

An appellate proceeding with national implications is pending before the Arizona Court of Appeals. Oral arguments were heard on Thursday, September 30, 2010 at Mesa High School.

The appeal pits Scenic Arizona, Inc. and the Neighborhood Coalition of Greater Phoenix, Inc. against American Outdoor Advertising, Inc. (AOA) and the City of Phoenix Board of Adjustment over permits issued for electronic billboards. It is a high profile case in many respects:

- Due to the important public interests at stake, the case has drawn the attention of amicus curiae (friend of the court) briefs from the national Sierra Club, Inc. and Scenic America, Inc. (in support of Scenic Arizona and a Phoenix neighborhood coalition). An amicus curie brief has also been filed by Clear Channel Outdoor, Inc. (CCO), the world's largest outdoor advertising company (in support of digital billboards).
- The Sierra Club and Scenic America represent the interests of scenic conservationists, whose cause has been taken up over the years by diverse interests ranging from Stewart Udall and Lady Bird Johnson to William F. Buckley and Dr. Seuss.
- Given the public interests involved in aesthetics and highway safety, the Sierra Club and Scenic America expect that the appellate court will reach the merits of the case. Unlike a federal court proceeding, the court may consider the public interest in reaching the merits of such a case. This is especially true where the violation of the Arizona Highway Beautification Act (AHBA) or federal regulations under the Highway Beautification Act (HBA) would otherwise go unaddressed.
- The case has also drawn an unusual court order directing the Arizona Department of Transportation (ADOT) to file a brief to explain its position, even though ADOT is not a party to the appeal. The directive that a non-party file an amicus brief is highly unusual in any appeal. This gave the ADOT the opportunity to address the merits of the case and, quite frankly, reveal its failure to follow the law.
- The appendix to the Sierra Club, et al.'s amicus brief reveals the internal debate in the summer of 2007 at the Federal Highway Administration (FHWA) that led the agency to a sudden change in its longstanding interpretation of what constitutes an "intermittent" change - from once a day to more than 7,000 times a day.
- It is noteworthy that FHWA's current administrator, Victor Mendez, headed the ADOT until 2009. It is also noteworthy that the Secretary of the Office of Homeland Security, Janet Napolitano, was the Arizona Governor from 2003 to 2009, and as Governor she vetoed a legislative effort to change state law to allow digital billboards and the state law was never changed thereafter.
- It is also noteworthy that the U.S. Transportation Secretary, Ray LaHood, has made distracted driving an important issue, and that he "maintains that distracted driving continues to be an epidemic in the U.S."

### **The key points of the appeal include:**

**Standing:** AOA and CCO maintain that the appellants Scenic Arizona and Neighborhood Coalition lack "standing" to challenge the local permitting of AOA's digital billboards along the adjoining interstate highway. In challenging the appellants' standing, AOA and CCO seek to prevent the appellate court from reaching the merits of the case, even though the case is one involving an issue of great public importance that is likely to recur.

**Merits:** Digital/LED billboards with intermittent lighting are highly profitable to the billboard industry, because they draw the attention of passing drivers to an array of internally illuminated messages changing intermittently at a rapid rate. For thirty years, the State of Arizona interpreted state law to preclude electronic billboards from changing more than once per day. Indeed, this was likewise the interpretation given to the prohibition on intermittent lighting by the FHWA. CCO chose to completely ignore the issue of customary use that was addressed in the Sierra Club amicus brief, while AOA acknowledged that customary use for lighting is in the federal agreement and the state statute. The merits rest upon a matter of law where the term "intermittent" is framed by the exceptions and by three decades of consistent interpretation given to customary use. To quote the late Congressman Jim Wright from debate over amendments to the HBA, "the law clearly says customary use."

FHWA, however, failed to enforce federal law and regulations, and a proliferation of electronic billboards began to appear in isolated locations in several states. By the time that FHWA realized the growing extent of the problem, it was faced with an acknowledgment that its own lack of enforcement would pose a problem once the agency began to follow the law.

Through the mechanism of a "guidance memorandum" the agency sought to dodge that problem by saying that it would not challenge a state's interpretation that would allow changes ranging at intervals of 4, 6 and 8 seconds (or, in other words, by saying that it would not do its job). The problem for FHWA is the fact that the prohibition on "intermittent" lighting allows for exceptions such as a change in display of the time, the temperature, or the date. The FHWA cannot legally ignore the fact that the exceptions frame the definition of the term "intermittent," but, unless and until challenged in court, that is precisely what FHWA has been doing and will continue to do.

To many, the FHWA has become another federal agency that is more than "cozy" with the industry that it is supposed to regulate. To give it deniability for authorizing such illegal displays, FHWA has been careful to state that its "guidance memorandum" does not have the force of law. Yet the billboard industry repeatedly holds up the memorandum as legal justification for its actions and asks the states to allow light emitting diode signs that change rapidly throughout the day.

The Sierra Club has identified in the appendix to its amicus brief three internal FHWA emails, each of which speaks volumes:

- On August 7, 2007, the Federal Highway Administration, Kentucky Division, communicated with FHWA officials about the growing problem with LED-screen billboards:

*Our Division has received ambiguous assistance from Hqtrs. The program office appears to prefer a "soft" position in remedying the deviations from applicable regs and statutes. My concern is that industry is playing serious hardball to roll back billboard controls and FHWA seems unable to understand the strength of the effort...It would be desirable to have a clear nationwide FHWA position that strongly advocates for the integrity of the letter and intent of the law.*

- The responding memorandum recited that, for further guidance, a state could contact the Office of Real Estate Services c/o Catherine O'Hara, and instructions for doing so were provided at the end of the memorandum. A FOIA request sent to FHWA on October 1, 2007 yielded the following statement by Catherine O'Hara in August 2007:

*To me, any illuminations which go on or off more than once a day are intermittent lights.*

- Aware of the "more than once a day" or "once each day" (see Amicus App. 71, 85) context for interpretation of the term "intermittent," another FHWA staff member revealed his difficulty maneuvering around this problem in his September 24, 2007 internal memorandum to Gloria Shepherd, who signed the September 25, 2007 Guidance Memorandum:

*I am having a tough time with coming up with a clear way to define the term "intermittent" (used in all or most Fed/State agreements). I am still playing with it, and any suggestions are welcome. I do think we need some explanation. The scenic organizations are going to hit us hard on that point, and any lawsuits might turn on that word.*

- See Amicus App. 71-73, and 93 (Gloria Shepherd response to FOIA Request, with FHWA counsel email dated September 25, 2007) (emphasis supplied). There was no way for FHWA to deal with the issue other than to just ignore the same in the guidance memorandum and await a lawsuit over a state-federal agreement where the outcome would "turn on that word." **FHWA's counsel obviously knew that the term "intermittent" would be defined by the exceptions.**