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by and through, Department of Transportation

BEFORE THE STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Accusation by the STATE OF CALIFORNIA, DEPARTMENT OF TRANSPORTATION, Complainant, v. NANO MALDANADO., Respondents.	OAH Case No. n2006100521 NOTICE OF ADOPTION OF PROPOSED DECISION

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NOTICE IS HEREBY GIVEN that the Proposed Decision issued by the Office of Administratve Hearings. ("OAH"), dated March 2, 2007, attached hereto as Exhibit A, is adopted by the California Department of Transportation ("Caltrans"). This adoption is effective on the date of this Notice.

DATED: April 11 2007

BRUCE BEHRENS, Chief Counsel
THOMAS C. FELLENZ, Deputy Chief Counsel
RONALD W. BEALS, Assistant Chief Counsel
O. J. SOLANDER, Deputy Attorney

By_____
BECKIE HALEY
Senior Legal Analyst

I CONCUR:

DATE: April _____, 2007

By_____
KEITH ROBINSON, Chief
Division of Landscape Architecture

PROOF OF SERVICE
(C.C.P. §§ 1013A and 2015)

I, the undersigned, say:

I am, and was at all times herein mentioned, a citizen of the United States and employed in the County of Sacramento, State of California, over the age of 18 years and not a party to the within action or proceeding; that my business address is 1120 N Street, Sacramento, California; that on the date reflected below, I enclosed a true copy of the documents described as follows:

NOTICE OF ADOPTION OF PROPOSED DECISION

in a separate envelope for each of the persons named below, addressed as set forth immediately below the respective names, as follows:

Law Office of Fogarty & Zell
Attn: Dennis Zell
198 Taylor Boulevard
Millbrae, CA 94030

The following is the procedure by which service of this document was effected:

_____ U.S. Postal Service (by placing such envelope(s), with postage thereon fully prepaid as first-class mail, and depositing the same on the aforesaid date in a mailing facility regularly maintained by the United States Postal Service for the mailing of letters at Sacramento, California)

____ Golden State Overnight delivery deposited at 1120 N Street, Sacramento, California, 95812

_____ FAX

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April _____, 2007, at Sacramento, California.

_____
CAROL MATSON, Declarant

EXHIBIT A

BEFORE THE
DEPARTMENT OF TRANSPORTATION
STATE OF CALIFORNIA

In the Matter of: NANO MALDONADO, Respondent.	OAH No. N2006100521

PROPOSED DECISION

Administrative Law Judge Nancy L. Rasmussen, Office of Administrative Hearings, State of California, heard this matter on February 2, 2007, in Oakland, California.

Stephen A. Silver, Esq., represented the California Department of Transportation.

Dennis Zell, Esq., Fogarty & Zell, LLP, represented respondent Nano Maldonado, who was present.

The matter was submitted for decision on February 2, 2007.

FACTUAL FINDINGS

Background

1. The California Department of Transportation is the agency responsible for the enforcement of the Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.). If a freeway is classified as landscaped, the Act prohibits advertising displays on adjacent property, except in limited circumstances. (Bus. & Prof. Code, §§ 5440-5443.5.) A person may request the Chief Landscape Architect to declassify a section of freeway classified as landscaped, and, following an inspection by a Landscape Architect, the Chief Landscape Architect must determine whether the freeway section meets the criteria for a landscaped freeway. (Cal. Code Regs., tit. 4, § 2512.)

2. On August 10, 2006, respondent Nano Maldonado, through his attorney, submitted a written request to Chief Landscape Architect Keith Robinson[1] asking that the

[1] Keith Robinson's actual job title at the Department of Transportation is Principal Landscape Architect, but he is the designated Chief Landscape Architect for purposes of enforcing the Outdoor Advertising Act.

section of Highway 101 located in San Mateo County at mile marker 3.95 be declassified as a landscaped freeway for a distance of more than 200 feet. Respondent owns a commercial building on property adjacent to this section of freeway, and there is a billboard on the roof of the building.

3. On September 8, 2006, Keith Robinson denied respondent's request for declassification, based on the determination that the freeway section meets the criteria for a landscaped freeway. On September 18, 2006, respondent appealed the denial.

Criteria for Landscaped Freeway – Relevant Law

4. Business and Professions Code section 5216 provides, in pertinent part:

> (a) "Landscaped freeway" means a section or sections of a freeway that is now, or hereafter may be, improved by the planting at least on one side or on the median of the freeway right-of-way of lawns, trees, shrubs, flowers, or other ornamental vegetation requiring reasonable maintenance.
>
> (b) Planting for the purpose of soil erosion control, traffic safety requirements, including light screening, reduction of fire hazards, or traffic noise abatement, shall not change the character of a freeway to a landscaped freeway.

5. California Code of Regulations, title 4, section 2508, addresses the classification of a freeway as landscaped. That section provides:

> (a) A freeway may not be classified as a landscaped freeway until a licensed Landscape Architect employed by the Department and based on personal inspection of the Highway Planting Project, certifies in writing that the character of the freeway is changed to a landscaped freeway. The freeway character is changed to a landscaped freeway when Ornamental Vegetation is in place, is at least 1,000 feet in length, is alive, exhibits healthy growth characteristics, and the Highway Planting Project is Accepted by the Department.
>
> (b) The Planting will require reasonable maintenance. That means a plant which, when planted, requires maintenance on a regular basis to maintain it in a healthy and attractive condition. The fact that as a plant matures it may require less maintenance than when first planted is not interpreted to mean it does not require reasonable maintenance. As used herein, maintenance means any of the following: watering, fertilizing, spraying, cultivating, pruning, cutting, mowing, replacing, weed control,

washing, pest control, disease control, litter removal, or other similar plant care procedures.

(c) Functional planting does not change the character of the freeway to a landscaped freeway. Functional planting means vegetation primarily for soil erosion control, traffic safety, reduction of fire hazards, and traffic noise abatement or other non-ornamental purposes. A single row of plantings in the median shall be considered a functional planting.

6. California Code of Regulations, title 4, section 2242, subdivision (r), provides:

"Ornamental Vegetation" means lawns, trees, shrubs, flowers, or other Plantings designed primarily to improve the aesthetic appearance of the highway. Inert material specifically placed to highlight the Ornamental Vegetation is considered part of the Ornamental Vegetation.

Highway 101 Section at Issue

7. The section of Highway 101 in San Mateo County that includes post mile 3.95 has been classified as landscaped freeway since 1979 and for an undetermined number of years before then. The plans for the first planting project for that part of Highway 101 show an approval date of September 25, 1961. On June 15, 1979, the Chief Landscape Architect issued a memo following his review and inspection of previously classified landscaped freeway sections, in which he stated that the section of Highway 101 in San Mateo County from post mile 2.74 to 5.40 was classified as landscaped freeway. There have been two additional planting projects, in 1994 and 2002, in the section that includes post mile 3.95.

8. On the northbound side of the freeway in the area of post mile 3.95, the plantings consist of trees and shrubs, including eucalyptus, evergreen elm, bottlebrush, melaleuca, cotoneaster, India hawthorn and silverberry. The southbound side of the freeway has a sound wall along it, with no plantings on the side facing the roadway. On the "community side" of the sound wall, which respondent's building faces across Rolison Road, Boston ivy vines are planted. The plantings on both sides of the freeway are irrigated, and they receive regular landscape maintenance, including weed control, pruning and tree removal.

9. After he received respondent's declassification request, Keith Robinson assigned Landscape Architect Dale Williams to make a site visit to determine whether this section of freeway meets the criteria for a landscaped freeway. On September 8, 2006, Williams visited the site and took photographs. He observed that the plants along the freeway were in a healthy condition and there was evidence of maintenance. Williams also measured the landscaping to make sure it was at least 1,000 feet in length.

10. In the opinion of Williams and Robinson, the plantings along the freeway are ornamental rather than functional. The primary purpose of the plantings is esthetic – to improve the appearance of the freeway and the sound wall. The mixture and variety of trees and shrubs is consistent with an esthetic purpose. There is no evidence of a graffiti problem on the sound wall in this area. (If the Boston ivy vines had been planted to cover graffiti, their primary purpose would be functional.)

11. Williams determined that this section of freeway meets the criteria for a landscaped freeway, and Robinson agreed with his determination.

Respondent's Evidence

12. Respondent retained Larry Carducci, a licensed landscape architect, to investigate the differences between the sections of Highway 101 in San Mateo County classified as landscaped and the sections not so classified. The Department of Transportation posts on the Internet a list of freeway sections classified as landscaped. From this list, Carducci extrapolated which sections of Highway 101 in San Mateo are not classified as landscaped. He focused his review on the freeway between post mile 0 and 14. Carducci observed landscaping in some sections of freeway not classified as landscaped. Along freeway sections classified as landscaped, Carducci observed billboards with advertising displays that he believes are prohibited. He also observed billboards which he believes violate certain regulations pertaining to advertising displays.

LEGAL CONCLUSIONS

1. The section of Highway 101 in San Mateo County that includes post mile 3.95 meets the criteria for a landscaped freeway set forth in Business and Professions Code section 5216 and California Code of Regulations, title 4, section 2508 and section 2242, subdivision (r). This section of freeway has been improved by the planting of trees, shrubs and vines for a distance at least 1,000 feet. The plants are ornamental vegetation because their primary purpose is esthetic, and they require reasonable maintenance.

2. Under California Code of Regulations, title 4, section 2512, Chief Landscape Architect Keith Robinson acted properly in denying respondent's request to declassify this section of freeway as a landscaped freeway.

3. Respondent argues that the Department of Transportation is violating his constitutional rights by refusing to declassify the freeway section where his billboard is located when other sections with landscaping are not classified as landscaped, and by prohibiting off-site commercial advertising on his billboard when billboards with such advertising are located along other sections of freeway classified as landscaped. These issues are beyond the scope of this proceeding.

ORDER

The denial by the Chief Landscape Architect of the request by respondent Nano Maldonado to declassify as a landscaped freeway the section of Highway 101 in San Mateo County that includes post mile 3.95 is affirmed.

DATED: March 2, 2007

Nancy L. Rasmussen

NANCY L. RASMUSSEN
Administrative Law Judge
Office of Administrative Hearings

PROOF OF SERVICE
(C.C.P. §§ 1013A and 2015)

I, the undersigned, say:

I am, and was at all times herein mentioned, a citizen of the United States and employed in the County of Sacramento, State of California, over the age of 18 years and not a party to the within action or proceeding; that my business address is 1120 N Street, Sacramento, California; that on the date reflected below, I enclosed a true copy of the documents described as follows:

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Executed on April _____, 2007, at Sacramento, California.

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CAROL MATSON, Declarant