



U.S. Department
of Transportation
**Federal Highway
Administration**

Texas Division Office

October 16, 2017

300 E. 8th Street, RM 826
Austin, TX 78701
Tel 512-536-5900
FAX 512-536-5990
www.fhwa.dot.gov/txdiv

In Reply Refer To:
HPP-TX

Mr. Gus Cannon, CTCM
Director of Right of Way Division
Texas Department of Transportation
P.O. Box 5075
Austin, Texas 78763-5075

Amendments to Chapter 21 related to Commercial Signs

Dear Mr. Cannon:

The Federal Highway Administration (FHWA) Texas Division has reviewed the preamble, proposed repeals, amendments and new sections to Chapter 21 of Title 43, Texas Administrative Code, Part 1. FHWA understands that the Texas Legislature passed SB 2006 in response to the Third Court of Appeals ruling in the *AusPro v. The Texas Department of Transportation (TxDOT)* decision that invalidated the Texas Highway Beautification Act (HBA). We appreciate that TxDOT has kept FHWA informed about the appeals process to modify the Court's ruling. We further recognize that a judicial remedy may take many more months and that Texas' legislative correction was a necessity.

At the federal level, 23 United States Code (USC) § 131(a) requires States to control outdoor advertising and reads as follows: "The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty."

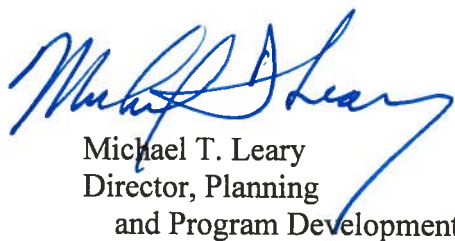
FHWA has reviewed SB2006 and the proposed rules implementing that statute. We recognize that the object of the legislation was to correct Texas HBA subchapters B and C that were found to have violated the 1st Amendment of the U.S and Texas Constitutions by *AusPro v. Texas Department of Transportation (TxDOT)*. FHWA's analysis indicates the there are two main differences with the federal HBA and our Federal State Agreement (FSA).

First, the on premise/off premise distinction has been dropped and a new "commercial sign" concept created. This new concept allows TxDOT to regulate commercial signs in a manner that is not identical to, but is similar to the requirements of the federal HBA and FSA. FHWA finds this conditionally acceptable, pending the results of the actual implementation of the new Texas HBA starting next year.

Second, neither the new Texas HBA nor the proposed rules (if adopted) regulate noncommercial speech signs. FHWA understands that the regulation of noncommercial speech faces strict scrutiny in the courts and therefore is inherently difficult. Nonetheless, the federal HBA and FSA require the regulation of noncommercial speech, and therefore the new Texas HBA does not appear to be in compliance. However, FHWA understands the difficulty of implementing an entirely new regulatory scheme as required by *AusPro*. Therefore, going forward, FHWA will work with TxDOT to develop a program that complies with the federal HBA and FSA to the extent allowed by law to control outdoor advertising along Texas' interstates and highways.

We are continuing to vet policies related to this issue with our headquarters offices and additional comments may follow. If you have questions, please contact me or Chrisy Currier, ROW Program Manager in the Division Office at (512) 536-5931.

Sincerely,



Michael T. Leary
Director, Planning
and Program Development

cc: Wendy Knox