain additional information such as the booster's address, phone number, slogan (e.g., "No Job Too Small") or logo.

Because these booster signs are within 660 feet of adjoining state highway 297, and visible from the traveled portion of the roadway, the DOT believed they violated pertinent portions of Iowa Code section 306C.11. The statute prohibits advertising devices "erected or maintained within any adjacent area, or on the right-of-way of any primary highway" except signs "concerning activities conducted on the property on which they are located." Iowa Code § 306C.11. By statute, "adjacent area" means "an area which is contiguous to and within six hundred sixty feet of the nearest edge of the right of way of any interstate, freeway primary, or primary highway." *Id.* § 306C.10(1). The term "[a]dvertising device" is broadly defined to include

> any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or any other device designed, intended, or used to advertise or give information in the nature of advertising, and having the capacity of being visible from the traveled portion of any interstate or primary highway.

Id. § 306C.10(2).

The DOT sent out removal notices. Contested administrative proceedings followed in which the high school challenged the DOT's claim that the signs were visible from the highway. The school also claimed that enforcement of the statute was an assault on constitutionally protected

commercial speech, an issue the administrative law judge (ALJ) did not resolve but preserved for judicial review.

An administrator for the DOT's highway beautification program testified that he had personally observed the signs and that they were adjacent to highway 297 and visible to drivers along the roadway. In revealing testimony, one of the boosters not only admitted the signs could be read from the highway but, in the DOT's words, "also helped explain why state law prohibits them":

> Q. If you are driving out of town and you take your eyes off the road and look over at the left and you try to pick out a sign, just one sign all by itself and read just one sign, can you read it? A. Maybe.
>
> Q. What's it depend on? A. The weather, for one thing.
>
> Q. Assume it is clear weather. A. How fast you were going and if you want to have an accident or not by looking at the signs instead of at the road.

Based on this evidence, the ALJ affirmed the order for removal of the signs. Following an unsuccessful intra-agency appeal, the high school sought judicial review. The district court acknowledged that substantial evidence supported the agency's finding that the signs are visible from the road, in evident violation of section 306C.11. It went on, however, to hold that the signs fell within the "on-premise" exception to the statute. Alternatively the court found the statute was not only an unconstitutional regulation of speech but violated due process and amounted to a taking of property without just compensation. This appeal by the DOT followed.

II. Scope of Review.

Our review is for the correction of errors at law. *Soo Line R.R. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994). To the extent the appeal concerns issues of constitutional magnitude, we review the record de novo. *Id.*

III. Applicability of On-Premise Exception.

The district court evidently believed that the booster signs were not intended to advertise the boosters' businesses but to celebrate the "boosterism" occurring within the ballfields themselves. In the court's words, "this act of recognizing supporters and being recognized as a supporter of the athletic teams is an activity conducted on the property just as selling concessions,

having a celebrity throw out the first pitch on opening day and the like." Following this reasoning, the court concluded the on-premise exception to section 306C.11 applied. The DOT assails this conclusion on appeal. Bypassing its credible objection to the way the issue was preserved for review, we agree that the defense fails on its merits.

Under the on-premise exception, "[a]dvertising devices concerning activities conducted on the property on which they are located" are not prohibited. Iowa Code § 306C.11(2). To qualify for the exception, an on-premise sign "must be located on the same property as the advertised activity" and limited to "identifying the activities located on or products or services available on the property." Iowa Admin. Code r. 761–117.1 (1999). Thus, for example, the exception would permit a fast-food establishment like McDonald's to erect signage on its own property notwithstanding its proximity to the highway. *Cf. Brazelton Group v. Iowa Dep't of Transp.*, 623 N.W.2d 581, 583 (Iowa 2001) (under similar language in predecessor statute, court affirmed order preventing company from locating sign for Ramada motel on property owned by Sirloin Stockade restaurant).

Here, the district court attempted to shoehorn something into the exception that simply does not fit. The placards in question do not merely identify or celebrate boosters in the bleachers. They advertise goods and services available to the public well beyond the centerfield fence. If their sole purpose were to foster goodwill, there would be no need to include addresses and telephone numbers on the signs. Moreover, as the DOT rightly points out, the goodwill generated by the signs "is the very essence of advertising." Because the signs do not advertise products or services available on the property, they do not qualify for protection under the plain meaning of section 306C.11(2). The district court erred in so ruling.

IV. Constitutionality of Iowa Code section 306C.11.

The district court ruled that if the booster signs do not fit the on-premise exception, then the statutory prohibition against their display deprives the high school of due process, takes its property without just compensation and violates its right to freedom of speech. On appeal, the DOT begins by noting that the high school limited its constitutional claims to alleged First Amendment breaches, that is, claims that the statute violates "protected commercial speech" and

"liberty of speech." It asserts the other constitutional bases for the court's decision have not been preserved for our review. We agree. *See Garwick v. Iowa Dep't of Transp.*, 611 N.W.2d 286, 288 (Iowa 2000) (failure to raise constitutional issue before agency prevents preservation of claim for judicial review and on appeal).

Two free-speech claims are before us. First, the DOT challenges the district court's finding that the distinction drawn in section 306C.11 between on-premise and off-premise signs amounts to an unconstitutional content-based regulation of commercial speech. Second, the DOT contests the court's conclusion that section 306C.11, as applied to these signs, unconstitutionally restricts speech without advancing the state's interest in traffic safety or aesthetics.

Fundamental principles guide our resolution of these issues. Content-based speech regulations are forbidden by the Constitution. *City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S. Ct. 2118, 2128, 80 L. Ed. 2d 772, 786 (1984). But, as the DOT rightly argues, the district court has misinterpreted the meaning of "content-based" as applied to the facts of this case. Content-based statutes "favor some *viewpoints or ideas* at the expense of others." *Id.* at 804, 104 S. Ct. at 2128, 80 L. Ed. 2d at 786 (emphasis added). Section 306C.11 does not differentiate between types of advertising devices based on viewpoint. The statute regulates signage by location, a distinction having nothing to do with content. The United States Supreme Court has recognized this distinction, clearly holding that "offsite commercial billboards may be prohibited while onsite commercial billboards are permitted." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512, 101 S. Ct. 2882, 2895, 69 L. Ed. 2d 800, 818 (1981). Other courts have routinely rejected the argument put forth by the high school here. *See, e.g., Messer v. City of Douglasville*, 975 F.2d 1505, 1509 (11thCir. 1992) (city ordinance prohibiting off-premise billboards is viewpoint neutral); *Nat'l Adver. Co. v. Chicago*, 788 F. Supp. 994, 997–98 (N.D. Ill. 1991) (distinction between on-site and off-site advertising "not aimed toward the suppression of an idea or a viewpoint"). The district court erred when it interpreted section 306C.11 to the contrary.

As for the claim that section 306C.11 otherwise unconstitutionally restricts the high school's freedom of speech, we are guided by the four-part test articulated by the Supreme Court in *Metromedia*:

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Metromedia, 453 U.S. at 507, 101 S. Ct. at 2892, 69 L. Ed. 2d at 815.

We observe at the outset that the speech being regulated here is of a commercial nature and thus afforded lesser constitutional protection than other forms of expression. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563, 100 S. Ct. 2343, 2350, 65 L. Ed. 2d 341, 349 (1980). Because the booster signs neither advertise illegal activity nor are they misleading, however, the state's power to restrict them is circumscribed. *Id.* at 563–64, 100 S. Ct. at 2350, 65 L. Ed. 2d at 349. Thus we move to the second part of the *Metromedia* test.

The DOT asserts that section 306C.11 advances the state's interests in traffic safety and aesthetics. The Supreme Court has held these are "substantial governmental goals." *Metromedia*, 453 U.S. at 507–08, 101 S. Ct. at 2892, 69 L. Ed. 2d at 815; *accord Messer*, 975 F.2d at 1510–11. This court has long recognized our legislature's intent to echo Congress's national highway beautification and safety goals by regulating signage along Iowa's primary roadways. *Iowa Dep't of Transp. v. Nebraska-Iowa Supply Co.*, 272 N.W.2d 6, 13 (Iowa 1978), *overruled on other grounds by Estate of Grossman v. McCreary*, 373 N.W.2d 113, 114 (1985); *accord Meredith Outdoor Adver., Inc. v. Iowa Dep't of Transp.*, 648 N.W.2d 109, 115 (Iowa 2002). In short, there can be little doubt that section 306C.11 addresses a substantial governmental interest in protecting the traveling public while preserving the landscape adjoining Iowa's highways.

The high school nevertheless asserts that the record contains no evidence that section 306C.11 directly advances the goals it purports to address, thus failing the third prong of the *Metromedia* test. The fact is, the DOT does not need statistics or reports to enforce the plain mandate of the statute. It is the challenger who bears the burden of overcoming the presumptive constitutionality of a statute by negating every reasonable basis on which the law might be upheld. *Brazelton*, 623 N.W.2d at 584. The high school has not met that burden here.

Finally, the Constitution requires that the challenged statute be no "more extensive than is necessary" to meet the state's articulated interests. *Central Hudson*, 447 U.S. at 566, 100 S. Ct. at 2351, 65 L. Ed. 2d at 351. In that connection we note that section 306C.11 is less prohibitive than

the ordinance at issue in *Metromedia*. There the Supreme Court upheld a statute prohibiting *all* outdoor off-premise advertising. *Metromedia*, 453 U.S. at 493–96, 101 S. Ct. at 2885–87, 69 L. Ed. 2d at 805–08. Iowa Code section 306C.11 only prohibits advertising devices within 660 feet of the right-of-way. As the DOT suggested in its early correspondence with school officials over this controversy, they need only mount the signs so that they are not visible from the traveled portion of highway 297. And, of course, the statute does not affect the myriad other ways the school may lawfully recognize its boosters.

In summary, Iowa Code section 306C.11 draws a legitimate distinction between on-premise and off-premise signs and regulates the signage at issue here consistent with constitutional norms pertaining to commercial speech. The district court's contrary judgment must be reversed and the court of appeals decision affirming that ruling, vacated. We remand to the district court for entry of an order affirming the DOT's removal notice.

DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT REVERSED AND REMANDED WITH INSTRUCTIONS.

IN THE IOWA DISTRICT COURT FOR BLACK HAWK COUNTY

IMMACULATE CONCEPTION CORP., and DON BOSCO HIGH SCHOOL,

Petitioner,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,

Respondent.

NO. LACV085949

ORDER

Petitioners' appeal was submitted to the Court on briefs and oral argument on September 10, 2001. The parties appeared by their attorneys who participated by telephone conference call.

This is an appeal of a ruling by the Iowa Department of Transportation affirming an administrative law judge's proposed decision that some 37 signs erected by Petitioners are in violation of §306C.11 (Code of Iowa). In making this ruling, the Court has reviewed the entire record made before the administrative law judge, including the administrative file, the exhibits offered and admitted into evidence, the ALJ's proposed decision and the ruling on appeal to the review officer.

Based on this review, the Court agrees with Petitioners that enforcing Iowa's billboard control laws against Don Bosco High School and its Booster Club ends up hurting the student athletes who are assisted by the Booster Club's fund raising and ends up negatively interfering with the school-pride and competitiveness vital to the program but also to the community of Don Bosco High School at large. The Court is also inclined to the view that, if enforcement of this statute against the school were the result of agency policy rather than legislative policy, in other words, if enforcement were not required by law, the ALJ's decision would likely be reversed because the negative impact on the private rights affected is so grossly disproportionate to the benefit accruing to the public interest that it does not appear to have any rational foundation. See

§17A.19(10)(k) (Code of Iowa). Stated otherwise, the Court cannot reverse the agency when it is the legislature, rather than the agency, which imposes a grossly disproportionate impact on private rights by enacting legislation having no rational foundation.

The Court, concludes, however, that Petitioners' signs are not in violation of the statute or, if they are in violation, the statute is unconstitutional both on its face and as applied to Petitioners for the following reasons.

There are 37 4 by 8 plywood signs involved in this case. The signs have been attached to the inside of the outfield fences at Don Bosco's High School baseball and softball diamonds in Gilbertville, Iowa. Each sign contains the name and sometimes the phone number of a local sponsoring business who makes an annual donation to the Booster Club. The Booster Club spends the donations on uniforms and equipment for the school's athletic teams. Neither Petitioners nor the Booster Club rents or sells advertising space on the outfield fences to the sponsors, and the Booster Club is incapable of doing so because it does not own that space. Parenthetically, it would be incorrect but not surprising if both the contributors to the athletic program and the Boosters Club would tend to characterize donations to the athletic program as the purchase or rental of advertising space if for no other reason than because the Booster Club, more likely than not, is not an organization to which tax deductible contributions can be made while advertising is a tax deductible business expense. Moreover, although the record is silent on the issue, the Court assumes without deciding that an individual or group with no particular outside activities, such as an alumni society, could and would also be recognized by a sign on the fence if he, she, or they made a similar contribution to the Booster Club.

In any event, how Petitioners, the Booster Club, and its contributors characterize these donations is not dispositive of any of the issues in this case and it is clear that Don Bosco High School has no interest in advertising activities off its premises and merely permits the Boosters to hang the signs on the fence to recognize the supporters of the school's baseball and softball programs and this act of recognizing supporters and being recognized as a supporter of the athletic teams is an activity conducted on the property just as selling concessions, having a celebrity throw out the first pitch on opening day and

the like. Advertising devices concerning activities conducted on the property on which they are located are not prohibited. See §§306C.11(2) (Code of Iowa).

Recognizing financial supporters by identifying them by name and including a telephone number which parents and other interested parties can call to express their gratitude could be done in many ways. It could be done in a newsletter, it could be done in a program of events, if could be done on a plaque in a trophy case or affixed to the bleachers, or it could be done by an announcement over a loudspeaker system during the 7th inning stretch. Nonetheless, so long as the activity of recognizing financial supporters and being recognized as a financial supporter is an activity conducted at the athletic fields, signs or displays in furtherance of that activity are not prohibited. Moreover, were this a federal highway, the signs would not be in violation of federal law because it is apparent from their size and location that the signs were not "erected with the purpose of their message being read from (the) main traveled way." See 23 U.S.C. §131(c). The evidence in support of these findings appears in the record made before the administrative law judge at pages 45 and 46 and 65-66, in Petitioners' videotape, and in Respondent's photographs.

As an aside, because Iowa law is more restrictive than federal law concerning whether signs have been erected with the purpose of being read from the highway, that difference together with this ruling should clearly insulate the state from any risk of losing federal highway funds.

In the Court's view, using signs to identify and recognize supporters at the ball fields is indistinguishable from using signs to inform fans and spectators that Coke and Pepsi are available at the concession stands, that the student athletes hit their homeruns (but do not hit them off premises) with Louisville Sluggers; that they field fly balls, line drives, and ground balls with Rawlings baseball gloves; or that they round the bases in Reeboks. All of these are activities conducted on the premises and all of them appear to be legitimate subjects of signage at the ball fields.

This particular issue was directly addressed by Petitioners in their reply brief at the bottom of page 6 and the top of page 7. Although it was not directly raised in Petitioners' post-trial brief to the reviewing officer, or in their petition for

judicial review, the Court finds that it was raised indirectly in their initial brief in this appeal in the references to boosterism and in the conclusion. The ALJ, however, did find that it was the Booster Club which solicited these contributions and that in return the local businesses would be recognized by having their names put on the signs which were attached to the home run fence.

Because the Court believes that insufficient attention was paid to the distinction between the on-premises activity of recognizing financial supporters of the the school's athletic programs through donations to the Booster Club and whatever off-premises activities the sponsors may conduct, and because this clearly distinguishes this case from the ordinary sale or lease of commercial advertising space for off-premises activities, the Court believes that the parties should deem the issue submitted by consent or, by post hearing motion, should request a limited remand to the agency and the ALJ for further findings and rulings on this issue including, if appropriate, the taking of additional evidence.

Having said that much, the Court also finds that if these signs were not within the exception for the advertising of activities conducted on the property, as provided by §306C.11(3) (Code of Iowa) they would be prohibited if §306C.11 is constitutional. The signs are within 650 feet of Highway 297. Highway 297 is a primary highway as designated by the department, viz., the state department of transportation, and, although in serious dispute, there is substantial evidence in support of the ALJ's finding that the signs are visible when the whole record is taken into account, including all of the evidence in support of and contrary to a finding of visibility. See §§306C.10(1),(2),(6),(14),(21), and §§17A.19(10)(f)(1),(2), and (3) (Code of Iowa).

With respect, however, to the constitutional issues, the Court is unable to find that there is any constitutional basis for distinguishing between the advertising of activities conducted on and off the property for the following reasons.

Assuming that the regulation of billboards pursuant to Division II of Chapter 306C of the Iowa Code is an exercise of the police power of the State, the Court can conceive of no rational basis to distinguish between advertising activities conducted on and off the property with respect to the impact

they have on highway safety, esthetics, visual clutter, and the like. On this record, it appears that Don Bosco High School could erect and maintain 37 4 by 8 plywood signs on their fences to advertise and promote their softball and baseball teams (but not their fencing or jai alai teams), the sale of concessions, the equipment used by the players, and so forth without violating any billboard regulations. The signs could be identical or they could be distinguishable by background color; size, color, and style of lettering; pictures of team members; and so forth. They do not exceed any applicable size restriction and there is no restriction as to number or placement. Because the distinction between advertising activities conducted on a property and off that property is patently arbitrary and bears no rational relationship to highway safety, esthetics, visual clutter, and the like, §306C.11 (Code of Iowa) violates the 14th amendment to the United States Constitution and §9 of Article 1 of the Iowa Constitution. See Koster v City of Davenport, Iowa, 183 F.3d 762 (C.A. 8 Iowa 1999); Hill v Hamilton County Public Hosp., 71 F. Supp. 2d 936 (N.D. Iowa 1999); State v Bell, 572 N.W.2d 910 (Iowa 1997).

Secondly, assuming that the same number of signs of the same size could be hung on the outfield fences in the same locations so long as they merely advertised the ball team, concessions, equipment used by the players and so forth, as opposed to activities carried on, or products and services sold off premises, the statute does not regulate the time, place, or manner of advertising at all. In fact, it regulates nothing other than the content of the regulated speech and this violates Petitioners' freedom of speech under the U.S. and Iowa Constitutions. See Messer v City of Douglasville, Georgia, 975 F.1d 1505, 1510 (11th Cir. 1992).

Finally, because the distinction between the advertising of activities on and off premises bears no rational relationship to highway safety, esthetics, visual clutter, and the like, prohibiting Petitioners from leasing or selling advertising space which they can use to advertise their own activities is a taking for public purposes which deprives Petitioners of a valuable property right without just compensation, and this violates the 5th amendment to the United States Constitution and §18 of Article 1 of the Iowa Constitution. See Crippen v City of Cedar Rapids, 618 N.W.2d 562 (Iowa 2000); Kelley v Story County Sheriff, 611 N.W.2d 475 (Iowa 2000); Osborn v City of Cedar Rapids, 324 N.W.2d 471 (Iowa 1982); Sioux City v Tott, 60

N.W.2d 510 (Iowa 1953); and Lage v Pottawattamie County, 5 N.W.2d 161 (Iowa 1942).

In reaching these conclusions, the Court is well aware of and has considered the authorities, which are extensive, to the effect that the constitutionality of statutes is presumed, that every possible constitutional construction of a statute must be negated, and all of the other principles which generally promote deference to the legislature's prerogatives.

For all of these reasons, the Court concludes that Don Bosco High School should not be prohibited from recognizing its sponsors and showing its appreciation for their financial support by identifying them on signs posted on the outfield fences of their baseball and softball fields.

IT IS THEREFORE ORDERED:

1. The decision of the agency is reversed.

2. The Court will consider submissions by the parties in support of or in opposition to a remand to the administrative law judge for additional findings and conclusions regarding the Court's determination that Petitioner's signs concern activities conducted on the property on which they are located are exempt from prohibition pursuant to §306C.11 (Code of Iowa) because they concern activities conducted on the property on which they are located, if filed within the time for filing a motion pursuant to R.C.P. 179b.

3. Costs are taxed to Respondent in the amount of $ 80.00.

September 12, 2001.

JON FISTER, JUDGE
FIRST JUDICIAL DISTRICT

cc: counsel

Copy hereof mailed or delivered to
Pltf/Pet Atty J. Nichols
Defn/Resp Atty M. Hunsaker
County Atty
Sheriff
Ct Adm
Others

IN THE IOWA DISTRICT COURT FOR BLACK HAWK COUNTY

IMMACULATE CONCEPTION CORP., and DON BOSCO HIGH SCHOOL, Petitioner, vs. IOWA DEPARTMENT OF TRANSPORTATION, Respondent.	NO. LACV085949 SUPPLEMENT TO ORDER DATED SEPTEMBER 12, 2001

Because things that should go without saying should never go without saying, and because meaning depends on context, this is a supplement to the Court's order of September 12, 2001, to state directly, rather than by direct implication, that its findings and conclusions with respect to the constitutionality of §306C.11 (Code of Iowa), only apply to signs which have not been erected with the purpose of their message being read from the main traveled way.

As stated in the original order, such signs would not be regulated or prohibited under federal law and the Court expresses no opinion one way or another whether the statute would be constitutional if limited to signs erected with the purpose of being read from the highway.

Whether §306C.11 draws an arbitrary distinction with no rational basis between the advertising of activities conducted on a property and off a property through signs whose purpose is to be read from the highway or not, it is arbitrary and there is no rational basis to make such distinctions between such signs not intended to be read from the highway.

Whether regulating the content of signs intended to be read from the highway violates freedom of speech or not, regulation of the content of speech in signs not intended to be read from the highway does.

Finally, whether taking the right of property owners to sell or lease space for signs advertising activities not

conducted on the property for a public purpose when those signs are intended to be read from the highway requires just compensation or not, taking those rights for a public purpose when the signs are not intended to be read from the highway does.

While the Court can only speculate that it may have been out of constitutional considerations that the federal government limited billboard regulation to signs which were erected with the purpose of their message being read from the highway, there is little doubt that the limitation recognizes the practical necessity of enabling travelers to reach their destination by permitting owners or tenants of property to identify themselves and their activities.

In any event, whether the State can prohibit signs intended to be read from the highway which advertise activities not conducted on the property was not an issue presented to or decided by the Court and this amendment is incorporated in the original order the same as if originally included.

September 14, 2001.

JON FISTER, JUDGE
FIRST JUDICIAL DISTRICT

cc: counsel

Copy hereof mailed or delivered to
Pltf/Pet Atty
Defn/Resp Atty
County Atty
Sheriff
Ct Adm
Others
Mailed

IN THE COURT OF APPEALS OF IOWA

No. 2-394 / 01-1493
Filed June 19, 2002

IMMACULATE CONCEPTION CORP. and DON BOSCO HIGH SCHOOL,
Petitioners-Appellees,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,
Respondent-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.

The respondent appeals from the district court ruling on judicial review reversing the respondent's order requiring the petitioners to remove signs that the respondent found under Iowa Code section 306C.11 (1999) to be prohibited advertising signs within the adjacent area of a highway. **AFFIRMED.**

Thomas J. Miller, Attorney General, David A. Ferree, Special Assistant Attorney General, and Mark Hunacek, Assistant Attorney General, for appellant.

John W. Holmes of Holmes & Holmes, Waterloo, for appellees.

Considered by Sackett, C.J., and Huitink and Hecht, JJ.

PER CURIAM

AFFIRMED. *See* Iowa R. App. P. 6.24.

RECEIVED

IOWA DEPARTMENT OF TRANSPORTATION
800 Lincoln Way
Ames, Iov

APR 0 5 2001

Post-it® Fax Note 7671	Date 4/5/01	# of pages ▶ 1
To Steve Westvold	From Mark Hunacek	
Co./Dept.	Co.	
Phone #	Phone #	
Fax # 1891	Fax #	

IMMACULATE CONCEPTION CORP.
AND DON BOSCO HIGH SCHOOL

Appellant,

v.

IOWA DEPARTMENT OF TRANSPORTATION,
OFFICE OF RIGHT OF WAY,

Respondent.

RULING ON APPEAL

STATEMENT OF CASE

The appellant filed an appeal of the administrative law judge's proposed decision entered on February 5, 2001. The proposed decision upheld the respondent's determination that the appellant's sign is in violation of Iowa Code section 306C.11.

FINDINGS OF FACT

The ALJ's findings of facts are adopted and set out in this ruling as if fully set out.

CONCLUSIONS OF LAW

The ALJ's conclusions of law are found correct and are adopted in full in this ruling.

ORDER

The decision of the administrative law judge is supported by the record and is affirmed.

DATED THIS 5th DAY OF April, 2001.

Carol Houge
CAROL HOUGE
REVIEWING OFFICER

PROOF OF SERVICE
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause and attorney(s) of record by depositing a copy in the U.S. Mail, postage prepaid, to each at their respective addresses on 4-5 2001

cc: Mark Hunacek
Assistant Attorney General
General Counsel Division
Iowa Department of Transportation
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Ames, IA 50010

John Holmes
Attorney at Law
Suite 612, 531 Commercial St.
Waterloo, IA 50701

John Priester
Administrative Law Judge
Dept. of Inspections & Appeals
00DOTRW-2

Steven Westvold
Office of Traffic & Safety
Iowa Dept. of Transportation
Ames, IA 50010

APR - 5 2001

This decision exhausts all available administrative remedies and is the final agency action for the purposes of judicial review.

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IOWA DEPARTMENT OF TRANSPORTATION
800 Lincoln Way
Ames, Iowa 50010

IMMACULATE CONCEPTION CORP.
AND DON BOSCO HIGH SCHOOL

Appellant,

v.

IOWA DEPARTMENT OF TRANSPORTATION,
OFFICE OF RIGHT OF WAY,

NOTICE

Respondent.

The appellant's appeal of the administrative law judge's decision entered on February 5, 2001, in the above captioned action shall come on for review on the 30th day of March, 2001.

The review shall be conducted under the provisions of Iowa Admin. Code r. 761-13.7, which limits the review to the record made before the administrative law judge. The record made before the administrative law judge includes the tape recorded record made of the hearing, Exhibits 1 through 15 entered by the appellant, and the post hearing briefs submitted by the parties. No additional evidence or testimony shall be considered.

DATED THIS 21st DAY OF March, 2001.

Carol Houge
CAROL HOUGE
REVIEWING OFFICER

cc: Mark Hunacek
Assistant Attorney General
General Counsel Division
Iowa Department of Transportation
800 Lincoln Way
Ames, IA 50010

John Holmes
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Waterloo, IA 50701

Steven Westvold
Office of Traffic and Safety
Iowa Department of Transportation
800 Lincoln Way
Ames, IA 50010

PROOF OF SERVICE
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause and attorney(s) of record by depositing a copy in the U.S. Mail, postage prepaid, to each at their respective addresses on 3-21 2001
C. Houge

377

IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
DIVISION OF APPEALS
LUCAS STATE OFFICE BUILDING
DES MOINES, IA 50319

IMMACULATE CONCEPTION CORP. AND DON BOSCO HIGH SCHOOL, Appellants, v. IOWA DEPARTMENT OF TRANSPORTATION, OFFICE OF RIGHT OF WAY, Respondent.	DOCKET NO. 00DOTRW-2 **DEPARTMENT OF TRANSPORTATION'S RESPONSE TO ADMINISTRATIVE APPEAL**

In response to the Administrative Appeal filed by appellants, the respondent DOT states:

1. DOT agrees with the factual summary of the case set out in the first numbered paragraph of the Administrative Appeal.

2. DOT filed a post-hearing brief shortly after the contested case administrative hearing in this matter, and now incorporates by reference the argument made in that brief.

3. Appellants' arguments in their Administrative Appeal are based to some extent on a document that they have attached to their appeal. This document was not introduced in evidence at the contested case hearing, and should therefore not be considered by this tribunal in ruling on the appeal. If considered, nothing in that document supports reversal of ALJ Priester's decision. Even if it is true that "scientific verification...has been [hard] to obtain," that hardly means there is anything

constitutionally infirm about the statutory scheme which requires removal of appellants' signs. A legislature is not required to base statutes on scientifically verifiable facts; indeed, the wisdom of many statutes is often the subject of considerable controversy and debate. The rational relationship between highway distractions and highway accidents is self-evident, and was in fact testified to at the administrative hearing by appellants' own witness Leo Becker. Asked if the signs could be read, Becker stated that it depended on "[h]ow fast you are going and if you want to have an accident or not by looking at the signs instead of at the road." Tr. at 57.

4. Appellants' statement that if "the motorist has his eyes on the road the fact that the signs exist at all barely registers in his peripheral vision," even if true, it might well describe many billboards along, and parallel to, highways. Acceptance of this argument as grounds for ignoring the statutory mandate would effectively gut the provisions of state and federal beautification law.

5. This case hinges on the factual finding made by ALJ Priester that the signs in question were visible from the primary highway. This factual finding is amply supported by the testimony of Steve Westvold, who personally visited the scene and attested to the visibility of the signs. The distance from the signs to the highway is not much greater than the distance from the signs to the bleachers, and, as appellants themselves admit, the signs are designed to be observed from the bleachers.

6. For the foregoing reasons, the proposed decision of ALJ Priester should be affirmed in its entirety.

IOWA DEPARTMENT OF TRANSPORTATION

THOMAS J. MILLER
Attorney General of Iowa

DAVID A. FERREE
Special Assistant Attorney General

MARK HUNACEK (ST0100012)
Assistant Attorney General
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Steve Westvold
Iowa Department of Transportation
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Administrative Law Judge John M. Priester
Lucas State Office Building
Des Moines, IA 50309

PROOF OF SERVICE
THE UNDERSIGNED CERTIFIES THAT THE FOREGOING INSTRUMENT WAS SERVED UPON ALL PARTIES TO THE ABOVE CAUSE TO EACH OF THE ATTORNEYS OF RECORD HEREIN AT THEIR RESPECTIVE ADDRESSES DISCLOSED ON THE PLEADINGS, ON 2/21/01
BY: ☒ U.S. MAIL ☐ FAX
☐ HAND DELIVERED ☐ UPS
☐ FEDERAL EXPRESS ☐ OTHER
SIGNATURE Peggy L Ricker

345

IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
DIVISION OF APPEALS
LUCAS STATE OFFICE BUILDING
DES MOINES, IA 50319

IMMACULATE CONCEPTION CORP. AND DON BOSCO HIGH SCHOOL,	)	
Appellants,	)	Docket No. 00DOTRW-2
v.	)	
IOWA DEPARTMENT OF TRANSPORTATION OFFICE OF RIGHT OF WAY,	)	**ADMINISTRATIVE APPEAL**
Respondent.	)	

Appellants Immaculate Conception Corp. and Don Bosco High School (hereinafter "Don Bosco"), by and through undersigned counsel, hereby administratively appeal from the proposed decision, dated February 6, 2001, of Administrative Law Judge John M. Priester. In support and further explanation, Don Bosco states:

1. This case involves 4 x 8 - foot signs attached to the outfield fences at Don Bosco's baseball and softball diamonds in Gilbertville, Iowa. These fences happen to be located within the 660-foot "adjacent area" along Highway 297. The signs include the names of local businesses, which after being solicited by the booster club, agreed to donate money. The money generated by this fundraising activity is used to help pay for uniforms and equipment for the school's athletic teams.

2. The signs in question are intended by the boosters to be viewed by, and to "advertise" to, the spectators seated in the bleachers while attending ball games. Clearly, the idea is that the spectators (mostly relatives and friends of the players) will appreciate the support of the local businesses named on the signs and patronize their establishments.

The student athletes and the businesses involved all benefit from this arrangement. That the booster's signs can be seen from the highway at all is merely incidental.

3. The issue in this case centers on the meaning of the word "visible" in Iowa Code Sections 306C.10(2) and 306C.10(21), as applied to the particular facts and circumstances in this instance. As demonstrated by the testimony and videotape evidence offered by Appellant at the contested case hearing in this matter, and as fully discussed in its post-trial brief (incorporated herein by this reference), a motorist driving past the signs at the posted speed limit is not able to discern, read and comprehend the individual messages on the signs. If the motorist has his eyes on the road the fact that the signs exist at all barely registers in his peripheral vision.

4. In spite of this, the DOT requested that the signs be removed because, in its opinion, they are in violation of Chapter 306C. ALJ Priester's ruling in this matter essentially adopts the DOT's position and finds that simply because it is possible that a passing motorist might notice that the signs exist, even without being able to read and understand the message(s), the signs are, for purposes of enforcing Chapter 306C, visible.

5. Don Bosco contends in this appeal that the position of the DOT and of ALJ Priester is not a reasonable interpretation of the statutory language. The negative impact upon the student athletes at Don Bosco being supported by the booster signs is grossly disproportionate to whatever traffic safety or aesthetic considerations the DOT claims justifies regulating these particular, barely noticeable from the traveled portion of the roadway, signs. Zealously and literally enforcing 306C in this instance is unreasonable, arbitrary, capricious, and an abuse of discretion.

6. The proponents of federal and state regulations designed to eliminate signs along roadways have long justified such measures in large part by claiming that the

regulations are related to the governmental interest in traffic safety. However, as noted in a 1996 report by Scenic America (copy attached and made a part hereof), despite "several attempts to verify empirically that billboards and other roadside advertising signs are detrimental to traffic safety by their very nature...scientific verification for this has been [hard] to obtain." Since 1948, numerous field studies analyzing actual accident data and laboratory studies using controlled conditions to simulate the driving experience have been performed, but none has conclusively demonstrated any correlation between signs and accident prevalence. Without any conclusive, hard, scientific evidence that roadside signs generally—and these booster signs in particular—have any negative impact upon traffic safety, to say that the state has a legitimate interest in regulating such signs in the name of safety is a contrived argument. To say that these particular booster signs should be regulated in the name of aesthetics is likewise a contrived argument. The videotape presented by Appellant at the hearing clearly shows that they are not readily visible when driving by the ball fields at the posted speed limit.

7. Don Bosco challenges the constitutionality of the DOT's action in applying Chapter 306C to require removal of these booster signs despite the fact that there is absolutely no evidence that such enforcement advances the state's asserted interest in traffic safety or aesthetics. Additionally, there are equal protection issues in that political and special event signs are permissible under the statute, but off-premises commercial signs are disallowed. This makes 306C.11 more extensive than is necessary to serve the asserted state interests.

WHEREFORE, Don Bosco requests that the reviewing officer, in exercising de novo review, should reverse the decision of the DOT and ALJ Priester, and allow the booster signs to remain in place.

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DATED: February 20, 2001.

Respectfully submitted,

John W. Holmes

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ATTORNEY FOR APPELLANT

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Administrative Law Judge John M. Priester
Lucas State Office Building
Des Moines, IA 50309

Carol Houge
Iowa Department of Transportation
800 Lincoln Way
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Orig. to: Steven Westvold
Office of Traffic and Safety
Iowa Department of Transportation
800 Lincoln Way
Ames, IA 50010 (by Stipulation)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed in the pleadings, on FEBRUARY 20, 2001,

By
- ☒ U.S. Mail
- ☐ Hand Delivered
- ☐ Federal Express
- ☐ FAX
- ☐ Overnight Courier
- ☐ Other

Signature John W Holmes

340

IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
DIVISION OF ADMINISTRATIVE HEARINGS
LUCAS STATE OFFICE BUILDING
DES MOINES, IOWA 50319

IMMACULATE CONCEPTION CORP.
AND DON BOSCO HIGH SCHOOL,

Appellants DOCKET NO. 00DOTRW-2

v.

IOWA DEPARTMENT OF TRANSPORTATION **DECISION**
OFFICE OF RIGHT OF WAY,

Respondent

STATEMENT OF THE CASE

This matter came on for hearing before Administrative Law Judge John M. Priester pursuant to an appeal by the Appellants from a decision of the Department of Transportation's notice to the Appellant that the signs erected on the high school's baseball and softball home run fences were inappropriate. The hearing was held on December 14, 2000. The Appellants participated in the hearing with Leo Becker, a booster member from Don Bosco High School, and Attorney John W. Holmes. The Respondent was represented by Assistant Attorney General Mark Hunacek and called as a witness Steven Westvold of the Iowa Department of Transportation Office of Right of Way.

The record was held open for the submission of post-hearing briefs. The record was closed on January 29, 2001, after all of the briefs were received.

The following exhibits were admitted into the record without objection:

Exhibits 1-4: Photographs taken in Gilbertville, Iowa;
Exhibits 5-9: Photographs taken in Lamont, Iowa;
Exhibits 10, 11, 12 & 14: Photographs taken in Elkader, Iowa;
Exhibit 13: Map drawn of the area;
Exhibit 15: Videotape.

ISSUE

The Appellants raised two issues on appeal: whether the signs in question are visible from Highway 297 and whether the Iowa regulations and laws are unconstitutional.

BURDEN OF PROOF

The Appellants are challenging the Respondent's action in serving notice that the signs erected are in violation of Iowa law. In an administrative action, where the Appellant is challenging an agency determination, the burden of proof is upon the Appellant to show the agency's actions were unreasonable, arbitrary or capricious or characterized by an abuse of discretion. Empire Cable v. Dept. Of Revenue & Finance, 507 N.W.2d 705, 707 (Iowa App. 1993); Busing v. Iowa Dept. Of Transp, MVD, 455 N.W.2d 921, 922 (Iowa 1990).

The Iowa Supreme Court has held that a court reviewing the decision of an administrative agency may reverse, modify, or grant other appropriate relief only if the agency action is affected by error of law, is unsupported by substantial evidence in the record, or is characterized by an abuse of discretion. Burns v. Board of Nursing, 495 N.W.2d 698 (Iowa 1993).

FINDINGS OF FACT

The facts in this matter are generally not in dispute. The Appellants have a baseball and softball diamond in Gilbertville, Iowa. As a fundraiser for the booster club local businesses are solicited to have their names put on four feet by eight foot signs that are attached to the home run fence. The money raised by this endeavor goes towards paying for team uniforms and the like. There are 37 signs located on these two ball diamonds.

The signs can be seen from the highway. The signs are only four feet by eight feet and have some larger print and some smaller print. But they can be seen and read from the highway.

The Appellants presented evidence in the form of a videotape showing that when you drive by the ball fields at the posted speed limit of 35 miles per hour, the signs are not visible.

The ball fields are located just south of Highway 297. Highway 297 is designated a primary state highway. The signs are located within the adjacent area of the highway. The adjacent area is the area within 660 feet of the highway right-of-way measured on a line perpendicular to the centerline of the highway.

The Respondent sent notice on January 31, 2000, that the sign violated Iowa Code Chapter 306C and must be removed. The Appellant appealed this notice.

CONCLUSIONS OF LAW

The Federal Government passed legislation, the Bonus Act, to encourage the states to regulate outdoor advertising. See 23 U.S. § 131, 23 C.F.R. § 750.713. The federal legislation states:

> It is a national policy that the erection and maintenance of outdoor advertising signs, displays, or devices within 660 feet of the edge of the right-of-way and visible from the main-traveled way of all portions of the Interstate System constructed upon any part of the right-of-way, the entire width of which is acquired subsequently to July 1, 1956, should be regulated, consistent with national standards to be prepared and promulgated by the Secretary of Transportation.

23 C.F.R. § 750.101(a)(2).

The federal regulations also state:

> The provisions of this subpart are applicable to all areas adjacent to the Federal-aid Interstate and Primary Systems, including toll sections thereof, except that within urban areas, these provisions apply only within 660 feet of the nearest edge of the right-of-way. These provisions apply regardless of whether Federal funds participated in the costs of such highways. The provisions of this subpart do not apply to the Federal-aid Secondary or Urban Highway System

23 C.F.R. § 750.702

The Iowa legislature passed laws in conformance with the Bonus Act. The Iowa Code provides that "an advertising device shall not be erected or maintained within any adjacent area, or on the right-of-way of any primary highway." Iowa Code § 306C.11. This code section then lists the exceptions to this rule. The exceptions include signs such as:

1) advertising the sale or lease of property upon which they are located;
2) advertising activities conducted on the property on which they are located;

3) in the adjacent area in commercial/industrial zones;
4) official and directional signs pertaining to items such as natural wonders, scenic and historic attractions, recreational attractions and municipal recognition signs;
5) erected by the Department of Transportation giving information of interest to the traveling public;

Iowa Code § 306C.11(1)-(5).

The Iowa Code defines "adjacent area" as "an area which is contiguous to and within six hundred sixty feet of the nearest edge of the right of way of any interstate, freeway primary, or primary highway." 306C.10(1). An "advertising device" is defined as "any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or any other device designed, intended, or used to advertise or give information on in the nature of advertising, and having the capacity of being visible from the traveled portion of any interstate or primary highway." Iowa Code § 306C.10(2). A "primary highway" is "the entire primary system as officially designated, or as may hereafter be so designated, by the department." Iowa Code § 306C.10(14). Finally, "visible" is defined as "capable of being read or comprehended without visual aid or by a person of normal visual acuity." Iowa Code § 306C.10(21).

The Appellants' challenge to the agency action is that the Respondent's action is improper because the signs are not visible from Highway 297. The Appellant contends that the signs are not visible from the road when a vehicle is traveling at the posted speed limit, when the driver's eyes are fixed on the road and the perpendicular and parallel signs are not visible when traveling at the posted speed limit.

It is undisputed that the signs erected on the two ball fields are within the adjacent area along Highway 297 in Gilbertville, Iowa. It is also undisputed that the signs constitute an "advertising device" under Iowa Code section 306C.10. The only question to be determined is whether the signs are "visible" from the traveled portion of Highway 297.

The Appellants' position is that these signs are not capable of being read or comprehended when passing by the ball fields at the posted speed limit. Additionally, many of the signs are placed parallel and perpendicular to the highway so it is very difficult for a passing motorist to see the signs and understand that they are advertisements. The Appellants urge that the signs were placed on the home run fences solely for the viewing of the spectators at

the ball games and not as advertisements to be read by passing motorists.

Iowa law, as stated previously, defines visible as "capable of being read or comprehended without visual aid or by a person of normal visual acuity." Iowa Code § 306C.10(21). Comprehend is defined in the dictionary as "to grasp mentally; understand or know." The American Heritage Dictionary, Second Edition, Houghton, Mifflin Company, Boston, 1985.

The question boils down to whether visible requires that the entire sign be able to be read and understood from the traveled portion of the road, or whether the sign just has to be comprehended, or understood, to be an advertisement.

The undersigned finds that the signs attached to the home run fences at the baseball and softball diamonds at the Don Bosco High School are able to be read or comprehended from the traveled portion of the highway. When viewing the signs from the highway a viewer is able to comprehend that the signs are advertising for local businesses. Not all of the words may be clearly read, but the viewer comprehends, or understands, that the signs are advertisements. Thus, the signs fall within the regulations of the Respondent Agency. The Appellants have failed to satisfy their burden of proof that the Agency's actions were unreasonable, arbitrary or capricious or characterized by an abuse of discretion.

The Appellants' argument that the question of whether the signs are visible or not should be determined by a vehicle traveling past the signs at the posted speed limit is rejected as unreasonable. Iowa law allows the Department of Transportation to regulate signs if they are visible "from the traveled portion of any interstate or primary highway." Iowa Code § 306C.10(2). There is nothing in this code section that would require that the sign be visible from the traveled portion of the highway while passing the sign at the posted speed limit. All that is required is that the signs be capable of being seen or comprehended from the roadway. These signs fall into that classification.

The Appellants' next issue raised was a constitutional challenge to the Respondent's action. The Appellants urge that the Constitution was violated in that there was no proof that Iowa Code section 306C.11 advances the State's interest in traffic safety and esthetics, unequal protection in that political and special events signs are permissible but off-premises commercial signs are disallowed, and because section 306C.11 is more extensive than

necessary to serve the asserted state interests of traffic safety and esthetics.

The undersigned does not have the authority to strike down a statute as unconstitutional. See, Salsbury Laboratories v. Iowa Department of Environmental Quality, 276 N.W.2d 830 (Iowa 1979). However, an administrative law judge may receive evidence on constitutional issues to preserve an appellant's record for judicial review. See Chauffeurs, Teamsters and Helpers Local No. 238 v. Iowa Civil Rights Commission, 394 N.W.2d 375 (Iowa 1986). Thus, the Appellant's constitutional challenges are noted and preserved for appeal purposes, but they will not be ruled upon.

DECISION

The Respondent's determination that the Appellant's sign is in violation of Iowa Code chapter 306C.11 is correct and hereby AFFIRMED.

DATED THIS 5th DAY OF FEBRUARY, 2001.

JOHN M. PRIESTER
Administrative Law Judge

CC: JOHN W HOLMES, ATTORNEY
HOLMES & HOLMES
631 COMMERCIAL STREET SUITE 612
WATERLOO IA 50701

MARK HUNACEK, DOT GENERAL COUNSEL

STEVEN WESTVOLD
DOT RIGHT OF WAY OFFICE

TERRI EMERY, DIA

BETTY MAXWELL, DIA

This decision shall be final, unless within twenty (20) days from the date of this Order, you or any interested party appeal to the Director of the Right of Way Office, Iowa Department of Transportation, Park Fair Mall, 100 Euclid Avenue, P.O. Box 9204, Des Moines, Iowa 50306-9204, clearly stating the grounds upon which such appeal is based. See Iowa Administrative Code 761-13.7.

Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Lucas State Office Building
Des Moines, Iowa 50319

IMMACULATE CONCEPTION CORPORATION, and DON BOSCO HIGH SCHOOL, Appellants,	)	DOCKET NO. DOTRW-2
vs.	)	**Appellant's Post-Trial Brief**
IOWA DEPARTMENT OF TRANSPORTATION, OFFICE OF RIGHT OF WAY, Appellee.	)	

ISSUES PRESENTED

I.

The first question presented is whether or not the statute should be construed to require that the phrase "having the capacity of being visible from the traveled portion of any ... primary highway" in the definition of "Advertising device" in section 306C.10(2), when read with the definition of "visible" given in section 306C.10(21), means from a vehicle traveling at the posted speed limit.

II.

The second question presented, assuming that question I above is answered in the affirmative, is whether or not the statute should be construed to require that the phrase "having

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the capacity of being visible from the traveled portion of any ... primary highway" in the definition of "Advertising device" in section 306C.10(2), when read with the definition of "visible" given in section 306C.10(21), means while your (the driver's) eyes are on the road.

III.

The third question presented is whether or not the Appellee DOT carried its burden to show the signs on the perpendicular portions of the two outfield fences were "visible" within the meaning of Chapter 306C, from the traveled portion of Highway 297, while moving at the speed limit.

IV.

The fourth question presented is whether or not the Appellee DOT carried its burden to show by a preponderance of the evidence that all the signs on the parallel portions of the two outfield fences were "visible" within the meaning of Chapter 306C, from the traveled portion of Highway 297, while moving at the speed limit. It is the position of the Appellants that the preponderance of the evidence shows that only the "Icon" style signs on the parallel fences are "visible" while traveling at the speed limit on the highway; and then *only* one-at-a-time provided that the driver takes his eyes off the road and specifically looks over and down at such an Icon-style sign; and that adjacent signs are not visible even in this limited case because there is not enough time to also get them in focus.

V.

There are also three constitutional law issues: (a) Whether 306C.11 is unconstitutional under Metromedia Inc.v. City of San Diego, 453 U.S. 490 (1981) because there was no proof that Section 306C.11 advances the State's interests in traffic safety and esthetics; (b) Whether 306C.11 is also unconstitutional under Metromedia Inc.v. City of San Diego, 453 U.S. 490

(1981), or under Article I, Section 7 of the Constitution of the State of Iowa, because it allows temporary political signs (306C.22) and special event signs (306C.23) while simultaneously disallowing off-premises commercial signs, except in industrial or commercial areas; and (c) Whether 306C.11 is unconstitutional under the fourth test of Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980), because it is more extensive than necessary to serve the asserted state interests of traffic safety and esthetics.

FACTS

The Appellants presented a video-tape, Exhibit 15. The tape shows that none of the 37 signs at issue can be considered to be "visible" if the driver is keeping his eyes on the road.

Mr. Leo Becker, a member of the booster club which puts up the signs, testified that the signs are not visible when you drive by and your eyes are on the road. (Tr. P. 56-57).

Mr. Becker testified that none of the 37 signs are in full view. (Tr. P. 60). He also testified these signs are not readily seen while one is driving past the ball fields. (Id.). He testified that if you are going at the regular speed limit you are going too fast to read these signs. (Tr. P. 63). On cross examination he said the Icon style signs with large lettering could be read if you look at just one. (Tr. P. 58).

In contrast, Mr. Steven Westvold did not drive by the ballfields until the day prior to the hearing. (Tr. P. 20). He could not testify on cross examination about the location of particular signs. (Tr. P. 22-23). He could not testify to being able to read specific signs. (Tr. P. 24, 26). He had not even considered the signs that are perpendicular to the right of way (Tr. P. 51). He did not measure the size of the lettering on any sign. (Tr. P. 25). It was undisputed that the agency's decision to notice the 37 signs in this case was made based on static pictures taken from about 5 feet in front of each sign, not from 400 feet away while moving at the speed limit

on Highway 297. (Tr. P. 20; 25).

The following is from pages 25 and 26 of the Transcript:

"Q. If it's a fact that the Backes and Schaefer Plastering sign is right next to the Elk Run Plaza sign ... is it your testimony that a person driving west on Highway 297 could read Backes and Schaefer Plastering Company and the phone number and then read Elk Run Truck Plaza, I-380 and Highway 20, Elk Run Heights, Junie's Restaurant and Blimpie's?" A. No, it is not. Q. It is not your testimony? A. No, it is my testimony that the signs are visible from the highway. That is the measure that we apply. It's not traveling at any speed. ... The question is is it visible. ... Not at any speed, not driving this way or that; is the sign visible, period."

Mr. Westvold, the day before trial, "sat on the other **side of the road** with my rotary amber beacon lights." (Tr. P. 25). The test he applied was a static or stationary test, not one while moving at the speed limit in the **traveled portion** of the road. (Id.).

ARGUMENT

Visible in 306C.10(2) and 306C.10(21) means discernible.

The test applies while moving at the speed limit.

Section 321.354 of the Code makes it unlawful to stop, park or leave standing a vehicle whether attended or not, upon "the main traveled part of a highway." It makes little sense to conclude that use of the words "traveled portion" in 306C.10(2) mean something other than "the main traveled part" as used in 321.354. Someone who stopped in the traveled portion to read a sign would be a hazard and violate 321.354 of the Code.

Outdoor Billboards subject to highway beautification are designed to be visible to the traveling public. The outfield fence booster signs in this case were intended to be seen, from the bleachers, by the fans who attend the games. (Tr. P. 66) . That they can be seen at all from the

highway is merely incidental.

A dictionary definition of the word "visible" is "capable of being seen" according to the Merriam-Webster's Collegiate Dictionary at http://www.britannica.com. Indeed Section 306C.10(2), defining advertising device, uses the phrase "having the capacity of being visible". It is submitted that there is not any difference between "capable of being seen" and "having the capacity of being visible." If 306C.10(21) had been omitted, the DOT's position would make more sense.

It is submitted, however, that 306C.10(21), which defines "visible", goes beyond merely being visible as in capable of being seen. Section 306C.10(21) says that "visible" means capable of being read or comprehended. The impression received from the advertising must be more than simply seeing the sign or the letters.

It is submitted that the statutory definition in 306C.10(21) is akin to the word "discern." Because section 306C.10(21) states "capable of being read or comprehended", it is clear the legislature meant mentally perceptible or distinguishable, capable of being "discerned" by the understanding and not merely the senses. Cf. Colonial Trust Company v. Elmer C. Breuer, Inc., 363 Pa. 101, 69 A.2d 126 (1949) ("visible" means perceivable by the eye whereas "discernible" means mentally perceptible or distinguishable); see Carter v. South Carolina Department of Highways and Public Transportation, 279 S.C. 332, 306 S.E.2d 614 (1983).

If the Iowa legislature only meant capable of being seen by the eye, the legislature did not need to specially require "read or comprehended" as it did. The legislative intent is to require that the advertising be capable of being read, a mental activity. Thus, although "visible" is the word used in 306C.10(2) to define advertising, the test which should be applied is one of mental perception, as in reading and comprehending; not simply just able to be seen.

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A car that approaches from the distance of a mile on a level, straight, two-lane highway is "visible." But telling whether or not it is a Ford Crown Victoria is not possible until the car is much closer. It is only in about the last five or six hundred feet that a highway patrol cruiser can be discerned from a family sedan. If the cruiser does not have extra flashing lights on top, it is more difficult.

It is respectfully submitted that the Appellee DOT applied a test which is not consistent with 306C.10(2) as specially defined in 306C.10(21). These 37 signs are virtually impossible to discern while driving by on Highway 297 at the speed limit. Only the Icon-like signs can be discerned; and there was not any testimony by Mr. Westvold about which of those signs were on the parallel fences and capable of being read.

Moreover, such Icon like signs can only be read one a time when the driver looks over and down at that particular sign. (Tr. P. 58). No evidence was presented to this court to prove which particular Icon-like signs are on the parallel fences and can be read from Highway 297 while traveling at the speed limit. To adopt the position of the Appellee DOT is to render section 306C.10(21) superfluous. Miller v. Westfield Insurance Co., 606 N.W.2d 301, 305 (Iowa 2000). Statutory interpretation is a matter of law. This court should first construe the meaning of "visible" in 306C.10(21); and then decide if it also requires that the driver keep his eyes on the road. Hornby v. State, 559 N.W.2d 23, 25 (Iowa 1997).

None of the ball field signs in this case can be discerned if the driver keeps his eyes on the road. Not even the so-called icon like signs. It is only incidental that such Icon like signs can be read from the road while traveling. Only for a brief instant. Not something that truly can be read. A fair construction of 306C.10(21) in this case is that no sign is discernible by a driver traveling at the speed limit who has his eyes on the road.

These 37 signs are not intrusive. They were not designed to be discerned by the traveling public. They were meant for fans at the ball game who are sitting in the stands. The 37 signs are only a small flash of color in a driver's peripheral vision. This is shown by the video tape, Exhibit 15. It is respectfully submitted that the preponderance of the evidence shows they are not visible as defined in 306C.10(21) when moving in the traveled portion of the highway. This is a case arising because the DOT is giving the word visible a dictionary definition and ignoring the meaning of 306C.10(21). This is also a case where the DOT ignored the problem presented by the signs on the fences perpendicular to the right of way. There is no evidence at all in the record that these signs can be discerned at all. Because the Department failed to present any particular evidence about which signs can actually be read and comprehended (discerned) while traveling on Highway 297, the department's action against the Appellants should be dismissed.

Constitutional Issues.

(The three constitutional issues will not be argued here based on several Iowa cases which say that an ALJ cannot find a statute unconstitutional. E.g. Salsbury Laboratories v. Iowa Department of Environmental Quality, 276 N.W.2d 830 (Iowa 1979). However, Appellants are not waiving such issues, have stated them in number "V" above, and intend to present them to the District Court if that become necessary E.g. McCracken v. Dept. of Human Services, 595 N.W.2d 779, 785 (Iowa 1999); Chauffers, Teamsters and Helpers Local No. 238 v. Iowa Civil Rights Commission, 394 N.W. 2d 375 (Iowa 1986)).

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause by depositing a copy thereof in the U. S. Mail, postage prepaid, in envelope addressed to each of the attorneys of record herein at their respective addresses disclosed on the pleadings, on January 24, 2001

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IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
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IMMACULATE CONCEPTION CORPORATION AND DON BOSCO HIGH SCHOOL, Appellant, v. IOWA DEPARTMENT OF TRANSPORTATION, OFFICE OF RIGHT OF WAY, Appellee.	*	DOCKET NO. DOTRW-2 **RESPONDENT'S BRIEF**

NATURE OF THE CASE

The Iowa Department of Transportation (DOT) has requested the removal of thirty-seven signs located on fences on softball and baseball fields located at Don Bosco High School in Gilbertville, Iowa. DOT's actions are based on Iowa Code § 306C.11.

STATUTORY OVERVIEW

Iowa Code § 306C.11 states that, with exceptions not relevant here, "an advertising device shall not be erected or maintained within any adjacent area, or on the right of way of any primary highway." The term "advertising device" has a statutory definition:

> "Advertising device" includes any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or any other device designed, intended, or used to advertise or give information in the nature of advertising, and having the capacity of being visible from the

traveled portion of any interstate or primary highway.

Iowa Code § 306C.10(2). The term "visible" is also defined:

> "Visible" means capable of being read or comprehended without visual aid by a person of normal visual acuity.

Iowa Code § 306C.10(21).

There are several points that should be made about these statutory provisions. First, the use of the phrase "read or comprehended" clearly indicates that a billboard may be "comprehended," and therefore "visible," even if not every word on it can be "read." If comprehending a sign entailed reading it, then the phrase "or comprehended" in section 306C.10(21) would be superfluous, and it is a standard principle of statutory construction that a statute should not be interpreted so as to render any portion of it superfluous. *See, e.g., Iowa Auto Dealers Ass'n v. Iowa Dep't of Revenue*, 301 N.W.2d 760, 765 (Iowa 1981). Moreover, if "visibility" required reading all the words on an advertising device, then a person wishing to put up a sign could circumvent the statutory requirement by simply adding, at the bottom of the sign, some language in small enough letters that it could not possibly be read by anyone any distance away.

Second, the statute does not require that the advertising devices be visible from a moving car, and does not require that they be visible by a person staring straight ahead. All that the statute requires is that the devices have the capacity of being visible from a primary highway. Consequently, any argument that the signs in question are allowable because they are only fleetingly visible by a person in a moving car are completely misplaced, because they seek to add a requirement into the statute that the

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legislature did not see fit to put there. Indeed, virtually *any* billboard is only visible for a few seconds by a person traveling at high speed in an automobile; writing such a requirement into the statute would effectively nullify legislative intent, which is to minimize outdoor advertising along interstates.

Third, the statute does not require that the signs actually be visible from the highway, only that they have "the capacity of being visible." Again, this language cannot be seen as superfluous. To give effect to this language, it must be held that the signs are prohibited by the statute even if they are not always visible from all angles.

CONSTITUTIONAL QUESTIONS

At the outset of the hearing, petitioner made reference to constitutional claims, presumably under the First Amendment, while simultaneously acknowledging that those claims could probably not be addressed at the administrative level. Tr. at 13. While agreeing with this acknowledgment, DOT will, for the sake of completeness, point out that similar First Amendment claims have been rejected elsewhere. *See Dep't of Transp. v. Shiflett*, 251 Ga. 873, 310 S.E.2d 509 (1984); *Markham Advertising Co. v. State*, 73 Wash.2d 405, 439 P.2d 248 (1968).

FACTS

It is undisputed that thirty-seven signs are on the fences of a baseball field and softball field in Gilbertville, Iowa, just off of Highway 297, which is a primary highway. Tr., pp. 15-16. These signs advertise various businesses in the location or general vicinity of Gilbertville. Tr., p. 16. They signs are referred to as "booster signs" because a booster or sponsor of Don Bosco High School pays the high school to advertise their

product and support for the school thereby generating good will for the product or service advertised. Tr., p. 46. The intent is for the signs to be visible from the bleachers, at least to the extent that people sitting in the bleachers could identify the sponsor or booster. Tr., p. 66. According to the testimony of Leo Becker, a booster club member who was called as a witness by petitioners, the signs are approximately 385 to 405 feet away from the bleachers. Tr., p. 67. This is about 70 or 80 feet less than the distance from the signs to the highway. Tr., pp. 68-69.

Steven Westvold, the highway beautification manager for the Iowa Department of Transportation, personally inspected the signs at issue and verified that they were indeed visible from the primary highway. Tr., p. 16. Westvold's personal verification confirmed a similar conclusion that had previously been reached by a DOT agent, who had been there earlier. Tr., p. 20.

Petitioners' evidence (consisting essentially of the testimony of Leo Becker, and some photographs and video) does not compel -- indeed, does not justify -- a contrary result. Becker's testimony on direct examination actually supports the DOT's position, and also (presumably inadvertently) justifies the desire of the state of Iowa to prevent advertising signs from being visible from the highway:

> Q. If you are driving out of town and you take your eyes off the road and look over at the left and you try to pick out a sign, just one sign all by itself and read just one sign, can you read it?
>
> A. Maybe.
>
> Q. What's it depend on?
>
> A. The weather, for one thing.

Q. Assume it is clear weather.

A. How fast you were going and if you want to have an accident or not by looking at the signs instead of at the road.

Tr. at 57. Becker then went on to testify that the signs that "have the large lettering" could be read. *Id.* Becker's subsequent testimony that certain signs could not be read is largely irrelevant, because, as previously observed, the issue is not whether the signs could be completely read, but whether they have the capacity of being visible from the highway. Indeed, later in his testimony, Becker even acknowledged the visibility of the signs:

Q. The signs themselves would be visible from the highway if you were standing on the highway looking at them, isn't that correct?

A. If you were stopped.

Tr. at 61. It appears that Becker's testimony was largely predicated on the fact that the signs could not be completely read by a person in a traveling car:

Q. Sure. Right. That sign would be visible from the highway, isn't that correct?

A. Not readable.

Q. Why do you say that?

A. Because he wouldn't be able to read it. You're going to fast. If you are going at the regular speed limit, you are going to fast to read the signs.

Tr. at 62-63. Thus, the most that Becker's testimony establishes is that some of the signs could not be completely read from a moving vehicle; nothing in Becker's testimony establishes that the signs were not "visible" from the highway, when the term

"visible" is properly understood. Indeed, Becker's testimony affirmatively establishes that the signs had "the capacity of being visible."

The photographs and videotape offered by petitioner also do not prove their claim. The part of the video in which the camera was not aimed at the ballfields of course proves nothing, because, as previously noted, the issue is not whether a person staring straight ahead could see the signs, but whether the signs are visible *at all* from the primary highway. The portion of the video in which the camera is aimed at the ball fields does show the signs. If petitioner argues that the signs are difficult to read, it must be noted that (a) the evidence discloses nothing about the lens used in the video camera and the extent to which it makes objects look further away, and (b) as previously noted, it is not necessary to be able to read the signs; it suffices that they be visible.

CONCLUSION

Once it is determined as a factual matter that the advertising devices are visible from the highway (which, as previously noted, is a point which even petitioner's sole witness conceded) it follows immediately from section 306C.11 that they must be removed. The actions of the DOT seeking their removal must be affirmed.

IOWA DEPARTMENT OF TRANSPORTATION

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THE UNDERSIGNED CERTIFIES THAT THE FOREGOING INSTRUMENT WAS SERVED UPON ALL PARTIES TO THE ABOVE CAUSE TO EACH OF THE ATTORNEYS OF RECORD HEREIN AT THEIR RESPECTIVE ADDRESSES DISCLOSED IN THE PLEADINGS, ON 11/17/01
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