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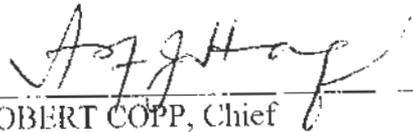
5 Representatives for Complainant
6 State of California, Department of Transportation

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8 **BEFORE THE**
CALIFORNIA DEPARTMENT OF TRANSPORTATION
9 **STATE OF CALIFORNIA**

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11 In the Matter of the Accusation Against:) OAH Case No. N2007010538
12)
13 SUPERIOR ADVERTISING,) **DESIGNATION OF**
14 Respondent.) **PRECEDENT DECISION**
15)
16)
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19 Pursuant to Government Code section 11425.60, the Department of Transportation designates
20 the Decision in this matter as a Precedent Decision.

21 DATED: January 15, 2008

22 By 
23 *for* ROBERT COPP, Chief
Division of Traffic Operations

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BEFORE THE
CALIFORNIA DEPARTMENT TRANSPORTATION
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

SUPERIOR ADVERTISING,

Respondent.

OAH Case No. N2007010538

PROPOSED DECISION

Administrative Law Judge Marilyn A. Woollard, Office of Administrative Hearings, State of California, heard this matter in Sacramento, California, on July 16, 2007, and September 6, 2007.

Assistant Chief Counsel Ronald W. Beals represented the complainant, State of California, Department of Transportation (Department or CalTrans).

Michael A. Grob, Attorney at Law, represented respondent Superior Advertising (Superior or respondent). Superior's president, Jeffrey McKenzie Hora, was also present.

At the July 16, 2007 hearing, the parties offered Stipulated Exhibits 1 through 23, and a statement of stipulated facts. Complainant and respondent submitted trial briefs, marked for identification respectively as exhibits A and B. The hearing was continued to August 13, 2007. On August 3, 2007, OAH received closing briefs from complainant and respondent, marked respectively for identification as exhibits C and D. On August 8, 2007, a pre-hearing telephone conference was convened to determine the need for additional evidence.

On September 6, 2007, the hearing reconvened. Oral and documentary evidence was provided and the record remained open for written closing argument. On September 18, 2007, OAH received respondent's supplemental brief, marked for identification as exhibit E. On September 19, 2007, OAH received complainant's reply to respondent's supplement brief, marked for identification as exhibit F. The record was then closed, and the matter was submitted for decision on September 19, 2007.

ISSUE

Did the Department correctly deny respondent's permit applications for four outdoor advertising displays in Glenn County adjacent to the Interstate 5 (I-5) freeway because they are within the boundaries of a "bonus segment" under the Outdoor Advertising Act, Business and Professions Code sections 5200, et seq.?¹

CONTENTIONS

The Department contends that respondent's proposed outdoor advertising displays are located within an area adjacent to I-5 that it has historically classified as a protected "bonus segment" of the freeway, where outdoor advertising displays are strictly limited in size and purpose. Respondent's proposed advertising displays are not within a "Cotton Amendment Area" (Cotton Area) where outdoor advertising displays are unregulated, because this segment of I-5 was not actually "constructed upon" any public road right of way that existed prior to July of 1956. The Department argues that it properly denied respondent's permit applications because its "constructed upon" interpretation of section 5204 is the proper interpretation and is entitled to deference.

Respondent contends that the Department's "constructed upon" interpretation is erroneous. In respondent's view, its proposed advertising displays are not within a bonus segment because the property the Department acquired for the construction of the relevant segment of I-5 extended to the centerline of County Road IA, a county road/right of way to the west of I-5 that existed prior to 1956. Respondent argues that the Department's I-5 property acquisition intersected with a portion of County Road IA's pre-1956 right of way and therefore created a Cotton Area. Respondent asserts that the advertising rights in this Cotton Area should be shifted to the east where its proposed signs are located, by a distance equal to the width of I-5.

FACTUAL FINDINGS

1. The California Department of Transportation is the agency responsible for the enforcement of the Outdoor Advertising Act. Outdoor advertising displays within the Department's jurisdiction require conformance with the applicable local (city or county) regulations and all applicable state regulations.

2. Superior is a limited liability corporation licensed to engage in the business of outdoor advertising in the State of California. Superior maintains Outdoor Advertising License No. 498 with the Department's Outdoor Advertising

¹ Unless otherwise indicated, all statutory references are to the California Business and Professions Code.

Program. Superior's proposed outdoor advertising display locations (display locations) are within the jurisdiction of the Department.

3. I-5 is an interstate freeway which travels north-south.

4. The road currently known as County Road 1A is an established north-south county road that existed prior to July 1, 1956. County Road 1A is to the west of I-5; it runs parallel to I-5 between County Road 24 and County Road 25.

5. Respondent's proposed display locations are to the east of I-5.

6. In late November 2005, Superior negotiated a 40-year land lease agreement with landowner Lavern Harris for the display locations. Pursuant to this agreement, respondent would place outdoor advertising signs at the property located at 3892 County Road J in unincorporated Glenn County, California.

As of September 21, 1959, the display locations property was not zoned as industrial or commercial. It was originally zoned as agricultural land. On September 17, 1987, Glenn County changed its zoning from A3 (agricultural) to M (industrial).

7. On July 10, 2006, Glenn County issued County Permit No. B0604-0054 to Superior for its four proposed outdoor advertising displays. There is no dispute that Superior has obtained proper permits from Glenn County for these signs.

8. On July 11, 2006, Superior applied to the Department for four permits to place two, double-facing 14 feet by 48 feet "painted bulletin" outdoor advertising displays, on the east side of I-5, in Glenn County, at post miles 22.08R and 22.17R, generally located one-fourth mile north of the County Road 25 overcrossing.

9. On July 26, 2006, James Arbis of the Department's Outdoor Advertising Program denied all of Superior's applications. The basis of the denial was that the proposed display locations "fall within a highly restricted segment of Interstate 5 classified as Bonus." Respondent was advised that its application was "non-conforming for the following criteria: (1) the location of the proposed application is less than 1000 feet from the location of your other proposed sign; (2) the proposed size of the display of 672 square feet exceeds the maximum area of 150 square feet and contains a dimension over 20 feet in length; and (3) display copy must advertise an activity within 12 air miles of the display."

10. On August 25, 2006, Mr. Hora filed a timely appeal on behalf of Superior of the Department's denial of its four permit applications.

Construction of I-5 Adjacent to Display Locations

11. The property on which I-5 was constructed that is adjacent to the display locations was purchased by the Department after July 1, 1956. The Department purchased this property from either G. Bosel, Jr. on May 6, 1964, and or/or Paul M. Overholtzer on March 27, 1963.

12. When acquiring property for freeway construction, the Department has a policy to avoid leaving landowners with property remnants of little economic value. This policy informed its acquisition of property near the display locations.

To avoid dividing the Overholtzer and/or Bosel properties by the freeway and leaving the owners with useless strips of property, the Department purchased excess property to the west of the proposed interstate. The western boundary of the property acquired by the Department for the new interstate extended to the centerline of County Road IA. This strip of property is approximately 30 feet in width, 15 feet of which are under County Road IA's pavement. Department land surveyor David Thibeault testified that this property is of nominal value and was likely taken out of the Department's excess property inventory as not saleable.

13. There is a freeway fence between the right of way for I-5 and County Road IA.

14. Before I-5 was constructed, County Road IA intersected at a 90 degree angle with County Road 25. When I-5 was constructed, a grade separation (elevation) was added to County Road 25 to create an east-west overpass to I-5, and County Road IA was realigned to connect to this overpass. There is no direct access to I-5 from either County Road IA or County Road 25.

15. When I-5 was constructed, it was not constructed upon any portion of County Road IA. I-5 does not cross County Road IA.

16. Following its land acquisition, the Department built a frontage road on the east side of I-5 by the proposed display locations to provide access to the parcels that would otherwise have been landlocked. The frontage road connects to the County Road 25 overpass.

Bonus Classification

17. California's current Outdoor Advertising Act defines a "bonus segment" as "any segment of an interstate highway which was covered by the Federal Aid Highway Act of 1958 and the Collier-Z'berg Act, namely, any such segment which is constructed upon right-of-way, the entire width of which was acquired subsequent to July 1, 1956." (§ 5204.) "Federal Aid Highway Act of 1958" refers to Section 131 of Title 23 of the United States Code, as in effect before October 22,

1965. (§ 5210.) Current references to the Collier-Z'berg Act refer to Chapter 128, Statutes of 1964 (First Extraordinary Session). (§ 5208.)

18. In 1958, Congress passed the Federal Aid Highway Act of 1958, commonly known as the Bonus Law, P.L. 85-381, 72 Stat. 95, Section 12, which was the first federal outdoor advertising control legislation. Congress determined it was in the public interest to encourage and assist States to control the use of and to improve the areas adjacent to the interstate system, by controlling the erection and maintenance of outdoor advertising signs, displays, and devices adjacent to that system. States were not required to adopt the provisions of the Bonus Law. As an incentive to participation, states that adopted the provisions of the Bonus Law received a bonus payment of ½ of one percent of their federal aid highway construction funds.

The Bonus Law as initially proposed banned all outdoor advertising displays along the new interstate freeway system with exceptions for: (1) directional or official signs; (2) on-premises signs for sale or lease; (3) advertising of activities within 12 miles of the sign; and (4) signs of specific interest to the traveling public. During the debate on the legislation, however, Senator Norris Cotton offered an amendment that excluded advertising regulation where any part of the land on which the freeway is constructed was acquired as right-of-way prior to 1956. These pre-1956 areas are known as "Cotton Areas." With this amendment incorporated, Congress declared that:

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 right-of way, *the entire width of which is acquired subsequent to July 1, 1956*, should be regulated, consistent with national standards to be prepared and promulgated by the Secretary of Transportation.
(23 CFR §750.101, subd. (a)(2).) [emphasis added.]

19. On May 15, 1965, California enacted the "Collier-Z'berg Act" that adopted the federal Bonus provisions in amendments to sections of the Business and Professions Code relating to outdoor advertising. In former section 5288, subdivision (b), the Collier-Z'berg Act incorporated Cotton Areas when it prohibited placing or maintaining any advertising displays "within 660 feet from the edge of the right-of-way of, and the copy of which is visible from, any highway included in the national system of interstate and defense highways (and which highway is constructed upon right-of-way, the entire width of which was acquired subsequent to July 1, 1956). . ."

Exceptions to prohibitions on outdoor advertising existed for (1) directional or other official signs or notices; (2) signs advertising the sale or lease of property upon

which they are located (on-premises signs); (3) certain signs for on-premises businesses or services; (4) certain signs advertising activities conducted within 12 miles; and (5) certain signs designed to give information in the specific interest of the traveling public. (Chapter 128, Statutes of 1964, section 2 (former section 5288).) In addition to these exceptions, former section 5288.1 included the federal Kerr Amendment that authorized outdoor advertising signs adjacent to the freeway on certain commercial and industrial zones which were established as of September 21, 1959.²

Under the "Collier-Z'berg Act," the director was authorized to enter into agreements with the Secretary of Commerce and accept any of the bonus fund allotments provided by 23 U.S.C. 131. (former § 5288.5.) This Act also authorized the Department to adopt regulations consistent with the federal standards.

20. On May 29, 1965, the California Department of Public Works, Division of Highways, and the United States Department of Commerce, Bureau of Public Roads, Federal Highway Administrator, signed an "Agreement for Carrying Out the National Policy Relative to Advertising Adjacent to the National System of Interstate and Defense Highways [the Interstate System]."

This Agreement pertained to all "Adjacent Areas," i.e., to all areas adjacent to, and within 660 feet of the edge of the right of way of, all portions of the Interstate System, except as specifically exempted (i.e., Kerr Amendment areas). California agreed to control the erection and maintenance of all outdoor advertising signs, displays and devices in Adjacent Areas consistent with the terms of the Act (23 U.S.C. § 131) and the National Standards promulgated by the Secretary of Commerce. By entering into this Agreement, California was to receive an increase in the federal share payable for any segment of the Interstate System provided for under the Federal-Aid Highway Act of 1956, as amended. Specifically, the federal funds "shall be increased by one-half of one percent of the total cost thereof," to the extent sufficient funds were appropriated and available.

21. In 1965, the Bonus Act was repealed and replaced by the Highway Beautification Act (HBA), which authorized the continuation of the Bonus provisions by those states that had adopted them. (23 U.S.C. 131, subd. (j).)³

² Section 5288.1 provided that Section 5288 shall not apply to those segments of the national system of interstate and defense highways which "traverse and abut on commercial or industrial zones within the boundaries of incorporated municipalities, as such boundaries existed on September 21, 1959, wherein the use of real property adjacent to and abutting on the national system of interstate and defense highways is subject to municipal regulation or control, or which traverse and abut on other areas where the land use, as of September 21, 1959, is clearly established by state law as industrial or commercial." (Chapter 128, Statutes of 1964, section 3.)

³ In pertinent part, the HBA provides that "any State transportation department which has, under this section as in effect on June 30, 1965, entered into an agreement with the Secretary to control the erection and maintenance of outdoor advertising signs, displays and devices in areas adjacent to the Interstate

22. Superior's permits for outdoor advertising displays are within a Bonus Segment of I-5.

On or about June 1966, the Department classified the site of the proposed display locations adjacent to I-5, from post mile 21.88 to post mile 22.52, as a Bonus Segment. This location has been classified as a bonus segment consistently since that date.

23. The Department's classification of the display location area as a bonus segment is consistent with the determination by the United States Department of Transportation, Federal Highway Administration (FHWA).

On March 27, 2007, Mr. Hora wrote to the United States Department of Transportation, Federal Highway Administration (FHWA), to request that it review the Department's denial of his permit applications, as falling within a "Bonus Area."

On April 2, 2007, FHWA Division Administrator Gene K. Fong responded to Mr. Hora as follows:

We have completed our review and we concur with CalTrans' determination that the area in question is NOT a Cotton area and never was. Therefore, we believe CalTrans could issue a permit for a sign consistent with provisions of 23 CFR 750 Subpart A – National Standards for Regulation by States of Outdoor Advertising Adjacent to the Interstate System Under the 1958 Bonus Program.

24. Regulations promulgated under the Federal Aid Highway Act of 1958 are found in the "National Standards for Regulation by States of Outdoor Advertising Adjacent to the Interstate System Under the 1958 Bonus Program" (National Standards), 23 C. F. R. § 750.101 et seq. California's Outdoor Advertising Act has incorporated the National Standards for regulating outdoor advertising on protected bonus segments of an interstate highway. (§ 5251; Cal. Code Regs., tit. 4, § 2300.)⁴

Section 750.102, subdivision (k), defines the controlled portion of the Interstate System to mean any portion which:

System shall be entitled to receive the bonus payments as set forth in the agreement, but no such State transportation department shall be entitled to such payments unless the State maintains the control required under such agreement. . ."(23 U.S.C. 131, subd. (j).)

⁴ The Outdoor Advertising Act provides that federal regulations promulgated prior to November 8, 1967, to address the Bonus Act (i.e., interstate highways constructed upon rights-of-way, the entire width of which was acquired after July 1, 1956), are continued in effect to the extent necessary to comply with California's Agreement with the Secretary of Commerce specified in Section 131(j) of Title 23 of the United States Code. (§ 5251.)

(1) Is constructed upon any part of right-of-way, the entire width of which is acquired for right-of-way subsequent to July 1, 1956 (a portion shall be deemed so constructed if, within such portion, no line normal or perpendicular to the centerline of the highway and extending to both edges of the right-of-way will intersect any right-of-way acquired for right-of-way on or before July 1, 1956); . . .
(23 C. F. R. § 750.102, subd. (k).)

“Protected areas” are defined to mean “all areas inside the boundaries of a State which are adjacent to and within 660 feet of the edge of the right-of-way of all controlled portions of the Interstate System within that State.” (23 C.F.R. section 750.102, subd. (c).) Signs permitted in protected areas include official signs, on-premise signs, signs within 12 miles of advertised activities, signs of specific interest to the traveling public. (23 C.F.R. § 750.105.)

Cotton Areas

25. U.S. Department of Transportation, Federal Highway Administration, described the Cotton Amendment as meaning that:

an area adjacent to the Interstate highway may be exempt from outdoor advertising control if any part of the land *on which the highway is constructed* was acquired as right-of-way *prior to 1956*. It is important to remember also that the right-of-way need not have been acquired for the purpose of constructing an Interstate highway; it could have been acquired 30 years ago for the construction of a no-longer-used farm-to-market road. . . .[emphasis added.]

The FHWA further explained that:

The pre-1956 right-of-way exemption, when included in a State’s law creates two broad loopholes in the State’s control of outdoor advertising. A number of Interstate highways have been constructed by upgrading an existing facility, usually by the construction of additional lanes or roadways, providing for control of access, and other similar actions. In such instances, the entire length of the highway is constructed partly on right-of-way acquired prior to 1956 and there is no outdoor advertising control whatsoever.

The second type of loophole occurs where an Interstate highway is constructed on a new location but crosses numerous existing State and county roads. In such instances, there are

outdoor advertising by virtue of being adjacent to the right-of-way, a portion of which was acquired prior to 1956. The older existing State and county roads which cross the Interstate highway are rights-of-way acquired prior to 1956, and they thus create exempt areas.

26. The Outdoor Advertising Association of America (OAAA) has describes the language of the Cotton Amendment as:

somewhat obscure and difficult to understand. In simple terms, it means that an area adjacent to the Interstate highway may be exempt from outdoor advertising control if any part of the land on which the highway is constructed was acquired as right-of-way prior to 1956. . .

The OAAA primer [Exhibit 18] provides examples of Cotton Areas created by one of the loopholes described by the FHWA.

None of these examples are similar to the situation posed by County Road IA, which does not cross I-5, and on no portion of which I-5 was constructed.

27. Respondent's proposed advertising display locations are not within a Cotton Area, where outdoor advertising controls cannot be imposed.

LEGAL CONCLUSIONS

1. *Burden of Proof:* No outdoor advertising display can be placed legally until after a permit and any required license are issued or renewed. (Cal. Code Regs., tit. 4, § 2420.) The burden of proof is on the applicant to demonstrate, by a preponderance of the evidence, that its applications to place outdoor advertising displays at particular locations should be granted. (*Martin v. Alcoholic Beverage Control Appeals Bd.* (1959) 52 Cal.2d 238; *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051- 1052.)

2. Section 5204 defines a "bonus segment" as "any segment of an interstate highway which was covered by the Federal Aid Highway Act of 1958 and the Collier-Z'berg Act, namely, any such segment which is constructed upon right-of-way, the entire width of which was acquired subsequent to July 1, 1956."

3. As set forth in Factual Findings 11 through 13, after 1956, the Department acquired property for right of way upon which to construct I-5. The right of way for I-5 was a smaller portion of this property, and the I-5 right of way was physically separated from County Road I-A by a freeway fence.

4. As set forth in Factual Findings 4 and 25, County Road 1A was acquired as a right of way prior to 1956. As set forth in Factual Findings 12 and 15, after 1956, the Department acquired the underlying fee to the centerline of County Road 1A, but it at no time constructed any portion of I-5 on County Road 1A.

5. There is no case law interpreting the relevant language of section 5204. Under settled canons of statutory construction,

when construing a statute, we must “ascertain the intent of the Legislature so as to effectuate the purpose of the law” . . .

The words of the statute are the starting point. “Words used in a statute . . . should be given the meaning they bear in ordinary use. . .

If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature . . .” (*Wilcox v. Birtwhistle*, 21 Cal. 4th 973, 977, citing *Lungren v. Deukmejian* (1988) 45 Cal. 3d 727, 735; internal citations omitted.)

The ordinary and unambiguous meaning of section 5204’s “constructed upon” language refers to that portion of property on which the new interstate was physically placed. The Department constructed I-5 on right of way it acquired after 1956. In doing so, the Department did not place any portion of the freeway on the pre-1956 right of way attached to County Road 1A.

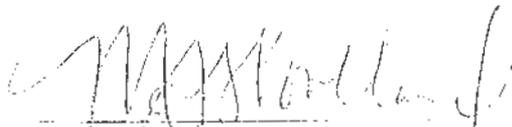
6. As set forth in Factual Findings 22 through 27, the Department’s interpretation of the “constructed upon” language of section 5204 is consistent with the interpretation of the FIIWA and the OAAA.

7. As set forth in the Factual Findings and Legal Conclusions as a whole, respondent’s proposed advertising displays are located in an established bonus segment of the I-5 freeway, and are not within an exempt Cotton Area. Respondent did not meet its burden of establishing that the Department lacked legal cause for denying its permit applications.

ORDER

Respondent’s appeal from the Department’s denial of its four permit applications is DENIED.

DATED: December 26, 2007


MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings