

2004

Young Electric Sign Company, Inc. v. Utah Department of Transportation : Petition for Rehearing

Utah Court of Appeals

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Heidi E. C. Leithead; Parr, Waddoups, Brown, Gee & Loveless; Attorneys for Plaintiff/Appellant.

Mark E. Burns; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; Attorneys for Defendant/Appellee.

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IN THE UTAH COURT OF APPEALS

YOUNG ELECTRIC SIGN COMPANY, INC.,
a Utah Corporation,

Plaintiff and Appellant,

v.

UTAH DEPARTMENT OF
TRANSPORTATION,

Defendant and Appellee.

APPELLATE CASE No. 20040265-CA

PETITION FOR REHEARING

APPEAL FROM A DECISION OF THE SECOND JUDICIAL DISTRICT COURT
DAVIS COUNTY, FARMINGTON DEPARTMENT, STATE OF UTAH
HONORABLE DARWIN C. HANSEN, DISTRICT JUDGE

Heidi E. C. Leithead (#5102)
PARR WADDUPS BROWN GEE &
LOVELESS
185 South State Street, Suite 1300
Salt Lake City, UT 84111
Telephone: (801) 532-7840

Attorneys for Plaintiff/Appellant
Young Electric Sign Company, Inc.

MARK E. BURNS (#6706)
Assistant Attorney General
MARK L. SHURTLEFF (#4666)
Utah Attorney General
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Telephone: (801) 366-0353

Attorneys for Defendant/Appellee
Utah Department of Transportation

FILED
UTAH APPELLATE COURTS
APR 28 2005

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



FILED
UTAH APPELLATE COURTS
MAY - 2 2005

MARK L. SHURTLEFF
ATTORNEY GENERAL

RAYMOND HINTZE
CHIEF DEPUTY

Protecting Utah • Protecting You

KIRK TORGENSEN
CHIEF DEPUTY

May 2, 2005

Clerk of the Court
Utah Court of Appeals
P.O. Box 140230
Salt Lake City, UT 84114-0230

Re: *YESCO v. UDOT*, 2005 UT App. 169, No. 20040265-CA
Errata in Petition for Rehearing

To Whom it May Concern:

There are three errors in Appellee Utah Department of Transportation's recently filed Petition for Rehearing. First, Appellee miscited subsection (h) of 23 U.S.C. § 131 on page 1. The correct reference is 23 U.S.C. § 131(d). Second, the word "standards" is missing from the same sentence. Finally, the general reference to 23 C.F.R. Part 750 on page 2 should have specified Subpart G of that Part, Sections 750.701 to 750.707. With all the corrections, that sentence should now read:

As a result of the opinion, the Department of Transportation ("UDOT") is left with an unworkable standard that, in this case at least, uses interchange measurement standards in conflict with the Utah Federal Agreement concerning outdoor advertising, the Highway Beautification Act, 23 U.S.C. § 131, particularly subsections (d) and (r) therein, and the national standards promulgated by the Secretary of Transportation, 23 C.F.R. Part 750, Subpart G, particularly Sections 750.701 to 750.707.

Petition for Rehearing at pp. 1-2. Appellee apologizes for these errors and felt it important to bring these corrections to the Court's attention. Thank you for your careful consideration of this matter.

Sincerely,

Mark E. Burns
Assistant Attorney General

cc: Heidi E. C. Leithead

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PARR WADDUPS BROWN GEE &
LOVELESS
185 South State Street, Suite 1300
Salt Lake City, UT 84111
Telephone: (801) 532-7840

**Attorneys for Plaintiff/Appellant
Young Electric Sign Company, Inc.**

MARK E. BURNS (#6706)
Assistant Attorney General
MARK L. SHURTLEFF (#4666)
Utah Attorney General
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Telephone: (801) 366-0353

**Attorneys for Defendant/Appellee
Utah Department of Transportation**

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IN THE UTAH COURT OF APPEALS

YOUNG ELECTRIC SIGN COMPANY, INC.,
a Utah Corporation,

Plaintiff and Appellant,

v.

UTAH DEPARTMENT OF
TRANSPORTATION,

Defendant and Appellee.

APPELLATE CASE NO. 20040265-CA

PETITION FOR REHEARING

QUESTION PRESENTED FOR REHEARING

The opinion in Young Electric Sign Company, Inc. v. Utah Dept. of Transp., 2005 UT App 169, mistakenly relies upon a different version of Utah Admin. Code R933-2-3(2) than the rule at issue in the proceedings below. Further, the Court has misapprehended the fact that the claimed “point of widening” in this case does not “begin to parallel” other lanes of traffic at the location in question. A picture taken by Appellant Young Electric Sign Company (“YESCO”) demonstrating this fact is attached hereto as Addendum B. As a result of the opinion, the Department of Transportation (“UDOT”) is left with an unworkable standard that, in this case at least, uses interchange measurement in conflict with the Utah Federal Agreement concerning outdoor advertising, the Highway Beautification Act, 23 U.S.C. § 131, particularly subsections (h) and (r) therein, and the

national standards promulgated by the Secretary of Transportation, 23 C.F.R. Part 750.

In light of its errors, should the Young opinion be withdrawn and further oral argument granted?

ARGUMENT

POINT I. THE COURT’S OPINION IS BASED IN PART ON THE NEW RULE THAT WAS NOT EFFECT IN THE PROCEEDINGS BELOW.

The Court’s opinion relies in part upon the new definition of “acceleration and deceleration lanes” in Utah Admin. Code R933-2-3(2), rather than the old rule, which was in effect in the proceedings below. Young Electric Sign Company, Inc. v. Utah Dept. of Transp., 2005 UT App 169 ¶ 11 and Addendum A hereto. The old rule did not include the last sentence which states: “On ramps and off-ramps are part of the interchange and shall not be considered an acceleration or deceleration lane under the Act or these rules.” This change became effective in March 2004.

One purpose for this rule change was to clarify Utah Code Ann. § 72-7-502(9). The change was adopted in response to the argument that YESCO made in the district court that large portions of the on-ramp could somehow be excluded from the interchange for purposes of outdoor advertising control. Without the rule clarification, UDOT maintains the old definition would have placed the state in violation of 23 C.F.R. §750.707 and the Utah-Federal Agreement by allowing the movement of non-conforming signs.

POINT II. THE INTERSECTING LANE DOES NOT “BEGIN TO PARALLEL” THE OTHER LANES OF TRAFFIC AT THIS LOCATION – THE RESULT IS AN UNWORKABLE STANDARD FOR OUTDOOR ADVERTISING REGULATION.

The Court also mistakenly states that the Antelope Drive on-ramp “begins to parallel I-15” when, in point of fact, it does not. Young, at ¶ 13 (emphasis added). See Exhibit 2, Photos 1 and 2, attached to October 22, 2002 letter from M. Short to UDOT Hearing Officer D. Miles (attached hereto as Addendum B (relevant photograph) and Addendum D (complete letter with all original attachments)).¹ As the Court can see from Addendum B, this intersecting lane plainly does not “begin[] to parallel the other lanes of traffic” at this point. See Utah Code Ann § 72-7-502(19).

UDOT’s position is that this intersecting lane (the Antelope Drive on-ramp) begins to parallel other lanes of traffic at the location that UDOT and the court below have described as the “point of pavement widening.” The Court’s factual error² creates and unworkable standard making it impossible for the Department to determine where so-called parallel lanes, that are not truly parallel, begin in other on-ramps.

To the extent that Legislature’s 2,640 foot limitation in Utah Code Ann. § 72-7-502(19) or exclusion of acceleration lanes requires a different result, those provisions are superceded by the standard for measuring interchanges set forth in the Utah-Federal

¹Exhibit 1 from the same letter was included as Addendum A in Appellant’s Brief.

²It appears this error was based in part on Appellant’s representation at page 18 of its initial brief.

Agreement. See Utah Code Ann. § 72-7-515(2)(“The provisions of this part are subject to and shall be superseded by conflicting provisions of the Utah-Federal Agreement.”); Utah Admin. Code R933-5-2 (incorporating the Utah-Federal Agreement, Section III.A.2.(b) (“No sign may be located on an interstate highway or freeway within 500 feet of an interchange, or intersection at grade, or rest area (measured along the interstate highway or freeway from the sign to the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main-traveled way). It is notable that this standard requires that the measurement begin at the sign to determine the nearest pavement widening created by an on-ramp or off-ramp.

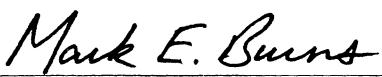
CONCLUSION AND CERTIFICATE OF GOOD FAITH

For the foregoing reasons, UDOT respectfully requests that the Court take these legal and factual errors into account, grant its Petition for Rehearing and set the case for further argument, or revise its opinion accordingly.

Pursuant to Utah R. App. P. 35(a), counsel for UDOT certifies that this petition is presented in good faith and not for purposes of delay.

RESPECTFULLY SUBMITTED this 28th day of April, 2005.

MARK L. SHURTLEFF
Attorney General

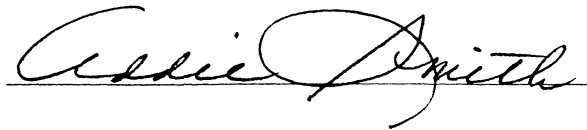


MARK E. BURNS
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing **PETITION FOR REHEARING** was mailed this 28th day of April, 2005 to:

HEIDI E. C. LEITHEAD
PARR, WADDOUPS, BROWN, GEE & LOVELESS
185 S STATE ST STE 1300
SALT LAKE CITY, UT 84111

A handwritten signature in cursive script, reading "Cassie Smith", written over a horizontal line.

ADDENDUM A

APR 14 2005

This opinion is subject to revision before
publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

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| | | |
|-------------------------------|---|----------------------------|
| Young Electric Sign Company, |) | OPINION |
| Inc., a Utah corporation, |) | (For Official Publication) |
| |) | |
| Plaintiff and Appellant, |) | Case No. 20040265-CA |
| |) | |
| v. |) | F I L E D |
| |) | (April 14, 2005) |
| State of Utah, by and through |) | |
| the Utah Department of |) | |
| Transportation, |) | 2005 UT App 169 |
| |) | |
| Defendant and Appellee. |) | |

Second District, Farmington Department
The Honorable Darwin C. Hansen

Attorneys: Heidi E. Leithead, Salt Lake City, for Appellant
Mark L. Shurtleff and Mark E. Burns, Salt Lake City,
for Appellee

Before Judges Billings, Bench, and Jackson.

BILLINGS, Presiding Judge:

¶1 Plaintiff Young Electric Sign Company (Young) appeals the trial court's order denying its motion for summary judgment and granting the Utah Department of Transportation's (UDOT) cross-motion for summary judgment. Specifically, Young argues that the trial court erred by upholding UDOT's denial of Young's application to erect an outdoor advertising sign. We reverse.

BACKGROUND

¶2 In 1978, Young erected an outdoor advertising sign on premises leased from the owner of real property located in Clearfield, Utah, adjacent to Interstate 15 (I-15). Sometime thereafter, UDOT constructed a freeway interchange nearby to allow traffic on Antelope Drive to enter and exit I-15 north of Antelope Drive.

¶3 In 2002, the property owner informed Young that it needed to move the sign to the north end of the property in order to accommodate development plans for the property. Young removed

the original sign and submitted an application to UDOT to locate a new sign further north on the east side of I-15, north of Antelope Drive. After reviewing the application, UDOT concluded that the proposed sign location was within 500 feet of the interchange in violation of Utah Code section 72-7-505(3)(c)(i)(A). See Utah Code Ann. § 72-7-505(3)(c)(i)(A) (Supp. 2004). In particular, UDOT found that the proposed sign location is 108 feet from the "point of the . . . ending of pavement widening at the . . . entrance to the main-traveled way." Id. Accordingly, UDOT denied Young's permit application.

¶4 Pursuant to Utah Code section 72-7-508(4), Young filed a complaint in Second District Court seeking de novo judicial review of UDOT's decision. See id. § 72-7-508(4) (Supp. 2004). On cross-motions for summary judgment, the district court upheld UDOT's decision. Young appeals.

ISSUE AND STANDARD OF REVIEW

¶5 Young argues that, in its ruling, which granted UDOT's motion for summary judgment and denied Young's motion for summary judgment, the trial court erroneously interpreted various provisions in the Utah Outdoor Advertising Act (the Act). See id. §§ 72-7-501 to -516 (2001 & Supp. 2004). "We review questions of statutory interpretation for correctness, affording no deference to the district court's legal conclusions." R.A. McKell Excavating, Inc. v. Wells Fargo Bank, N.A., 2004 UT 48, ¶7, 100 P.3d 1159. Furthermore, "[i]n the context of a summary judgment motion, we likewise employ a correctness standard and 'view the facts and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party.'" Id. (quoting Hermansen v. Tasulis, 2002 UT 52, ¶10, 48 P.3d 235).

ANALYSIS

¶6 The Act prohibits outdoor advertising signs within 500 feet of an interchange. See Utah Code Ann. § 72-7-505(3)(c)(i)(A). The Act specifically provides, in relevant part, that

signs may not be located on an interstate highway or limited access highway on the primary system within 500 feet of an interchange . . . measured along the interstate highway or freeway from the sign to the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main-traveled way.

Id. The Act defines "[i]nterchange" to "mean[] those areas and their approaches where traffic is channeled off or onto an interstate route, excluding the deceleration lanes, acceleration lanes, or feeder systems, from or to another federal, state, county, city, or other route." Id. § 72-7-502(9). In addition, the Act defines the "[p]oint of widening" as "the point of the gore or the point where the intersecting lane begins to parallel the other lanes of traffic, but the point of widening may never be greater than 2,640 feet from the center line of the intersecting highway of the interchange." Id. § 72-7-502(19).

¶7 UDOT argues that the "point of widening" defined in section 72-7-502(19) is not synonymous with the "point of the beginning or ending of pavement widening" as used in section 72-7-505(3)(c)(i)(A). Id. §§ 72-7-502(19), -505(3)(c)(i)(A). However, this interpretation renders the definition in section 72-7-502(19) meaningless. When construing statutes, we assume that the legislature used each term in the statute or its amendments advisedly; "thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable." Johnson v. Redevelopment Agency, 913 P.2d 723, 727 (Utah 1995) (quotations and citation omitted). Because the exact phrase "point of widening" is not used anywhere in the Utah Code or the Utah Administrative Code, and variations of the phrase "point of pavement widening" are used in both the Utah Code¹ and the Utah Administrative Code,² we interpret the phrases as synonymous.

¶8 While the district court noted the applicability of section 72-7-502(19), it failed to properly apply it. In the court's summary judgement ruling, it stated that under Utah Code section 72-7-502(19), the "point of widening" is defined as "either (1) 'the point of the gore' in the case where there is no acceleration lane, or (2) 'the point where the intersecting lane begins to parallel the other lanes of traffic' where there is an acceleration lane that does run parallel to the main-traveled way." (Footnotes omitted) (quoting Utah Code Ann. § 72-7-502(19)).

1. See Utah Code Ann. § 72-7-505(3)(c)(i)(A) (Supp. 2004) (stating that the placement of advertising signs are to be "measured along the interstate highway or freeway from the sign to the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main-traveled way") (emphasis added); id. § 72-7-505(3)(c)(ii) (same).

2. See Utah Admin. Code R933-2-12 (using phrase "nearest point of pavement widening"); id. R933-2-13 (same); id. R933-2-3 (using the phrase "nearest point of the beginning or ending of pavement widening"); id. R933-5-2 (same).

¶9 We agree with the district court that in places where there is no acceleration lane and the interchange on-ramp immediately "dies into the freeway," the "point of widening" occurs at the "point of the gore."³ In other words, the point of widening is where the on-ramp lane physically merges into the main-traveled way. We also agree that in places where there exists an acceleration lane, "the point where the intersecting lane begins to parallel the other lanes of traffic" constitutes the "point of widening." Utah Code Ann. § 72-7-502(19). However, because by definition, "the point of widening may never be greater than 2,640 feet from the center line of the intersecting highway of the interchange," *id.*, the district court erred by ruling that the point of widening occurs 2,937 feet from the center line of Antelope Drive.⁴

¶10 UDOT argues, and the district court apparently concluded, that there is no acceleration lane at this location and thus the point of the gore, or the point of widening, occurs when the lane proceeding northbound from Antelope Drive completely merges with I-15. Young contends that an acceleration lane does exist at this location and thus the point of widening occurs when the lane from Antelope Drive begins to parallel the other lanes of I-15. Accordingly, we must determine whether an acceleration lane exists in this case.

3. Black's Law Dictionary defines "gore" as either (1) "[a] small, narrow slip of land" or (2) "[a] small (often triangular) piece of land, such as may be left between surveys that do not close." Black's Law Dictionary 703 (7th ed. 1999).

4. UDOT claims that our enforcement of the 2,640-foot limit, see Utah Code Ann. § 72-7-502(19) (Supp. 2004), is contrary to the Utah-Federal Agreement entered into between the governor of Utah and the secretary of the United States Department of Transportation's Federal Highway Administrator on January 18, 1968, pursuant to the Highway Beautification Act of 1965. See 23 U.S.C. § 131 (2005); Utah Admin. Code R933-5-2; see also Utah Code Ann. §§ 72-7-501 to -516. We disagree. The core confusion rather stems from where the analysis of section 72-7-505(3)(c)(i)(A) begins. See Utah Code Ann. § 72-7-505(3)(c)(1)(A). UDOT begins the analysis at the sign and then goes counter to traffic flow to find an "ending of pavement widening." *Id.* We conclude that this defeats the purpose of the Act, which is to protect the 500-foot area around an interchange from advertising signs. We think Young's analysis, which begins the application of the various statutory definitions from the interchange at issue, better accomplishes the purpose of the Act.

¶11 The Utah Code does not define "acceleration lane." However, the Utah Administrative Code defines "acceleration and deceleration lanes" as

speed change lanes created for the purpose of enabling a vehicle to increase or decrease its speed to merge into, or out of, traffic on the main-traveled way. As used in the Act, an acceleration or deceleration lane begins and ends at a point no closer than 500 feet from the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main-traveled way. On-ramps and off-ramps are part of the interchange and shall not be considered an acceleration or deceleration lane under the Act or these rules.

Utah Admin. Code R933-2-3. Thus, an acceleration lane is a lane constructed for the purpose of allowing a vehicle to increase its speed to equal that of the traffic on the main-traveled way.

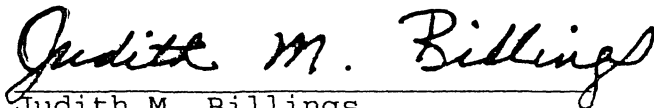
¶12 UDOT would like us to assume that acceleration and deceleration lanes occur only when there is a lane that travels from an on-ramp to the next off-ramp without ever merging into traffic on the main-traveled way. However, in the traffic rules and regulations chapter of the Utah Code, the legislature has defined this type of lane as an "auxiliary lane" not as an "acceleration or deceleration lane." Utah Code Ann. § 41-6-53.5(1)(b) (Supp. 2004) (stating that a "general purpose lane" does not include an "auxiliary lane that begins as a freeway on-ramp and ends as part of the next freeway off-ramp"). Further, the Act also distinguishes between "auxiliary lanes" and "acceleration lanes [and] deceleration lanes." Id. § 72-7-502(12) (defining "[m]ain-traveled way" as "the through traffic lanes, including auxiliary lanes, acceleration lanes, deceleration lanes, and feeder systems, exclusive of frontage roads and ramps"). Thus, the Act does not support UDOT's interpretation. Therefore, because in this case there exists a lane that meets the northbound lanes of I-15 and then continues on for 1,738 feet before finally merging into the outside lane of I-15, its purpose must be to allow vehicles to increase their speed to merge with I-15 traffic. Accordingly, we hold that an acceleration lane exists at this location.⁵

5. We also note that there are some locations where a freeway on-ramp does not convert into an acceleration lane. In these situations, the on-ramp immediately merges into the other lanes of traffic and the point of widening occurs at the "point of the
(continued...)

¶13 The acceleration lane in this case begins at the point of widening, or the point where the Antelope Drive on-ramp begins to parallel I-15, and extends 500 feet. See Utah Admin. Code R933-2-3 ("As used in the Act, an acceleration or deceleration lane begins and ends at a point no closer than 500 feet from the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main-traveled way."). Because an acceleration or deceleration lane is not, by definition, considered a part of the interchange, see Utah Code Ann. § 72-7-502(9) (defining interchange as "those areas and approaches where traffic is channeled off or onto an interstate route, excluding the deceleration lanes, acceleration lanes, or feeder systems, from or to another . . . route" (emphasis added)), in this case the Act prohibits advertising signs within 500 feet from the point of widening. See id. § 72-7-505(3)(c)(i)(A). Accordingly, Young's proposed sign location is permissible under the Act as it is 846 feet beyond this point.

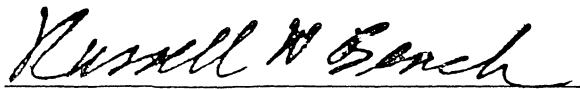
CONCLUSION

¶14 We hold that the district court erred by granting summary judgment to UDOT and denying Young's motion for summary judgment. Accordingly, we reverse.



Judith M. Billings,
Presiding Judge

¶15 WE CONCUR:



Russell W. Bench,
Associate Presiding Judge

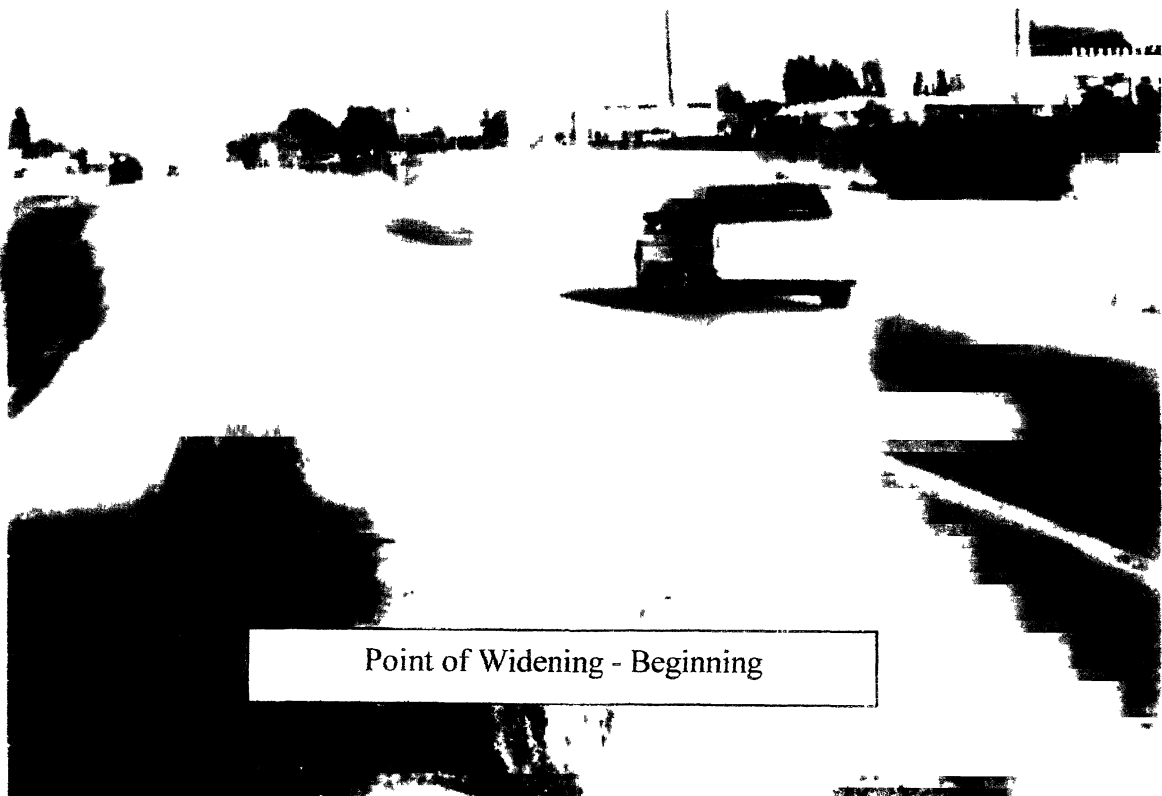
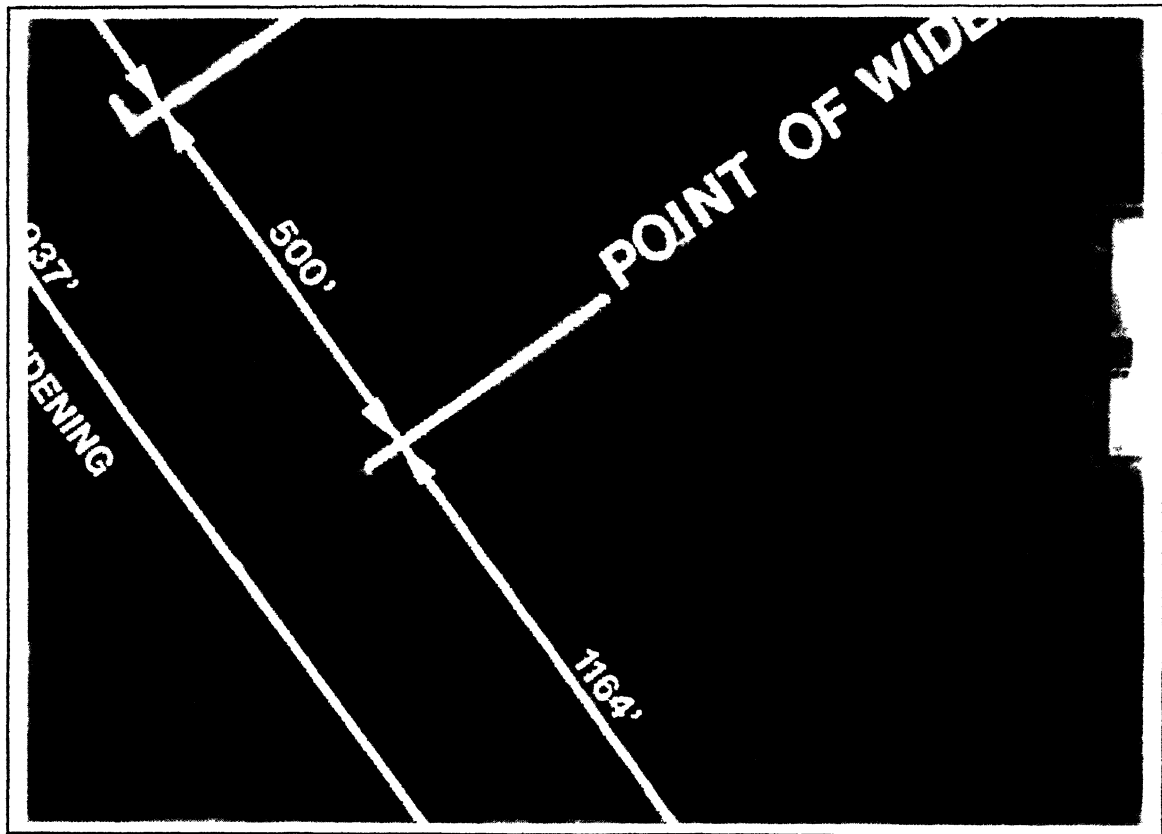


Norman H. Jackson, Judge

5. (...continued)

gore." Utah Code Ann. § 72-7-502(19) (Supp. 2004). That, however, is not the situation in this case as there exists an acceleration lane as defined by the Utah Administrative Code. See Utah Admin. Code R933-2-3.

ADDENDUM B



ADDENDUM C

8.3.2 When a certificate of registration has expired for more than one year, an application shall be made for an original certificate as if the application was being made for the first time.

KEY: automatic fire sprinklers
[September 3, 2003] March 3, 2004
 53-7-204

Transportation, Preconstruction, Right-of-Way Acquisition

R933-2-3

Definitions

NOTICE OF PROPOSED RULE

(Amendment)

DAR File No.: 26893

FILED: 01/14/2004, 13:49

RULE ANALYSIS

PURPOSE OF THE RULE OR REASON FOR THE CHANGE: This rule amendment is designed to make the definitions comply with federal law.

SUMMARY OF THE RULE OR CHANGE: The amendment clarifies the definition of acceleration-deceleration lane, adds a definition for feeder system, and deletes the definition for "out-of-standard." (DAR NOTE: A corresponding 120-day (emergency) rule that is effective as of January 14, 2004, is under DAR No. 26892 in this issue.)

STATE STATUTORY OR CONSTITUTIONAL AUTHORIZATION FOR THIS RULE: Section 72-2-501; and 23 CFR 750.707

ANTICIPATED COST OR SAVINGS TO:

❖ **THE STATE BUDGET:** The state does not anticipate any cost increase or savings to the state from this change because it does not require any different activity on the part of the state than the state currently does.

❖ **LOCAL GOVERNMENTS:** The rule does not apply to local governments; therefore, there are no costs or savings that accrue to them.

❖ **OTHER PERSONS:** No costs or savings are anticipated to result from the rule amendment because it does not require any person to undertake any activity or change the responsibilities they currently have.

COMPLIANCE COSTS FOR AFFECTED PERSONS: There would be no compliance costs because the rule change does not require anyone to do anything differently than they are doing now. Since no one is required to undertake any new activity, there should be no increase in costs.

COMMENTS BY THE DEPARTMENT HEAD ON THE FISCAL IMPACT THE RULE MAY HAVE ON BUSINESSES: Because there are no costs as a result of the rule change, there is no fiscal impact.

THE FULL TEXT OF THIS RULE MAY BE INSPECTED, DURING REGULAR BUSINESS HOURS, AT:

TRANSPORTATION
 PRECONSTRUCTION, RIGHT-OF-WAY ACQUISITION
 CALVIN L RAMPTON COMPLEX
 4501 S 2700 W
 SALT LAKE CITY UT 84119-5998, or
 at the Division of Administrative Rules.

DIRECT QUESTIONS REGARDING THIS RULE TO:

James Beadles at the above address, by phone at 801-965-4168, by FAX at 801-965-4796, or by Internet E-mail at jbeadles@utah.gov

INTERESTED PERSONS MAY PRESENT THEIR VIEWS ON THIS RULE BY SUBMITTING WRITTEN COMMENTS TO THE ADDRESS ABOVE NO LATER THAN 5:00 PM on 03/16/2004.

THIS RULE MAY BECOME EFFECTIVE ON: 03/17/2004

AUTHORIZED BY: John R. Njord, Executive Director

R933. Transportation, Preconstruction, Right-of-Way Acquisition. **R933-2. Control of Outdoor Advertising Signs.** **R933-2-3. Definitions.**

All references in these Rules to Title 72, Chapter 7, Part 5, are to those sections of the Utah Code known as the Utah Outdoor Advertising Act. In addition to the definitions in that part, the following definitions are supplied:

(1) "Abandoned Sign" means any controlled sign, the sign facing of which has been partially obliterated, has been painted out, has remained blank or has obsolete advertising matter for a continuous period of 12 months or more.

(2) "Acceleration and deceleration lanes" means speed change lanes created for the purpose of enabling a vehicle to increase or decrease its speed to merge into, or out of, traffic on the main-traveled way. As used in the Act, an acceleration or deceleration lane begins and ends at a point no closer than 500 feet from the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main-traveled way. On-ramps and off-ramps are part of the interchange and shall not be considered an acceleration or deceleration lane under the Act or these rules.

(3) "Act" means the Utah Outdoor Advertising Act.

(4) "Advertising" means any message, whether in words, symbols, pictures or any combination thereof, painted or otherwise applied to the face of an outdoor advertising structure, which message is designed, intended, or used to advertise or inform, and which message is visible from any place on the main travel-way of the interstate or primary highway system.

(5) "Areas zoned for the primary purpose of outdoor advertising" as used in the Act is defined to include areas in which the primary activity is outdoor advertising.

(6) "Commercial or industrial zone" as defined in of the Act is further defined to mean, with regard to those areas outside the boundaries of urbanized counties and outside the boundaries of cities and towns referred to in that subsection, those areas not within 8,420 feet of an interstate highway exit-ramp or entrance-ramp as

NOTICES OF 120-DAY (EMERGENCY) RULES

An agency may file a 120-DAY (EMERGENCY) RULE when it finds that the regular rulemaking procedures would:

- (a) cause an imminent peril to the public health, safety, or welfare;
- (b) cause an imminent budget reduction because of budget restraints or federal requirements; or
- (c) place the agency in violation of federal or state law (*Utah Code* Subsection 63-46a-7(1) (2001)).

As with a PROPOSED RULE, a 120-DAY RULE is preceded by a RULE ANALYSIS. This analysis provides summary information about the 120-DAY RULE including the name of a contact person, justification for filing a 120-DAY RULE, anticipated cost impact of the rule, and legal cross-references. A row of dots in the text (· · · ·) indicates that unaffected text was removed to conserve space.

A 120-DAY RULE is effective at the moment the Division of Administrative Rules receives the filing, or on a later date designated by the agency. A 120-DAY RULE is effective for 120 days or until it is superseded by a permanent rule.

Because 120-DAY RULES are effective immediately, the law does not require a public comment period. However, when an agency files a 120-DAY RULE, it usually files a PROPOSED RULE at the same time, to make the requirements permanent. Comment may be made on the proposed rule. Emergency or 120-DAY RULES are governed by *Utah Code* Section 63-46a-7 (2001); and *Utah Administrative Code* Section R15-4-8.

Transportation, Preconstruction, Right- of-Way Acquisition **R933-2-3** Definitions

NOTICE OF 120-DAY (EMERGENCY) RULE

DAR File No.: 26892
FILED: 01/14/2004, 13:38

RULE ANALYSIS

PURPOSE OF THE RULE OR REASON FOR THE CHANGE: Section R933-2-3 is the definitional section of the rule regarding the regulation of outdoor advertising. The amendment to the section is designed to take care of a conflict with federal law.

SUMMARY OF THE RULE OR CHANGE: The rule change adds a clarification to the definition of acceleration-deceleration lanes, a definition of feeder system, and deletes the definition of "out-of-standard." (DAR NOTE: A corresponding proposed amendment is under DAR No. 26893 in this issue.)

STATE STATUTORY OR CONSTITUTIONAL AUTHORIZATION FOR THIS RULE: Section 72-7-501; and 23 CFR 750.707

ANTICIPATED COST OR SAVINGS TO:

- ❖ THE STATE BUDGET: The state does not anticipate any cost or savings to the state from this change because it does not require any different activity on the part of the state than the state currently does now.
- ❖ LOCAL GOVERNMENTS: The rule does not apply to local governments, so no cost or savings to them is anticipated.

❖ OTHER PERSONS: None of the changes to the rule require any cost, or provide for any savings, to other persons. The changes do not require any persons to undertake any activities that they are not now carrying out, so there is no change in cost or savings.

COMPLIANCE COSTS FOR AFFECTED PERSONS: There would be no compliance costs because the rule change does not require anyone to do anything. Since no one is required to undertake any activity different than what they now undertake, there should be no increase in costs.

COMMENTS BY THE DEPARTMENT HEAD ON THE FISCAL IMPACT THE RULE MAY HAVE ON BUSINESSES: There is no fiscal impact on business.

EMERGENCY RULE REASON AND JUSTIFICATION: REGULAR RULEMAKING PROCEDURES WOULD place the agency in violation of federal or state law.

The Utah-Federal agreement does not allow for "out-of-standard" signs.

THE FULL TEXT OF THIS RULE MAY BE INSPECTED, DURING REGULAR BUSINESS HOURS, AT:

TRANSPORTATION
PRECONSTRUCTION, RIGHT-OF-WAY ACQUISITION
CALVIN L RAMPTON COMPLEX
4501 S 2700 W
SALT LAKE CITY UT 84119-5998, or
at the Division of Administrative Rules.

DIRECT QUESTIONS REGARDING THIS RULE TO:

James Beadles at the above address, by phone at 801-965-4168, by FAX at 801-965-4796, or by Internet E-mail at jbeadles@utah.gov

THIS RULE IS EFFECTIVE ON: 01/14/2004

AUTHORIZED BY: John R. Njord, Executive Director

R933. Transportation, Preconstruction, Right-of-Way Acquisition.

R933-2. Control of Outdoor Advertising Signs.

R933-2-3. Definitions.

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(2) "Acceleration and deceleration lanes" means speed change lanes created for the purpose of enabling a vehicle to increase or decrease its speed to merge into, or out of, traffic on the main-traveled way. As used in the Act, an acceleration or deceleration lane begins and ends at a point no closer than 500 feet from the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main-traveled way. On-ramps and off-ramps are part of the interchange and shall not be considered an acceleration or deceleration lane under the Act or these rules.

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(5) "Areas zoned for the primary purpose of outdoor advertising" as used in the Act is defined to include areas in which the primary activity is outdoor advertising.

(6) "Commercial or industrial zone" as defined in of the Act is further defined to mean, with regard to those areas outside the boundaries of urbanized counties and outside the boundaries of cities and towns referred to in that subsection, those areas not within 8,420 feet of an interstate highway exit-ramp or entrance-ramp as measured from the nearest point of the beginning or ending of the pavement widening at the exit from or entrance to the main traveled way that are reserved for business, commerce, or trade under enabling state legislation or comprehensive local zoning ordinances or regulations, and are actually used for commercial or industrial purposes, including the land along both sides of a controlled highway for 600 feet immediately abutting the area of use, measurements under this subsection being made from the outer edge of regularly used buildings, parking lots, gate-houses, entrance gates, or storage or processing areas.

(7) "Conforming Sign" means an off-premise sign maintained in a location that conforms to the size, lighting, spacing, zoning and usage requirements as provided by law and these rules.

(8) "Controlled Sign" means any off-premise sign that is designed, intended, or used to advertise or inform any part of the advertising or informative contents of which is visible from any place on the main traveled way of any interstate or federal-aid primary highway in this State.

(9) "Destroyed Sign" means a sign damaged by natural elements wherein the costs of re-erection exceeds 30% of the

depreciated value of the sign as established by departmental appraisal methods.

(10) "Feeder systems" are secondary roads that bring traffic to the main-traveled way.

~~[(10)](11)~~ "Freeway" means a divided highway for through traffic with full control access.

~~[(11)](12)~~ "Grandfather Status" refers to any off-premise controlled sign erected in zoned or unzoned commercial or industrial areas, prior to May 9, 1967, even if the sign does not comply with the size, lighting, or spacing of the Act and these Rules. Signs only, and not sign sites, may qualify for Grandfather Status.

~~[(12)](13)~~ "H-1" means highway service zone as defined in the Act.

~~[(13)](14)~~ "Lease or Consent" means any written agreement by which possession of land, or permission to use land for the purpose of erecting or maintaining a sign, or both, is granted by the owner to another person for a specified period of time.

~~[(14)](15)~~ "Legal copy" means the advertising copy on the sign that occupies at least 50% of the sign size.

~~[(15)](16)~~ "Nonconforming Sign" means a sign that was lawfully erected, but that does not conform to State law or rules passed or made at a later date or that later fails to comply with State legislation or rules because of changed conditions. The term "illegally erected" or "illegally maintained" is not synonymous with the term, "nonconforming sign", nor is a sign with "grandfather" status synonymous with the term, "nonconforming sign."

~~[(16)](17)~~ "Off-Premise Sign" means also, in supplement to the definition stated in the Act, an outdoor advertising sign that advertises an activity, service or product and that is located on premises other than the premises at which activity or service occurs or product is sold or manufactured.

~~[(17)](18)~~ "On-Premise Sign", in supplement to the definition stated in the Act, does not include a sign that advertises a product or service that is only incidental to the principal activity or that brings rental income to the property owner or occupant. [

~~(18) "Out-of-Standard" means any sign that fails to meet the standards and criteria set forth in the Utah Federal Agreement of January 18, 1968 as referenced in the Utah Outdoor Advertising Controls and Rules, current edition, or more restrictive statutes or rules passed after as to size, height, lighting, or spacing.]~~

(19) "Parkland" means any publicly owned land that is designed or used as a public park, recreation area, wildlife or waterfowl refuge, or historical site.

(20) "Property" as used in the definition of "On-Premise Sign" includes those areas from which the general public is serviced and which are directly connected with and are involved in assembling, manufacturing, servicing, repairing, or storing of products used in the business activity. This property does not include the site of any auxiliary facilities that are not essential to and customarily used in the conduct of business, nor does it include property not contiguous to the property on which the sign is situated.

(21) "Sale or Lease Sign" means any sign situated on the subject property that advertises that the property is for "sale" or "lease". This sign may not advertise any product or service unrelated to the business of selling or leasing the land upon which it is located, nor may it advertise a projected use of the land or a financing service available or being utilized in its development.

(22) "Scenic Area" as used in the Act includes a scenic byway.

(23) "Transient or Temporary Activity" means any industrial or commercial activity, not otherwise herein excluded, that does not have a prior continuous history for a period of six months.

Westlaw.

23 CFR § 750.707
 23 C.F.R. § 750.707

C

CODE OF FEDERAL REGULATIONS
TITLE 23—HIGHWAYS
CHAPTER I—FEDERAL HIGHWAY
ADMINISTRATION, DEPARTMENT OF
TRANSPORTATION
SUBCHAPTER H—RIGHT-OF-WAY AND
ENVIRONMENT
PART 750—HIGHWAY BEAUTIFICATION
SUBPART G—OUTDOOR ADVERTISING
CONTROL
 Current through June 16, 2004; 69 FR 33774

§ 750.707 Nonconforming signs.

(a) General. The provisions of § 750.707 apply to nonconforming signs which must be removed under State laws and regulations implementing 23 U.S.C. 131. These provisions also apply to nonconforming signs located in commercial and industrial areas within 660 feet of the nearest edge of the right-of-way which come under the so-called grandfather clause contained in State-Federal agreements. These provisions do not apply to conforming signs regardless of when or where they are erected.

(b) Nonconforming Signs. A nonconforming sign is a sign which was lawfully erected but does not comply with the provisions of State law or State regulations passed at a later date or later fails to comply with State law or State regulations due to changed conditions. Changed conditions include, for example, signs lawfully in existence in commercial areas which at a later date become noncommercial, or signs lawfully erected on a secondary highway later classified as a primary highway.

(c) Grandfather Clause. At the option of the State, the agreement may contain a grandfather clause under which criteria relative to size, lighting, and spacing of signs in zoned and unzoned commercial and industrial areas within 660 feet of the nearest edge of the right-of-way apply only to new signs to be erected after the date specified in the agreement. Any sign lawfully in existence in a commercial or industrial area on such date may remain even though it may not comply with the size, lighting, or spacing criteria. This clause only allows an individual sign at its particular location for

the duration of its normal life subject to customary maintenance. Preexisting signs covered by a grandfather clause, which do not comply with the agreement criteria have the status of nonconforming signs.

(d) Maintenance and Continuance. In order to maintain and continue a nonconforming sign, the following conditions apply:

(1) The sign must have been actually in existence at the time the applicable State law or regulations became effective as distinguished from a contemplated use such as a lease or agreement with the property owner. There are two exceptions to actual existence as follows:

(i) Where a permit or similar specific State governmental action was granted for the construction of a sign prior to the effective date of the State law or regulations and the sign owner acted in good faith and expended sums in reliance thereon. This exception shall not apply in instances where large numbers of permits were applied for and issued to a single sign owner, obviously in anticipation of the passage of a State control law.

(ii) Where the State outdoor advertising control law or the Federal-State agreement provides that signs in commercial and industrial areas may be erected within six (6) months after the effective date of the law or agreement provided a lease dated prior to such effective date was filed with the State and recorded within thirty (30) days following such effective date.

(2) There must be existing property rights in the sign affected by the State law or regulations. For example, paper signs nailed to trees, abandoned signs and the like are not protected.

(3) The sign may be sold, leased, or otherwise transferred without affecting its status, but its location may not be changed. A nonconforming sign removed as a result of a right-of-way taking or for any other reason may be relocated to a conforming area but cannot be reestablished at a new location as a nonconforming use.

(4) The sign must have been lawful on the effective date of the State law or regulations, and must continue to be lawfully maintained.

(5) The sign must remain substantially the same as it was on the effective date of the State law or regulations. Reasonable repair and maintenance of the sign, including a change of advertising message, is not a change which would terminate nonconforming rights. Each State shall develop its own criteria to determine when customary maintenance ceases and a substantial change has occurred which would terminate nonconforming rights.

23 CFR § 750.707

END OF DOCUMENT

(6) The sign may continue as long as it is not destroyed, abandoned, or discontinued. If permitted by State law and reerected in kind, exception may be made for signs destroyed due to vandalism and other criminal or tortious acts.

(i) Each state shall develop criteria to define destruction, abandonment and discontinuance. These criteria may provide that a sign which for a designated period of time has obsolete advertising matter or is without advertising matter or is in need of substantial repair may constitute abandonment or discontinuance. Similarly, a sign damaged in excess of a certain percentage of its replacement cost may be considered destroyed.

(ii) Where an existing nonconforming sign ceases to display advertising matter, a reasonable period of time to replace advertising content must be established by each State. Where new content is not put on a structure within the established period, the use of the structure as a nonconforming outdoor advertising sign is terminated and shall constitute an abandonment or discontinuance. Where a State establishes a period of more than one (1) year as a reasonable period for change of message, it shall justify that period as a customary enforcement practice within the State. This established period may be waived for an involuntary discontinuance such as the closing of a highway for repair in front of the sign.

(e) Just Compensation. The States are required to pay just compensation for the removal of nonconforming lawfully existing signs in accordance with the terms of 23 U.S.C. 131 and the provisions of Subpart D, Part 750, Chapter I, 23 CFR. The conditions which establish a right to maintain a nonconforming sign and therefore the right to compensation must pertain at the time it is acquired or removed.

<General Materials (GM) - References, Annotations,
or Tables>

23 C. F. R. § 750.707

ADDENDUM D



YESCO

YOUNG ELECTRIC SIGN COMPANY



Ogden Division

801-621-4710 Telephone
801-399-9648 Fax

2767 Industrial Drive
P.O. Box 1880
Ogden, Utah 84402-1880

October 22, 2002

David Miles, Hearing Officer
Utah Department of Transportation
4501 S. 2700 W.
Box 141260
Salt Lake City, UT 84114-1260

RE: Appeal of Departmental Action
UDOT File No. 02-1-3
R-407 Outdoor Advertising Application at MP 369.8 on Wayne Belleau Property

Dear Mr. Miles:

This is to follow up our telephone discussion on October 6. It is our understanding that you are the hearing officer for the aforementioned appeal. The appeal was filed on September 5, and it was our understanding that the procedure involves the department sending us a letter advising us of the briefing schedule for the appeal. You had indicated that Mark Burns with the Attorney General's Office would get that letter out to us right away, yet we have not received it.

You may recall that this appeal involves an outdoor advertising structure that we are seeking to relocate, and which has been removed. Accordingly, we are not receiving the advertising income to which we are entitled, and are unable to meet our commitments to advertisers during the delay. In order to avoid any further delay, we wanted to get before you an analysis of the state regulations, and how they apply in this appeal. We also discussed that, in view of the issues involved and to facilitate your review of the oversize exhibits we have in support of this appeal, we have requested an informal hearing with you on the appeal.

The analysis of the issues on appeal are as follows:

This is an appeal from the August 15, 2002 decision by Luana Middleton denying our permit application for relocation of an outdoor advertising sign on the above-referenced property.

Historical Background

The subject sign has existed since 1978. Several significant developments have occurred since the sign was erected that mandate its relocation. First, overhead electrical utility high power lines were installed in very close proximity to the sign well after the sign was erected. The power lines have created a risk of electrocution to our workers who change sign faces and perform maintenance on the subject sign periodically, and we have had to exercise great caution to deal with this situation. In a similar circumstance some time ago, our company had a worker electrocuted who was working on an outdoor advertising structure, so we are highly sensitive to such situations as they effect our employees. During the last session, and with UDOT's recognition that the risk of electrocution was significant, the Legislature passed a new law, S.B.145, to permit outdoor advertising companies to relocate signs closer to utility lines than applicable electrical codes would permit. This amendment to Section 72-7-516 was signed into law by the Governor in March, 2002.

Another relevant factor is the on-ramp configuration for the northbound on-ramp and acceleration lane adjacent to the existing sign location. The on-ramp was configured differently when the sign was erected. It merged into the freeway at a much more dramatic angle than it does now, impairing the ability of vehicles to get up to speed before being forced into a merge. In response to this problem, the on-ramp was reconfigured to angle more parallel to the through lanes before merging, allowing more space for acceleration before the merge into the northbound through lanes. The on-ramp now has an acceleration lane that slowly merges into the outer lane. From the point that the pavement for the main-traveled way widens to merge with the pavement for the on-ramp/acceleration lane, the incoming lane takes a full 1,773 feet until the pavement widening gradually ends.

In our efforts to relocate the subject sign to maintain the required separation from the utility lines, we discussed relocation sites with the owner of the land. The property owner made us aware that it was pursuing development on its land, such that the sign would have to be moved to the north end of the site. Accordingly, we filed the appropriate application forms with UDOT.

The Region One Permits Officer has misinterpreted the relevant state statutes and administrative rules to arrive at the conclusion that the proposed relocation site does not meet the spacing requirements from the interchange. In so doing, the denial of our permit request put us in the position of losing our sign altogether, or risking electrocution of our workers. It is clear that neither such result was the intent of the Legislature. The relocation site is a permitted one under the relevant statutes and rules. To accommodate the property owner, we are in the process of removing the existing sign. Accordingly, and following an inordinate delay in the processing of our permit request, we were forced to appeal this decision.

Statutory Analysis

The Permits Officer has interpreted the relocation site to be closer than permitted from the interchange, which she interprets to include all of the on-ramp/acceleration lane up to the point that the merging of the on-ramp/acceleration lane into the through lanes of the freeway ends. This is a misinterpretation of the statute and administrative rules.

Submitted herewith is an aerial photograph diagramming the roadway and property conditions in the area, as well as the existing and proposed sign location, for your reference. See Exhibit 1. We have a full-size copy of this exhibit, and reiterate our request for the opportunity to present this exhibit to you at an informal hearing or a meeting of the parties.

Section 72-7-505(3)(c)(i)(A) provides that outdoor advertising signs may not be located on an interstate highway “within 500 feet of an interchange”. Ms. Middleton has explained to us that she interprets the rule to prohibit any outdoor advertising until a point 500 feet beyond where the pavement widening for the on-ramp/acceleration lane ends. In doing so, Ms. Middleton has effectively interpreted the on-ramp/acceleration lane, in its entirety, to be part of the “interchange”. This is in error. The statute defines an “interchange”, in relevant part, as follows:

“Interchange or intersection” means those areas and their approaches where traffic is channeled off or onto an interstate route, *excluding the deceleration lanes, acceleration lanes, ...*

(emphasis added). *Id.*, Section 72-7-502(9). The term “acceleration lane” is not defined in the statute, but it is in the rule. R933-2-3(2) defines an acceleration lane as follows:

(2) “**Acceleration and deceleration lanes**” means speed change lanes created for the purpose of enabling a vehicle to increase its speed to merge into, or out of, traffic on the main-traveled way. *As used in the Act, an acceleration lane begins and ends at a point no closer than 500 feet from the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main-traveled way.*

(emphasis added). Clearly, under the regulatory scheme, the acceleration lane cannot be considered to be part of the “interchange”. The crux of the issue is whether the acceleration lane is measured 500 feet from the “point of beginning” of the pavement widening, or the “point of ending”. If it is the former, the proposed relocation site is a permitted location. If it is the latter, it is not. However, the latter would lead to an absurd result.

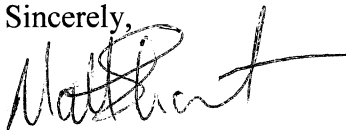
If the point of measurement were interpreted to be the point that the pavement widening for the on-ramp/acceleration lane ends, the acceleration lane could not begin (under the foregoing definition in the Rule) until a point 500 feet beyond where it ends. This interpretation would render the Rule definition for an “acceleration lane” to be

meaningless, and nonsense. The point of measurement has to be considered to be the *beginning* point of pavement widening, not the point where the pavement widening *ends*. Under the statute, from the point of the beginning of pavement widening, the “interchange” only continues for another 500 feet, at which point the incoming lane becomes an “acceleration lane” under the language of the rule. From that point northward, it may *not* be considered to be part of the “interchange” under the statutory definition.

The “point of widening” is identified on the attached Exhibit 1 and depicted in the photos attached as Exhibit 2, and is located 1164 feet from the center line of Antelope Drive where it intersects with the freeway. From the beginning point of widening, the “acceleration lane” begins, and the “interchange” ends, 500 feet to the north. See Exhibit 1. The statute provides that no outdoor advertising may be erected within 500 feet of the “interchange”, effectively setting up a sign-free zone for the first 500 feet after the “interchange” ends. Both the existing sign, and the relocation site, are well outside of the sign-free zone. See Exhibit 1.

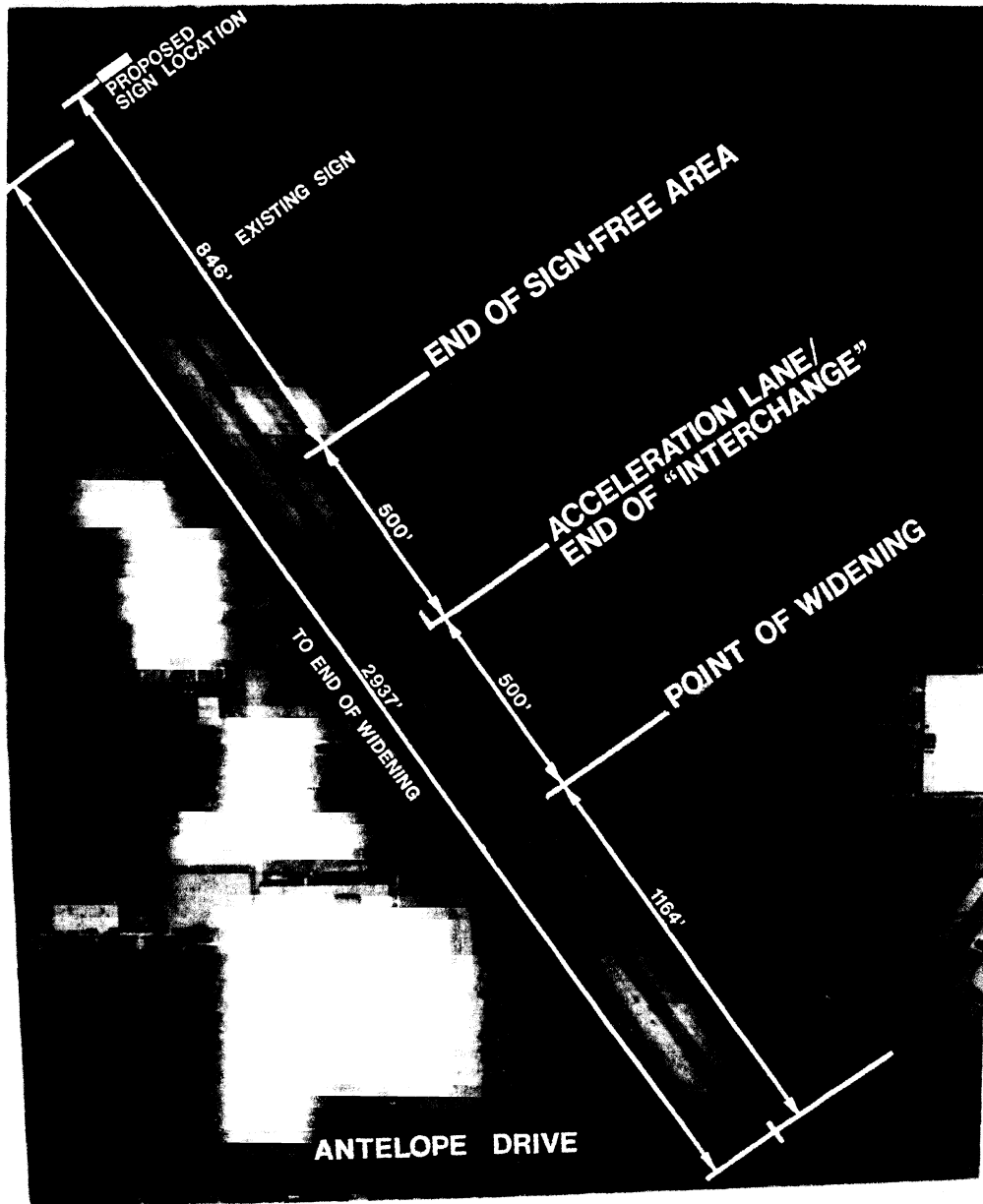
In summary, the relocation site is a permitted location for an outdoor advertising structure, being located in excess of 500 feet from the “interchange”. We respectfully request that you grant the appeal and approve the issuance of the permit as we have requested.

Sincerely,

A handwritten signature in black ink, appearing to read "Matt Short", with a stylized flourish extending to the right.

Matt Short
Outdoor Manager
Young Electric Sign Company

Attachments



CLEARFIELD CITY

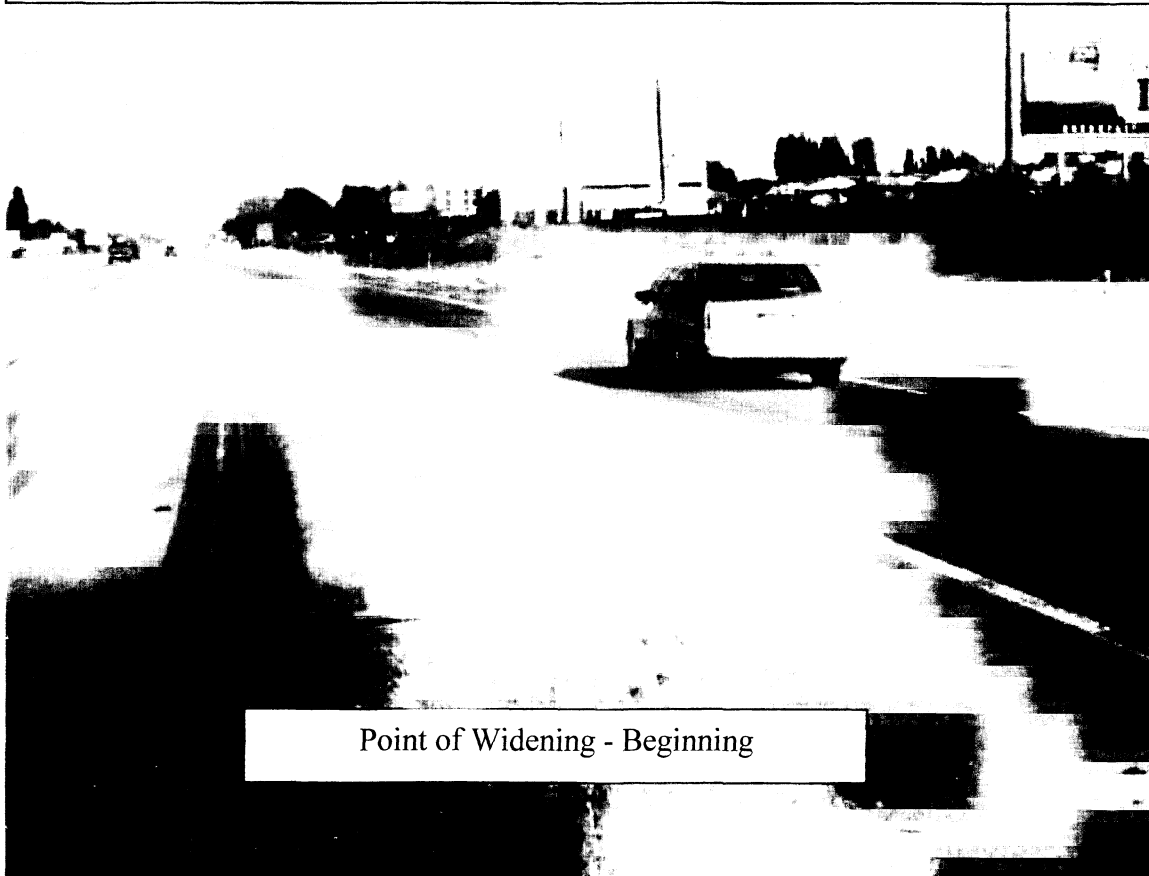
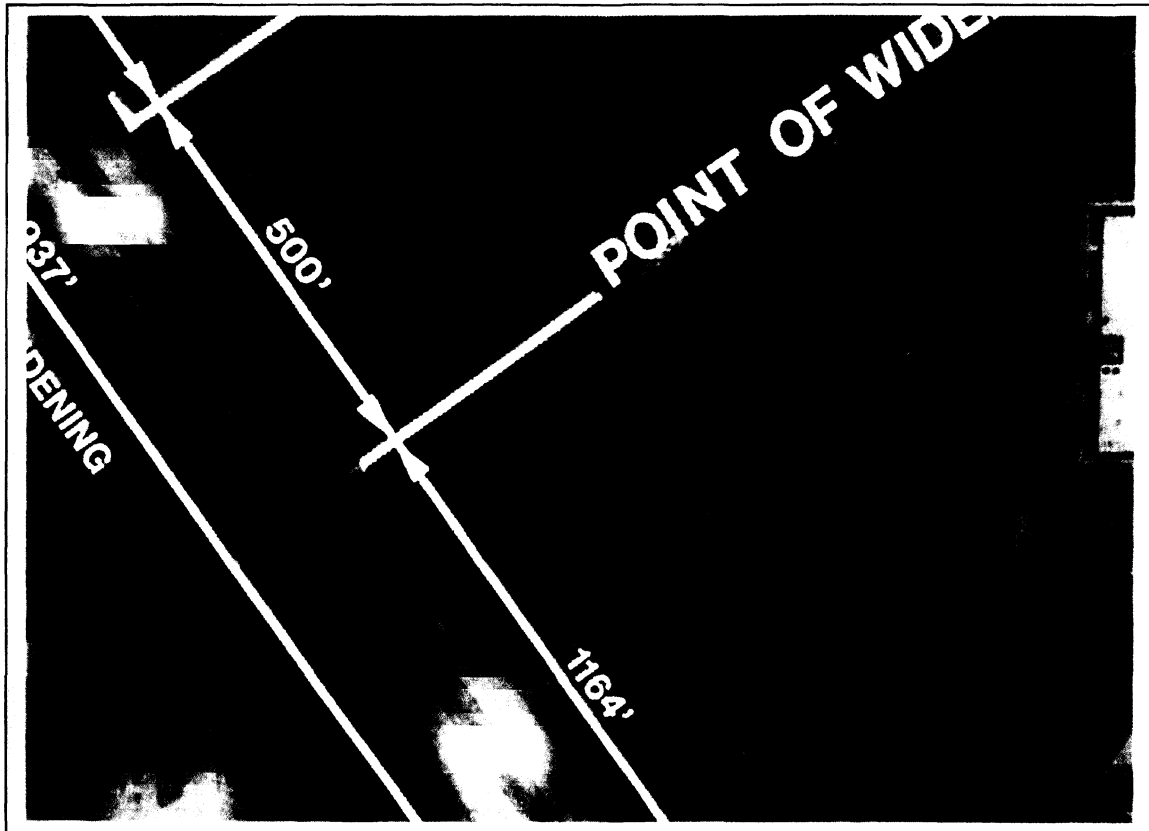
PHOTOGRAPHY DATE: JULY 1, 1976
SCALE: 1" = 100'
#55-6

EXHIBIT 1

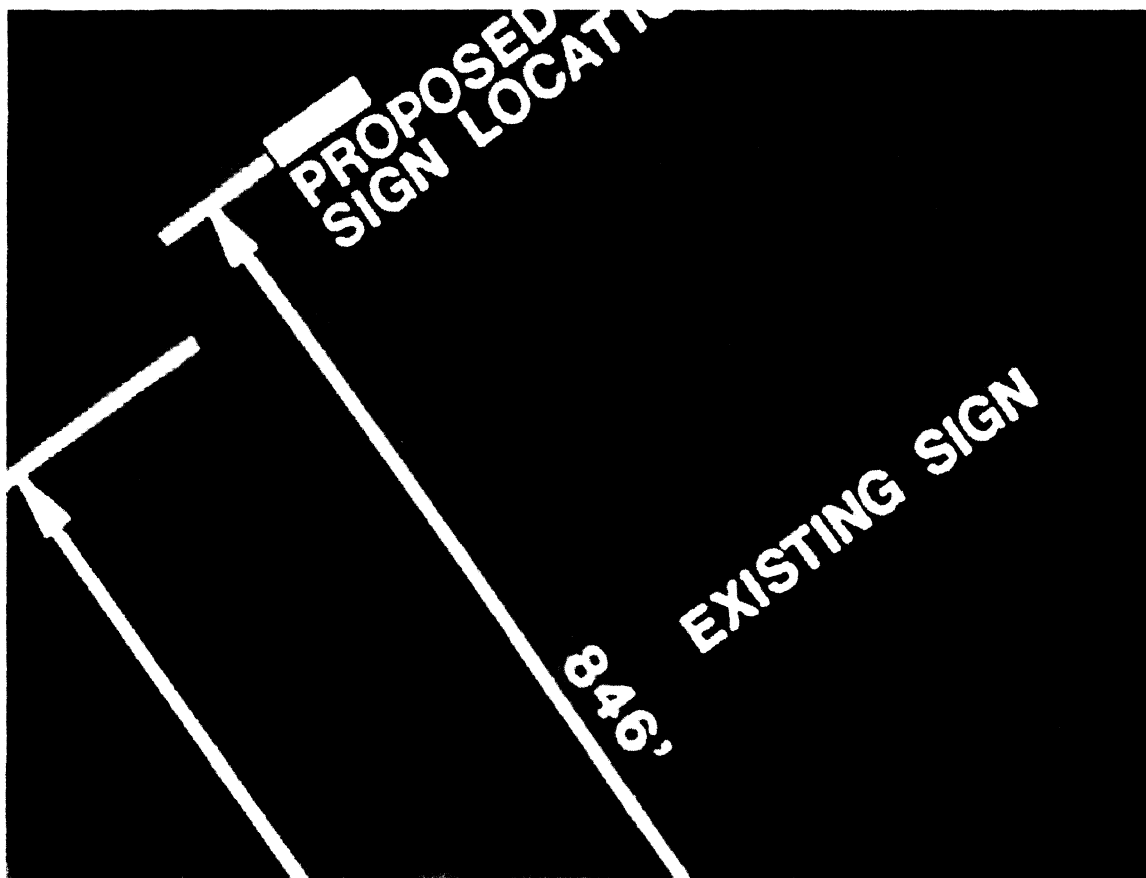
- | | |
|----------------|---|
| Photo 1 | Point of Widening (beginning) – aerial photo |
| Photo 2 | Point of Widening (beginning) – ground level photo |
| Photo 3 | Point of Widening (ending) – aerial photo |
| Photo 4 | Point of Widening (ending) – ground level photo |
| Photo 5 | Existing on-premise signs in area |
| Photo 6 | Existing on-premise monument sign |
| Photo 7 | Existing sign – prior to relocation |
| Photo 8 | Relocation site |

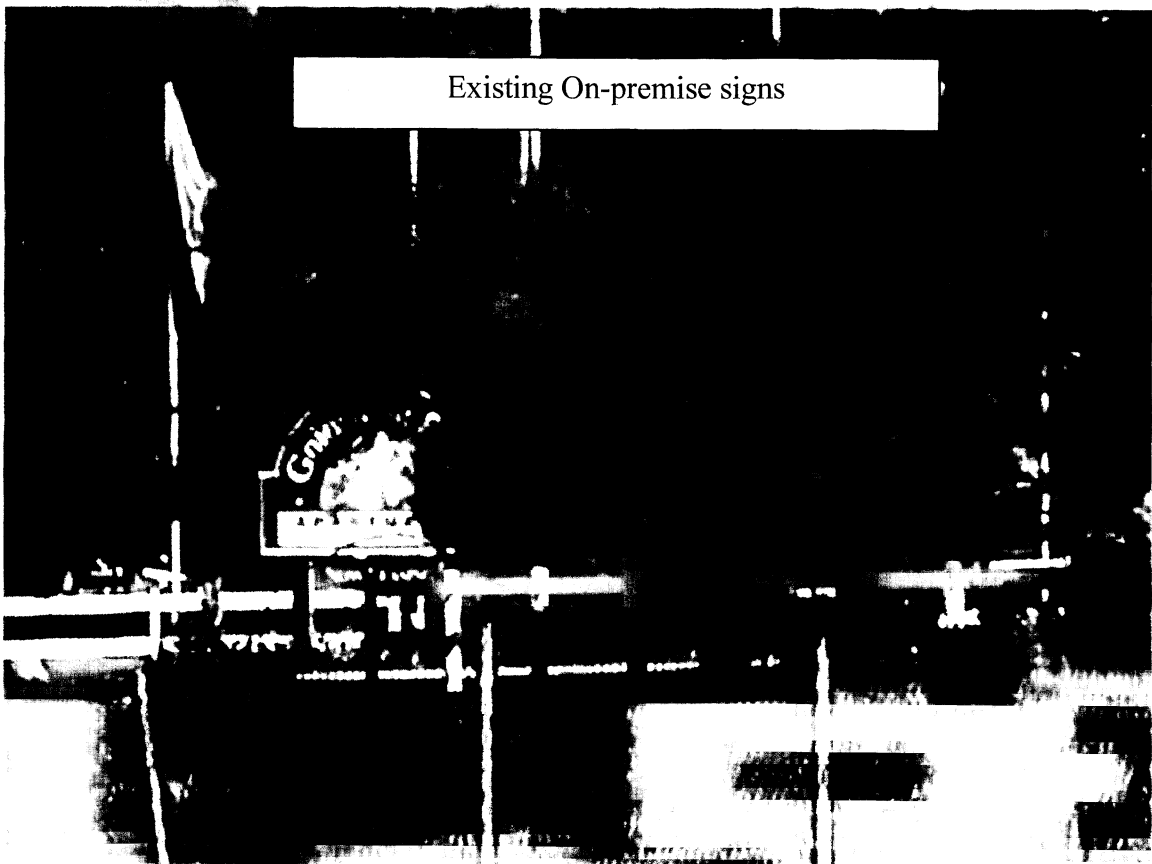
Area Photographs

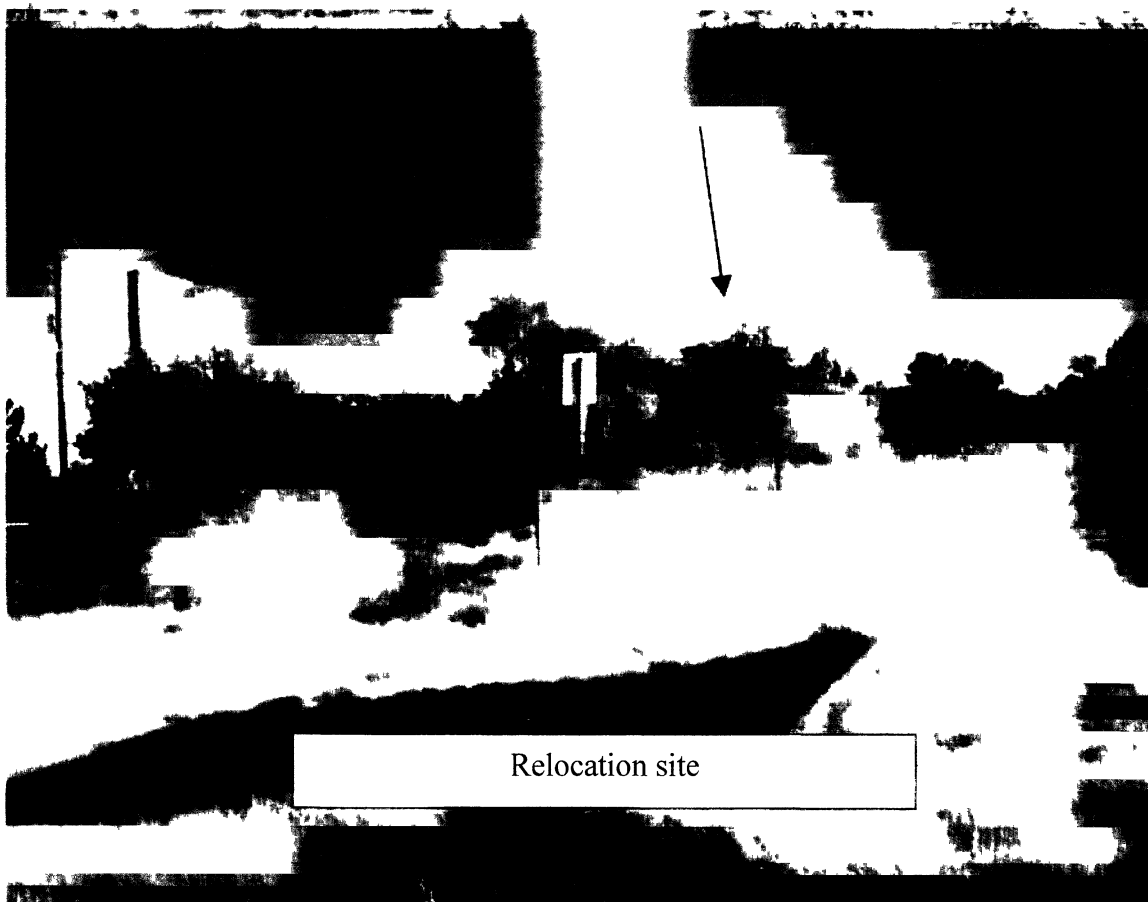
EXHIBIT 2



Point of Widening - Beginning







Relocation site