



U.S. Department
of Transportation

**Federal Highway
Administration**

Memorandum

Subject: **Legal Opinion on the Erection of Billboards on
the Right-of-Way of an Interstate Highway by a State**

Date: DEC 19 1996

From: **Chief Counsel**

Reply to
Attn. of: HCC-31

To: **Mr. Dennis Judycki (HST-1)
Mr. Thomas Ptak (HPD-1)**

You have asked us to review the Federal implications of a decision by the New Jersey Turnpike Authority to erect 12 double-sided billboards in the right-of-way of the New Jersey Turnpike on the portion of the turnpike north of Edison, New Jersey. The billboards would be leased to advertisers in the hopes of raising up to \$1.5 million for the Authority. The billboards would be placed in the Turnpike right-of-way in towns that would not oppose them. The New Jersey Turnpike is either signed as Interstate 95 and/or designated as part of the National Highway System, although there were few Federal funds used in its construction. The New Jersey Turnpike Authority is a public entity, operating separately from the New Jersey Department of Transportation. This memorandum will examine if the proposal to erect billboards in the Turnpike's right-of-way violates any Federal requirement or Federal Highway Administration (FHWA) policy. As will be shown below, the proposal appears to violate several Federal statutes and regulations. After discussing the laws dealing with advertising signs on the right-of-way and how the proposal would violate them, the memorandum will then address the legal consequences.

Signs on rights-of-way are generally governed by 23 U.S.C. §109(d) which provides that:

On any highway project in which Federal funds hereafter participate . . . the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings, and traffic signals installed or placed by any public authority or other agency, shall be subject to the approval of the State highway department with the concurrence of the Secretary, who is directed to concur only in such installations as will promote the safe and efficient utilization of the highways. (emphasis added)

The guidelines are made applicable to all public roads, regardless of Federal funding, under 23 U.S.C. § 402(a). The Federal Highway Administrator has been delegated the authority to make such approvals under 49 C.F.R. 1.48(b)(8). His decision as to which signs "promote the safe and efficient utilization of the highways" can only be overturned on the stringent "arbitrary or capricious" standard of the Administrative Procedure Act. See State of Nebraska, Department of Roads v. Tiemann, 510 F.2d 446 (8th Cir. 1975). Obviously, the phrase "such installations as will promote the safe and efficient utilization of the highways" can encompass many things. The

use of the adverb "only" in § 109(d), however, suggests that the section be read narrowly. Under a narrow reading, a sign must further the goal of safe and efficient use of the highway or it should not be approved. Agencies are accorded great deference in the interpretation they give to the statutes they are entrusted to enforce "unless that interpretation is inconsistent with a clearly expressed congressional intent." INS v. Cardoza-Fonesca, 480 U.S. 421, 454 (1987). As will be shown below, the congressional intent is clearly against allowing billboards upon the rights-of-way of public highways.

Pursuant to §§ 109(d) and 402(a), the FHWA promulgated the Manual on Uniform Traffic Control Devices (MUTCD) to provide national standards for traffic control devices on all highways open to the public. 23 C.F.R. § 655.603(a) provides:

National MUTCD. The MUTCD approved by the Federal Highway Administrator is the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel in accordance with 23 U.S.C. §§ 109(d) and 402(a).

The MUTCD does not have a formal definition of "sign." In the Introduction, the MUTCD does say that "[t]raffic control devices are all signs, signals, markings, and devices placed on, over, or adjacent to a street or highway by authority of a public body or official having jurisdiction to regulate, warn, or guide traffic." (MUTCD, 1988 ed., p. vii.) The MUTCD does not formally define "traffic control devices" but does give a statement as to their purpose:

... Traffic control devices are used to direct and assist vehicle operators in the guidance and navigation tasks required to traverse safely any facility open to public travel. Guide and information signs are solely for the purpose of traffic control and are not an advertising medium. (MUTCD, 1988 ed. Section 1A-1.)

The MUTCD divides traffic signs into three main categories: regulatory, warning, and guide. Regulatory signs "inform highway users of traffic laws or regulations and indicate the applicability of legal requirements that would not otherwise be apparent." (MUTCD, 1988 ed. Section 2B-1.) Warning signs are used "to warn traffic of existing or potentially hazardous conditions on or adjacent to a highway or street." (MUTCD, 1988 ed. Section 2C-1.) Guide signs, in general, are "essential to vehicle operators along streets and highways, to inform them of interesting routes, to direct them to cities, town, villages, or other important destinations, to identify nearby rivers and streams, parks, forests, and historical sites, and generally to give such information as will help them along their way in the most simple, direct manner possible." (MUTCD, 1988 ed. Section 2D-2.)

The MUTCD does permit limited advertising in two categories of guide signs: the "Motorist Service Signing" and "Tourist Oriented Directional Signs (TODS)." Motorist Service signs, more commonly known as "LOGO" signs, are large signs with smaller company logo signs upon them. Their purpose is to provide travelers with information about nearby essential motorist

services. The other permitted signs that can carry advertising are TODS; these are special signs in the interest of travelers and are limited to rural conventional roads. These two categories of commercial signs are permitted by the MUTCD because they are expressly provided for in Federal statute. See 23 U.S.C. §131(f) and (i).

Subsection (f) provides for the erection within the rights-of-way of informational signs which give "specific information in the interest of the traveling public." From the House Report on the HBA we learn what the Congress intended with the inclusion of subsection (f):

"This subsection (f) deals with the signs a motorist will see, in either direction, as he travels the Interstate System, to advise him of the kind of accommodations-motels, hotels, gasoline stations, and restaurants-that may be available at the next interchange. The committee felt strongly about the need for adequate information for motorists" H.R. Rep. No. 1084, 89th Cong., 1st Sess. (1965) *reprinted in 1965 U.S.C.C.A.N.* 3715.

Subsection (i) allows states to permit advertising pamphlets at safety rest areas. In addition, with FHWA approval, a state may establish "travel information systems within rights-of-way for the purpose of informing the public of places of interest within the state and providing such other information as a state may consider desirable." In keeping with the apparent intent of Congress, the FHWA regulations for roadside development, found at 23 C.F.R., part 752, essentially envision information systems at rest areas.

Neither of these categories of signs are advertising signs like the ones proposed in New Jersey. Signs erected solely as advertising signs do not fit any of the accepted categories of the MUTCD. They certainly do not regulate or warn motorists. Nor do they "give such information as will help them [motorists] along their way in the most simple, direct manner possible." The sole purpose of the signs proposed here is commercial advertising. They would not meet the tight size and content standards established for LOGO and TODS signs. They are not concerned with promoting "the safe and efficient utilization of the highways," which is the congressional mandate to the Secretary at 23 U.S.C. § 109. Advertising signs on the right-of-way therefore are not approved signs under the MUTCD.

Under 23 C.F.R. § 1.23(b), rights-of-way of public highways must be devoted "exclusively to public highway purposes" unless the Administrator of the FHWA gives his approval to the use of the right-of-way for any other use. To date, the Administrator has not given his approval to the placement of any billboards in the right-of-way of a public highway.

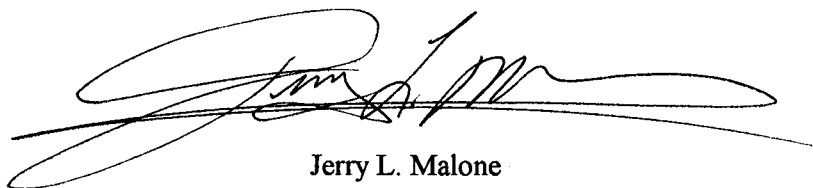
Indeed, a decision to permit advertising signs would seem to be contrary to the policies of the Highway Beautification Act (HBA), 23 U.S.C. § 131. The HBA generally bans signs, with some exceptions (not discussed in this memorandum), along the rights-of-way of the Interstate, Federal-

aid primary highway systems (which includes the National Highway System). The New Jersey Turnpike is an Interstate highway and also a part of the National Highway System, so the HBA is applicable to it. 23 U.S.C. § 131(t).

While the bulk of the HBA focusses on signs adjacent to, rather than on the right-of-way, it seems clear to us that the Congress never intended to broadly allow commercial signs on the right-of-way. Under the maxim of statutory construction, "*expressio unius est exclusio alterius*" ["the expression of one thing is the exclusion of another"], the fact that the HBA allows only these exceptions means that other forms of advertising on the right-of-way are forbidden. See Sutherland Statutory Construction § 47.23 (5th Edition). It would be ludicrous to suggest that Congress, while mandating the States to control advertising along thousands of miles of Interstate and Federal-aid primary highways, would also allow the States to erect billboards on the rights-of-way of those same thousands of miles of highway.

We recognize that the signs at issue here would be erected under the auspices of the New Jersey Turnpike, not the New Jersey Department of Transportation. Nevertheless, any violations of Federal requirement could be imposed on funds generally flowing from FHWA to the State. Under 23 U.S.C. § 302, the FHWA deals with NJDOT and not directly with a turnpike authority. The Administrator's authority to sanction a state for failure to comply with MUTCD standards for informational signs was the subject of the Nebraska v. Tiemann case, cited above. The State had been testing a format for motorist information signs which FHWA had abandoned. The failure of the State to remove these commercial information signs resulted in FHWA penalizing Nebraska. The case centered on the authority of the FHWA to impose a penalty for noncompliance with § 109(d), and the court upheld the FHWA's sanction imposed under authority of 23 C.F.R. § 1.36.

In conclusion, we believe that FHWA clearly has the authority to withhold funds from a State that allows the erection of billboards on rights-of-way, an act which constitutes a failure to comply with Title 23 requirements. Further, we believe that such an action by FHWA would be consistent with established policies for administering the MUTCD and would further the statutory policies of the HBA.

A handwritten signature in black ink, appearing to read "Jerry L. Malone", is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke at the end.

Jerry L. Malone