




## City of Philadelphia

LAW DEPARTMENT  
One Parkway  
1515 Arch Street  
17<sup>th</sup> Floor  
Philadelphia, PA 19102

### MEMORANDUM *Privileged and Confidential Advice of Counsel*

**TO:** Honorable Michael A. Nutter, Mayor  
**FROM:** Shelley R. Smith, City Solicitor   
**DATE:** December 8, 2011  
**SUBJECT:** Bill No. 110563 -- Wall Wrap

---

I am returning this bill to you with my signature approving it for form and validity. I am writing to advise you of a serious legal issue presented by the bill. The bill passed Council on December 1, 2011, and will become law without your signature if not returned by you to Council by December 15.

This bill makes a single change to the Zoning Code -- it authorizes the erection of a "wall wrap non-accessory outdoor advertising sign" within the area bounded by 6<sup>th</sup> and 7<sup>th</sup> Streets, Spring Garden and Willow Streets, subject to certain dimensional restrictions, including that the sign not be more than 10,000 square feet in size or more than 110 feet above ground level.

Shortly before the bill passed Council, the Pennsylvania Department of Transportation sent a letter to Council President Verna and the bill's sponsor, Councilman DiCicco, expressing PennDOT's view that passage of the bill and erection of a wall wrap pursuant to the bill "would be in violation of the 1974 certificate from the Department and state law. This would also be a violation of federal law and likely impact federal funding for projects in the City of Philadelphia." I have reviewed the relevant state and federal laws and conclude that there is a significant risk of a State law violation; that the ordinance on its face violates applicable federal law; and that, upon concurrence by the Federal Highway Administration, applicable federal regulations call for a ten percent reduction in federal highway funding to Pennsylvania, which funding loss PennDOT has clearly indicated will be allocated entirely to Philadelphia.

## **A. Applicable Statutes and Regulations**

### **1. Federal**

- Highway Beautification Act, 23 U.S.C. §131, et seq. (“HBA”)
- Code of Federal Regulations, 23 C.F.R. §750.700, et seq.

### **2. State**

- Outdoor Advertising Control Act of 1971, 36 P.S. §2718.101, et seq. (“OACA”)
- Pennsylvania Code, 67 Pa.Code §445, et seq.

## **B. Underlying Facts**

1. The property in question at 413 North 7th Street (“subject property”), including the proposed location of the sign on the building, is within 660 feet of the right-of-way of I-676, Vine Street Expressway (“highway”).

2. The highway is a federal primary highway (“controlled highway”) for purposes of the HBA and OACA.

3. The subject property is zoned L-4 Limited Industrial. Federal and state law permit outdoor advertising signs (“billboards”) on zoned industrial property subject to applicable size, spacing and lighting regulation.

## **C. Background**

In 1999, the Property Owner erected a 9,750 square-foot wall wrap billboard on the building without seeking or acquiring a zoning permit.

In 2000, the Owner applied for such a permit and was denied. That denial was eventually upheld on appeal through the courts. Despite a Commonwealth Court order that the wall wrap sign was illegal and must be removed, it remained in place until the City ultimately removed it at taxpayer expense.

In 2005, the Owner again applied for a zoning permit for a 9,750 square-foot wall wrap sign on the property. The permit was again denied, and again denied on appeal by the Philadelphia Court of Common Pleas Court and Commonwealth Court.

Throughout this history, the Old City Civic Association and other community groups have opposed and continue to oppose a wall wrap billboard at this location.

## **D. Discussion**

In plain language, the Federal Highway Administration (“FHWA”), through the HBA and its regulations, requires the states to maintain “effective control” of billboards along controlled highways. Loss of federal highway funding is the primary means of enforcing such control. 23 U.S.C. § 131(b).

Pennsylvania, after enacting the OACA, entered into an agreement with FHWA under the HBA in 1972, by which the Department of Transportation (“PennDOT”) is responsible for maintaining effective control in the Commonwealth, through the OACA and regulations issued thereunder.

PennDOT directly administers and enforces billboard controls in most of the Commonwealth, including issuing permits for billboards along controlled highways in Pennsylvania. In Philadelphia, however, PennDOT has “certified” control of such billboards in zoned commercial and industrial areas (in effect, “delegated”) to the City, and the City has accepted such authority pursuant to an agreement effective July 1, 1974.<sup>1</sup>

The billboard permitted under Bill No. 110563 (“Bill”), by exceeding the limits recognized under applicable federal and state regulation, would violate our certification from PennDOT and risk federal highway funds, for the following reasons:

### **1. Size (“Customary Use”)**

The Bill would permit a billboard up to 10,000 square feet. Although the maximum size under OACA is 1,200 square feet, that limit does not apply because the City controls the size restrictions under our Zoning Code through the PennDOT certification.

However, under the applicable federal regulations, the delegation of authority to the states (and through PennDOT to the City) is not completely open-ended. FHWA regulations require reasonable controls on size, spacing and lighting and, more particularly, that the state or local authority permit billboards only to the extent of the type of signs in “customary use.” See HBA, 23 U.S.C. §131(d).<sup>2</sup> And the FHWA reasonably construes “customary use” to mean in use at the time of the Pennsylvania agreement with the FHWA (1972).

---

<sup>1</sup> Technically, PennDOT “certifies” to the Federal Highway Administration that Philadelphia may regulate billboards on controlled highways because, through its own Zoning Code, the City maintains effective control as defined and accepted by the federal government.

<sup>2</sup> “The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned

In a 2008 Memorandum to the State of Florida, which had requested an interpretation of this provision, the FHWA clarified and restated what it called its “long held position” on this issue, that:

the term “customary use” ... refers to the predominant, usual outdoor advertising signs existing in a zoning authority’s jurisdiction as of the date of the State/Federal agreement was executed. The term is limited to the size, lighting and spacing standards for outdoor advertising signs and displays within the zoning authority.

Memorandum of FHWA, March 17, 2008.

This concept is echoed in the Pennsylvania statute as well, where the control criteria for size, spacing and lighting are set forth in order “to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this act *and with customary use in this Commonwealth*. 36 P.S. §2718.105(a) (emphasis added).

In other words, in the areas subject to federal regulation, the City may permit billboards of the approximate size in customary use in 1972. It is clear that “wall wrap” billboards of 7,000 to 10,000 square feet, as permitted in this Bill, were not “the predominant, usual outdoor advertising signs” in customary use at that time. Therefore, the billboard permitted by the Bill would be in violation of federal regulation by its size.

In addition, the certification of authority to the City is based on the City’s own restrictions with respect to size, spacing and lighting from 1974.<sup>3</sup> By significantly exceeding the size restrictions currently in effect in Philadelphia, the billboard proposed here not only would jeopardize federal highway funds but also PennDOT’s recognition of continuing City regulatory authority in this area, which could result in PennDOT resuming control and OACA standards governing such billboards rather than our Code.

## **2. “Sham” Zoning**

State and local billboard control under the federal regulatory scheme is not totally unfettered in another relevant way – while local authorities are free to apply commercial and

---

commercial and industrial areas within the geographical jurisdiction of such authority.” 23 U.S.C. §131(d).

<sup>3</sup> PennDOT recently affirmed the City’s “effective control” through the ongoing applicability of size limitations in our Zoning Code, in a letter dated October 28, 2010, from Deputy Secretary R. Scott Christie to Fran Burns, Commissioner of Licenses and Inspections.

industrial zoning designations as appropriate, they may not use such zoning to circumvent the restrictions of the HBA.

In order to prevent site-specific zoning (or rezoning) of areas bordering a highway for the purpose of allowing billboards, the federal regulations promulgated under the HBA address the issue as follows:

State and local zoning actions must be taken pursuant to the State's zoning enabling statute or constitutional authority and in accordance therewith. *Action which is not a part of comprehensive zoning and is created primarily to permit outdoor advertising structures, is not recognized as zoning for outdoor advertising control purposes.*

C.F.R., 750.708(b) (emphasis added).

Further interpretation of this regulation has been provided in a formal Legal Opinion issued by the FHWA to the State of Minnesota in 2004, which stated:

In promulgating §750.708, the FHWA does three things: First, it differentiates between legitimate, comprehensive zoning authorized by law and actions that are not true zoning. Second, it differentiates between legitimate commercial and industrial zones and limited purpose areas created primarily to allow outdoor advertising. Third, it identifies actions that are facially part of comprehensive zoning but in fact are merely schemes to allow outdoor advertising.

\* \* \*

Thus, a more reasonable interpretation of § 750.708(b) is that it directs the careful examination of a zoning action to make certain that it is *a legitimate exercise of zoning powers in furtherance of community-wide planning goals, rather than an attempt to use zoning for the primary purpose of opening up areas for outdoor advertising uses.* “[A] comprehensive zoning plan is a scheme or formula that reasonably relates the regulation and restriction of land uses, including the establishment of districts therefore, to the health, safety, and welfare of the public, and thus to the police power, and the exercise of the zoning power is limited thereby.” 101A C.J.S. *Zoning and Planning* §39 (1979). Comprehensiveness in the zoning context requires a carefully thought-out plan that is broad in both its purposes and its geographic scope.<sup>4</sup>

---

<sup>4</sup> See *Acceptance of State Zoning for Purposes of the Highway Beautification Act* [Legal Opinion], available at <http://www.fhwa.dot.gov/realestate/zoningop.pdf> [Apr. 14, 2004] (emphasis added).

It is clear on its face that Bill No. 110563 makes just one zoning change to the area within its defined boundary: it permits a single wall-wrap billboard on a specific building defined in the ordinance. As such, it is difficult to see the Bill as anything other than zoning created primarily to permit outdoor advertising, as proscribed by federal regulation.

**D. Conclusion**

For the reasons stated above, Bill No. 110563 would permit an oversize wall wrap billboard in excess of that currently allowed at that location under the Philadelphia Code, and thereby would violate the certification of effective control to the City of Philadelphia from the Pennsylvania Department of Transportation. It is my opinion that this failure to maintain “effective control” under state and federal regulation would allow for a successful enforcement action by the Federal Highway Administration through PennDOT to reduce federal highway funding available to the City by ten percent.