OFFICE
OF
THE ADMINISTRATIVE LAW JUDGE

2023 REPORT

MASSACHUSETTS DEPARTMENT OF TRANSPORTATIONOFFICE OF THE ADMINISTRATIVE LAW JUDGE

2023 Report

Overview of the Office

The Office of the Administrative Law Judge is established pursuant to G.L. c. 6C, §40, as amended by St. 2009, c. 25, §8. Its essential function is to make fair and impartial decisions on disputes involving the Department, including:

- construction contract disputes appealed from decisions of the Chief Engineer
- appeals from the denial of outdoor advertising permits by the Department's Division of Outdoor Advertising
- contractor appeals from decertification of disadvantaged minority business enterprises
- appeals from decisions of the Department’s Right of Way Bureau pursuant to the requirements of 49 CFR Part 24 §24.10
- other matters as assigned by the Secretary of Transportation

Executive Summary

This report provides the status and disposition of appeals and other matters brought to the Office of the Administrative Law Judge in 2023.

In summary, the following matters were handled in calendar year 2023:

- One (1) construction contract appeal was heard and resolved by a report and recommendation to the Secretary pursuant to M.G.L. c. 6C, §40.
- Two (2) construction contract appeals are pending and will be heard in calendar year 2024.

- Two (2) direct payment demands were ruled upon in accordance with G.L. c.30, §39F.

- One (1) appeal from DBE decertification proceedings initiated by the MassUCP was resolved by the MassUCP Adjudicatory Board.

- One (1) appeal from the denial of an application for an outdoor advertising permit for an electronic sign was received. An adjudicatory hearing was held, and a final agency decision was issued in accordance with 700 CMR 3.19 and G.L. c. 30A.

Construction Contract Appeals

Appeals Resolved by Report and Recommendation to the Secretary

D.W. White Construction Company #5-97935-001

A notice was received appealing the Chief Engineer's determination to deny a claim in the amount of $94,596.86 for Special Borrow backfill used on the project. After a hearing, this Office recommended that the claim be denied because the contractor's use of Special Borrow was a deviation from the approved plans and working drawings that was not approved in writing by the Engineer.

Appeals Pending

Baltazar Contractors, Inc. # 3-101985-001

A notice of appeal was received appealing the Chief Engineer's determination to deny a claim in the amount of $376,796.91 for additional costs incurred for removal and replacement of damaged concrete sidewalks. A hearing will be held, and a report and recommendation will be made to the Secretary in calendar year 2024.

MDR Construction Company, Inc. #5-112878-001

A notice of appeal was received appealing the Chief Engineer's determination to deny, in part, a claim in the amount of $94,915.85 and a time extension resulting from differing site conditions encountered while performing drainage operations. The Chief Engineer made a determination to approve the claim for a reduced amount of $2,846.00 and a contract time extension of 13 days. A hearing will be held, and a report and recommendation will be made to the Secretary in calendar year 2024.

Direct Payment Demands

In 2023, the following direct payment demands were received and resolved by rulings on the merits in accordance with G.L. c.30, §39F:

BrandSafway Services, LLC. – March 14, 2023

General Contractor: New England Building and Bridge Co.
Contract: #117756 - Holden / SB Interstate 190 over the Quinapoxet River
Amount: $74,027.28
Decision: Denied – March 23, 2023 (BrandSafway Services is not a "subcontractor" as defined in G.L. c.30, §39F)

Mass Electric Construction Company – June 16, 2023

General Contractor: RL Controls LLC
Contract: MBTA – Red Line and Silver Line Security Upgrades
Amount: $486,254.54
Decision: Denied – June 22, 2023 (MassDOT is not the awarding authority For the contract in question)

Massachusetts UCP Board Appeals

In 2023, the following contractor appeals from DBE decertification proceedings initiated by the MassUCP were decided or were pending with the Massachusetts Unified Certification Program Adjudicatory Board.

Decisions

MON Landscaping Inc. - MUCP #2021-0002

MON Landscaping requested a hearing before the Board to appeal a determination by MassUCP to initiate decertification proceedings based on a finding that the owner of the firm is not "economically disadvantaged." By letter dated September 12, 2023, to the Board, the MassUCP withdrew its proposal to decertify. Accordingly, the hearing was cancelled, and the matter was dismissed.

Outdoor Advertising Appeals

In 2023, the following appeal from the denial of outdoor advertising permits was heard in accordance with 700 CMR 3.19.

W.N. Realty – Appeal of Denial of Outdoor Advertising Permits ##2022D010 and 2022D011

This appeal concerned the denial of applications for permits to allow W.N. Realty to erect two electronic billboards at 61 Accord Park Drive / Route 3 in the town of Rockland. On October 31, 2023, a final agency decision was issued:

("The Federal State Agreement's prohibition on locating signs adjacent to or within 500 feet of an interchange does not apply to Route 3, a non-interstate highway. Therefore, OOA's denial of applications #2022D010 and 2022D011 based on that prohibition was improper. There is no other reason for OOA's denial of the permits. OOA is directed, therefore, to approve applications #2022D010 and 2022D011 and grant electronic sign permits to WNR to locate outdoor advertising facing Route 3 at 61 Accord Park Drive in Rockland.")

APPENDIX OF DECISIONS/RULINGS

A. Construction Contract Appeals **A-1**

Report & Recommendation: D.W. White Construction Co. #5-97935-001

B. Direct Payment Demands …………………………………………………………… **B-1**

Ruling, Direct Payment Demand of BrandSafway Services, LLC. dated March 23, 2023

Ruling, Direct Payment Demand of Mass Electric Construction Co. dated June 22, 2023

C. Mass. UCP Adjudicatory Board Appeals **C-1**

Notice of Withdrawal of Proposal to Decertify: MON Landscaping Inc.
- MUCP #2021-0002 dated Sept. 19, 2023

D. Outdoor Advertising Appeals **D-1**

W.N. Realty – Appeal of Denial of Outdoor Advertising Permits
##2022D010 and 2022D011

- *Docket*
- *Final Agency Decision dated October 31, 2023*

APPENDIX A-1

RULINGS

CONSTRUCTION CONTRACT APPEALS

Maura Healey, Governor
Kimberley Driscoll, Lieutenant Governor
Monica Tibbits-Nutt, Acting Secretary & CEO

MEMORANDUM

To: Monica Tibbits-Nutt, Acting Secretary & CEO

From: A.C. Albert Caldarelli, Administrative Law Judge

Date: October 16, 2023

Re: Report and Recommendation on Appeal of DW White Construction from the Chief Engineer's Denial of Claim #5-97935-001

I am pleased to submit for your consideration the attached report and recommendation that addresses an appeal by D.W. White Construction (DWW), the general contractor for contract #97935. The contract provided for the replacement of four (4) bridges that carry State Route 3 over High Street in Norwell and over State Route 123 in Hanover.

The appeal involved a dispute concerning payment for backfill used on the project. The contractor claims that it backfilled excavated areas with 8,134 cubic yards of material. The Department paid for that material under Item 150 for Ordinary Borrow at the unit bid price of $15.62/CY. DWW contends that the material should have been paid as Special Borrow under Item 150.1 at the unit bid price of $27.25/CY. The claim is for the price difference totaling $94,596.86.

By letter dated October 15, 2020, the Chief Engineer made a written determination to deny the claim. The contractor appealed that decision, and I held a hearing on September 25, 2023, to take testimony and evidence on the matter. My findings of fact and law are detailed in the attached report and recommendation.

Pursuant to M.G.L. c. 6C, § 40, my recommendation as to the disposition of this matter is to maintain the Chief Engineer's denial of the claim.

Agree ☒ Disagree ☐

Monica Tibbits-Nutt
Acting Secretary & CEO

dated: 10/16/2023

REPORT AND RECOMMENDATION
APPEAL OF D.W. WHITE CONSTRUCTION, INC.
REGARDING THE CHIEF ENGINEER'S DECISION
TO DENY CLAIM #5-97935-001

This report and recommendation is provided in accordance with the provisions of M.G.L. c. 6C, §40 and Division I, Subsection 7.16 of the Contract.

BACKGROUND

By letter dated October 15, 2020, the Chief Engineer made a written determination to deny a claim by D.W. White Construction (DWW) for additional costs to excavate 5,663 cubic yards of unsuitable materials encountered during construction of a temporary crossover and the cost of Special Borrow claimed to have been needed for backfill.[1] On November 10, 2020, DWW timely appealed the Chief Engineer's determination in accordance with Division I, §7.16 of the contract by submitting a notice of appeal to the Office of the Administrative Law Judge, and then submitting its Statement of Claim.

The parties participated in a status conference on July 12, 2021, concerning the factual background, procedural issues, and potential legal and factual issues to be heard. The parties also engaged in voluntary discovery and briefed their respective positions. After several extensions and continuances of the hearing date, requested by the parties for various reasons, a hearing was held on September 25, 2023. DWW was represented by Michael Sams, Esq. and M. Matthew Madden, Jr., Esq. Testimony was offered by Jack Harney, Vice President of DWW. Deputy General Counsel Owen Kane and Counsel Ingrid Freire represented the Department. Testimony was offered by Louis Lamoureux, Area Construction Engineer, and Paul Miller, Field Inspector.

The parties were given the opportunity to fully present their cases, including legal argument by each party's counsel. At the conclusion of the hearing, I took the matter under advisement.

FINDINGS

I have considered the evidence and testimony presented at the hearing, the contract plans and specifications, and the position papers submitted by the parties. I make the following findings:

1. Contract #97935 was awarded to D.W. White Construction Inc. on March 28, 2017. The contract provided for the replacement of four bridges that carry State Route 3 Northbound and Southbound over High Street in Norwell and over State Route 123 in Hanover.[2]

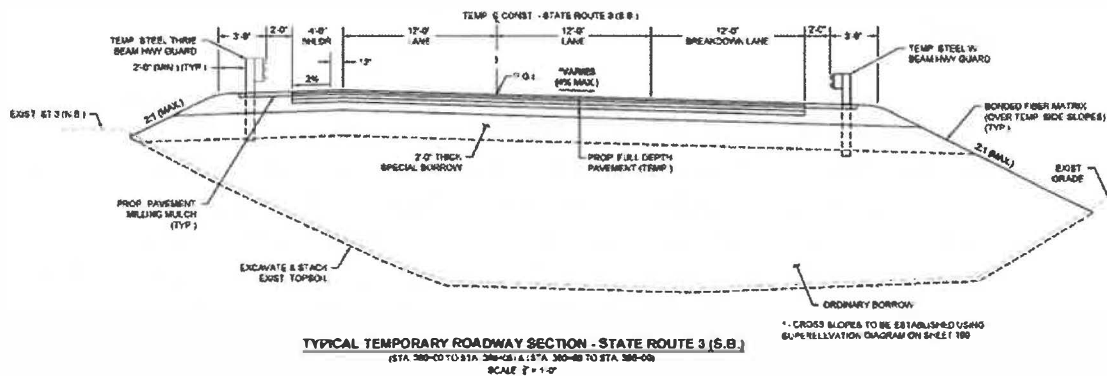
[1] The Chief Engineer's determination addressed DWW's claim as presented to the district and the claims committee, which was based on (1) omission of a pay item for "muck excavation" and (2) whether the cost of excavation and backfill work had increased because of a differing site condition. Those legal/contractual theories of the claim were not pursued on appeal. Therefore, they are waived and not addressed in this report and recommendation.
[2] Contract #97935, Special Provisions, Scope of Work.

2. The Contract required construction of "temporary crossover roadways" to accommodate traffic movements for staging of construction such that all four new bridges could be constructed offline.[3]

3. Sheets 13 through 17 of the contract drawings provide the "Typical Temporary Roadway Sections and Pavement Notes." Note 2 on Sheet 13 states in capital letters:

> ALL UNSUITABLE MATERIAL WITHIN 2 FEET OF THE PAVEMENT SUBGRADE SHALL BE REMOVED AND REPLACED WITH ORDINARY BORROW.

4. Sheet 16 of the contract drawings includes the Typical Temporary Roadway Section for State Route 3 (SB) at stations 360+00 to 366+05 (image provided below). The plan shows the area beneath the temporary roadway with a note to "EXCAVATE & STACK EXIST. TOPSOIL" and another note pointing to the same area that reads "ORDINARY BORROW." Note 1 on the sheet reads: "SEE SHEET 13 FOR TEMPORARY/PERMANENT PAVEMENT NOTES."



5. "Muck excavation" is described in Item 120.23 of the standard specifications of the contract:

> **120.23: Muck Excavation**
> Muck excavation shall consist of the removal and disposal of saturated or unsaturated mixtures of soils and organic matter not suitable for foundation material regardless of moisture content.

6. Requirements for backfilling muck excavation areas are contained in Item 150.65 of the standard specifications. The provision states, in pertinent part:

> **150.65: Backfilling Muck Excavation Areas**
> Backfilling after muck is removed shall consist of rock fragments, boulders up to 2 yd^3 in size, if available, or selected clean granular material not more than 15% of which pass through a #200 sieve as determined by AASHTO T 11. The backfill

[3] Contract Document A00830 at 18-19.

> shall be obtained from suitable excavation on the project, or from Special Borrow under Item 150.1.

7. A Request For Information (RFI No. 011) dated June 27, 2017 was submitted by DWW.[4] The RFI states:

   > DESCRIPTION OF REQUEST: Due to conditions found while clearing D W White requests that a muck item be added to the work of this contract.

   The designer's response to RFI No. 011, dated June 28, 2017, stated: "[A]ny muck excavation will be measured for payment per cubic yard under Item 120 'Earth Excavation.'"

8. DWW maintains that it notified MassDOT "verbally in the field of the muck issue" prior to excavation and backfill work related to the temporary crossover roadway construction.[5]

9. From August 23, 2017, through September 22, 2017, DWW excavated 5,663 cubic yards of unsuitable materials between stations 360+50 and 364+00 in preparation for construction of the Temporary Roadway for Route 3 Southbound.[6]

10. The quantity of muck excavation (i.e., "removal and disposal of saturated or unsaturated mixtures of soils and organic matter not suitable for foundation material") that DWW performed was not measured separately for purposes of payment, as it was included in payment for Item 120 Earth Excavation.[7] For purposes of this report and recommendation, I find DWW's claim that it excavated 5,663 cubic yards to be credible based on the testimony and evidence presented at the hearing. The quantity is also consistent with the designer's estimate for Item 120 for unsuitable material.[8]

11. DWW replaced the excavated unsuitable material between stations 360+50 and 364+00 with 8,134 cubic yards of Special Borrow at the bottom of the excavation, covered with a layer of Ordinary Borrow.[9]

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[4] MassDOT Exhibit #001-0063-69; DWW Exhibit #4.
[5] Testimony of Jack Harney.
[6] *Id.*
[7] *See* MassDOT Exhibit #001-0063-69 and DWW Exhibit #4 (designer's response to RFI No. 011 clarifying that muck excavation was within the scope of the special provision for Item 120 and was to be measured for payment per cubic yard under Item 120).
[8] MassDOT Exhibit #001-008.
[9] Testimony of Jack Harney; *also see* DWW Exhibit #7 ("Claim Cross Sections").

DISCUSSION

Based on my findings, I view DWW's claim as a dispute concerning the measurement of contract quantities.[10] The claim can be summarized as follows:

During construction of the temporary crossover roadway on Route 3 Southbound, DWW performed 5,663 cubic yards of muck excavation as defined in Item 120.23 of the standard specifications, which was paid by the Department under Item 120. Having established that muck excavation was performed and accepted for payment by the Department, DWW looks to Item 150.65. That provision requires that backfill for muck excavation areas be obtained from suitable excavation on the project, or from Special Borrow. Because it then installed 8,134 cubic yards of Special Borrow to backfill muck excavation areas as allowed for in Item 150.65, DWW contends that it should be compensated for that quantity of material at the unit price of $27.25 per cubic yards provided in Item 150.1 for Special Borrow.

The claim is logically sound; however, it is based on the premise that DWW installed the Special Borrow in conformity with the plans and specifications. It did not. For the reasons discussed below, the claim fails because the installation of Special Borrow at issue was a deviation from the project plans that was not approved in writing by the Department.

The contract calls for the construction of temporary crossover roadways to accommodate traffic movements for staging of the bridge construction. With respect to this work, there are special provisions that take precedent over the standard specifications.[11] There are also project specific plans which show the location, character, dimensions, and details of the work required for construction of the temporary crossover roadways.[12] Sheet 16 of the contract drawings provides the Typical Temporary Roadway Section for State Route 3 (SB) at stations 360+00 to 366+05, the location in which DWW installed Special Borrow to backfill muck excavation areas. Sheet 16 shows the area beneath the proposed temporary roadway with a note that directs the contractor to "EXCAVATE & STACK EXIST. TOPSOIL" and another note to backfill with "ORDINARY BORROW." The pavement notes require that "ALL UNSUITABLE MATERIAL WITHIN 2 FEET OF THE PAVEMENT SUBGRADE SHALL BE REMOVED AND REPLACED WITH ORDINARY BORROW."

The plans are unambiguous. They clearly require DWW to remove all unsuitable material under the proposed temporary crossover roadways from stations 360+00 to 366+05 and backfill with Ordinary Borrow to within 2 feet of the pavement subgrade. DWW's use of Special Borrow for that purpose was a deviation from the approved plans and working drawings.[13] There was no

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[10] *See* Division I, Subsection 9.01 ("The quantities of the various items of work performed shall be determined for purposes of payment by the Engineer and by the Contractor . . . Upon the completion of the work and before final payment is made the Engineer will make final measurement to determine the quantities of the various items of work performed, as the basis for final settlement.")

[11] Division I, Subsection 1.03 ("Special Provisions .. The special agreements and provisions prepared for proposed work on a specific project. These special provisions shall be included within the general term specifications and shall be made a part of the Contract with the express purpose that they shall prevail over all other specifications.")

[12] *See* Division I, Subsection 5.04 (Order of Precedence stating that the Plans take precedence over the Standard Specifications.)

[13] Division I, Subsection 5.03 ("Deviations from the approved plans and working drawings, that may be required by the need of the construction, will be determined by the Engineer and authorized by them in writing.")

evidence presented at the hearing that DWW sought or received written approval from the Engineer to deviate from the approved plans that required unsuitable material to be replaced with Ordinary Borrow. A contractor may not unilaterally substitute materials specified in the contract plans for different materials.[14] Even if the contractor believes that the alternate material might be superior for the particular use compared to the material specified, it cannot ignore the specifications.[15]

RECOMMENDATION

For the reasons stated above, I recommend that the contractor's appeal be DENIED.

Respectfully submitted,

Albert Caldarelli
Administrative Law Judge

Dated: October 16, 2023

[14] *Sutton Corp. v. Metropolitan Dist. Comm'n*, 423 Mass. 200, 210 (1996).
[15] *John F. Miller Co. v. George Fichera Constr. Corp.*, 7 Mass. App. Ct. 494, 497 (1979).

APPENDIX B-1

RULINGS

DIRECT PAYMENT DEMANDS

Maura Healey, Governor
Kimberley Driscoll, Lieutenant Governor
Gina Fiandaca, Secretary & CEO

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations
FROM: AC Albert Caldarelli, Administrative Law Judge
DATE: March 23, 2023
RE: Request for Direct Payment pursuant to M.G.L. c.30, §39F

Claimant: BrandSafway Services LLC
Contractor: New England Building and Bridge Co.
Contract: #117756 - Holden / SB Interstate 190 over the Quinapoxet River
District: District 3
Amount: $74,027.28

This Direct Payment Demand (Demand) by BrandSafway Services LLC was received by the Department on March 14, 2023.

FINDINGS

Based on my review of the Demand and the applicable contract, I make the following findings:

1. BrandSafway Services states in its Demand that it has rented various pieces of equipment to New England Building and Bridge Co. for use on Project #117756.

2. The equipment was rented pursuant to rental agreements executed between the parties.

3. BrandSafway Services claims that the balance due pursuant to the terms and conditions of the rental agreement is $74,027.28

4. The general contractor has not submitted a reply within the statutory 10-day period for doing so.

RULING

Direct payment pursuant to M.G.L. c. 30, §39F is available to a "subcontractor", which for purposes of contract #117756 means “a person approved by the awarding authority in writing as a person performing labor or both performing labor and furnishing materials pursuant to a contract with the general contractor” or “a person contracting with the general contractor to supply materials used or employed in a public works project for a price in excess of five thousand dollars.” Renting equipment to a general contractor does not constitute

performance of labor or the furnishing or supply of materials within the meaning of the direct payment statute.

Because BrandSafway Services is not a "subcontractor" as defined in G.L. c.30, §39F, it is not eligible for direct payment from MassDOT.

For the reasons above, the Demand is DENIED.

cc:

New England Building & Bridge Co.
388 Veazie Street
Providence, RI 02904-1016

BrandSafway Services, LLC
155 Will Drive
Canton, MA 02021

Carrie Lavallee, Chief Engineer
David Spicer, Deputy Chief Engineer for Construction
Barry Lorion, District 3 Highway Director

Maura Healey, Governor
Kimberley Driscoll, Lieutenant Governor
Gina Fiandaca, Secretary & CEO

MEMORANDUM

TO: Lina Swan, Director of Fiscal Operations
FROM: AC Albert Caldarelli, Administrative Law Judge
DATE: June 22, 2023
RE: Request for Direct Payment pursuant to M.G.L. c.30, §39F

Claimant: Mass. Electric Construction Company
Contractor: RL Controls LLC
Contract: MBTA – Red Line and Silver Line Security Upgrades
Amount: $486,254.54

This Direct Payment Demand (Demand) by Mass. Electric Construction Company was received by the Department on June 16, 2023.

FINDINGS

The Demand appears to arise out of a contract between the MBTA and RL Controls LLC. The jurisdiction of this Office extends only to direct payment demands arising from contracts with the Massachusetts Department of Transportation.

RULING

M.G.L. c. 30, §39F governs the process for making a demand for direct payment from an awarding authority. In this case, Mass. Electric Construction Company has not made its demand on the proper awarding authority, which is MBTA.[1] To the extent that Boston Concrete demands direct payment from MassDOT, the Demand must be DENIED.

Direct payment demands arising from MBTA contracts should be made by a sworn statement delivered to or sent by certified mail to:

MBTA
Attn: Roger LeBoeuf, Senior Lead Counsel / Capital Delivery
10 Park Plaza
Boston, MA 02116
rleboeuf@MBTA.com

[1] Copies of the Demand and this Ruling are being provided to MBTA for information. Nothing in this Ruling should be construed in any way as a determination on the merits should Mass. Electric Construction Company submit its Demand to the proper awarding authority in accordance with G.L. c. 30, §39F.

cc: Mass. Electric Construction Company
400 Totten Pond Road, Suite 400
Waltham, MA 02451

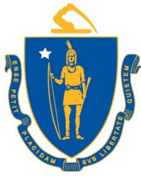
RL Controls LLC
2G Gill Street
Woburn, MA 01801

Roger LeBoeuf, MBTA

APPENDIX C-1

RULINGS

MASSUCP ADJUDICATORY BOARD APPEALS



Maura Healey, Governor
Kimberley Driscoll, Lieutenant Governor
Monica Tibbits-Nutt, Acting Secretary & CEO

MASSACHUSETTS UNIFIED CERTIFICATION PROGRAM
ADJUDICATORY BOARD

To: Anthony A. Froio, Esq.
Robins Kaplan LLP
800 Boylston Street, Suite 2500
Boston, MA 02199

Francisco Morales, Esq.
MassDOT, Office of the General Counsel
10 Park Plaza
Boston, MA 02116

Fernando Sousa
M-O-N Landscaping, Inc.
678 State Road, P.O. Box 70220
North Dartmouth, MA 02747

In the Matter of M-O-N Landscaping (MUCP #2021-0002)

NOTICE OF WITHDRAWAL OF PROPOSAL TO DECERTIFY

By letter dated September 12, 2023, to the Adjudicatory Board of the Massachusetts Unified Certification Program (Board), the MassUCP withdrew its January 28, 2021, proposal to decertify M-O-N Landscaping from the Disadvantaged Business Enterprise (DBE) Program.

As a result of MassUCP's withdrawal of its proposal, there is no need to proceed with the hearing scheduled to be held by and before the Board on September 27, 2023, which is hereby cancelled.

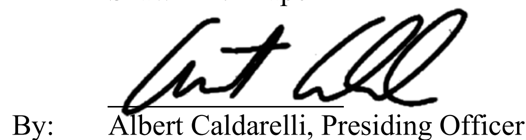
DISMISSAL

For the reasons stated above, this matter is DISMISSED.

Dated: September 19, 2023

The Adjudicatory Board

Albert Caldarelli
Kelly Monteiro Caesar
Patsy Peterson
Shawn M. Draper



By: Albert Caldarelli, Presiding Officer

APPENDIX D-1

RULINGS

OUTDOOR ADVERTISING APPEALS

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

APPEAL DOCKET

APPEAL OF DENIAL OF OUTDOOR ADVERTISING PERMITS ##2022D010 and 2022D011

<table>
<tr><th colspan="2">PARTIES</th></tr>
<tr><td>APPELLANT/APPLICANT

W.N. REALTY LLC

Address: 109 Accord Park Drive
Norwell, MA 02061

Counsel: Matthew Connolly, Esq.
Valerie Moore, Esq.
Nutter, McClennan & Fish LLC
155 Seaport Blvd.
Boston, MA 02210</td><td>APPELLEE

OFFICE OF OUTDOOR ADVERTISING
MASS. DEPT. OF TRANSPORTATION

Address: 10 Park Plaza
Boston, MA 02116

Counsel: Eileen Fenton, Senior Counsel
10 Park Plaza, Room 3510
Boston, MA 02116

Tucker DeVoe, Esq.
Goodwin Proctor LLC
100 Northern Ave.
Boston, MA 02210</td></tr>
</table>

<table>
<tr><th colspan="3">PROCEEDINGS AND ORDERS</th></tr>
<tr><th>Entry #</th><th>Filing Date</th><th>Description</th></tr>
<tr><td>1</td><td>3/23/23</td><td>NOTICE OF APPEAL filed by W.N. Realty Inc. by Letter dated March 22, 2023, from counsel, Matthew Connolly and Valerie Moore.</td></tr>
<tr><td>2</td><td>3/31/23</td><td>STATUS CONFERENCE held as scheduled.</td></tr>
<tr><td>3</td><td>4/3/23</td><td>SCHEDULING ORDER:
• <u>Position Papers</u>: The parties have elected to submit position papers in advance of the hearing.
    • Appellant stipulates that its notice dated March 22, 2023, shall serve as its position paper.
    • The Department shall file and serve its position paper on or before April 17, 2022.
    • If Appellant elects to submit a response to address issues raised in the Department’s position paper, it shall file and serve such response by May 1, 2023.
• <u>Viewing</u>: The parties will confer to determine whether a viewing of the proposed billboard location should take place prior to the hearing. The parties shall advise this Office of such determination on or before April 17, 2023.
• <u>Discovery</u>: The parties shall engage in voluntary discovery, which shall be completed by May 8, 2023.
• <u>Witnesses</u>: On or before May 8, 2023, each party shall serve its Witness List identifying the names, titles, and anticipated subject matter of testimony from each witness expected to testify at the hearing.
• <u>Hearing Exhibits</u>: The parties shall serve copies of its proposed hearing exhibits on or before May 8, 2023. After conferring, the parties shall file a joint exhibit list 48 hours before the date of the hearing that identifies and attaches all hearing exhibits that are agreed upon and any proposed hearing exhibits that are dispute.
• <u>Hearing</u>: A further Scheduling Order will be issued to set the date, time, and location of the hearing.</td></tr>
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4	4/11/23	PARTIES' REQUEST TO MODIFY SCHEDULING ORDER submitted by email dated 4/11/23 from Tucker DeVoe: "The parties have conferred and agreed to a slight extension to the briefing schedule for position papers. The parties propose that the Department will serve its position paper on or before April 24, 2023, and Appellant will serve its response on or before May 2. The parties are not asking to change any of the other dates."
5	4/11/23	PARTIES' REQUEST TO MODIFY SCHEDULING ORDER is ALLOWED.
6	4/12/23	PARTIES' STIPULATION CONCERNING NEED FOR A VIEWING filed by email dated 4/12/23 from Tucker DeVoe: "The parties have discussed whether there is a need for a viewing of the proposed billboard location and agree that there does not need to be a viewing. The parties are working on a stipulation that should simplify issues relating to the site location and layout."
7	4/24/23	POSITION PAPER filed by Office of Outdoor Advertising.
8	4/28/23	PARTIES' SECOND REQUEST TO MODIFY SCHEDULING ORDER submitted by email dated 4/28/23 from Matthew Connolly: "The parties have agreed to an extension for the following upcoming deadlines: Discovery complete—May 15, 2023 (currently May 8) Applicant's reply brief—June 6, 2023 (currently May 2) Witness and exhibit list—June 13"
9	4/28/23	PARTIES' SECOND REQUEST TO MODIFY SCHEDULING ORDER is ALLOWED.
10	6/6/23	REPLY STATEMENT filed by Appellant
11	6/9/23	PARTIES' THIRD REQUEST TO MODIFY SCHEDULING ORDER submitted by email dated 6/9/23 from Tucker DeVoe: "OOA counsel would like until Tuesday, June 20, to submit a brief response to Applicant's Reply Statement. The purpose is to address the two threshold issues that Applicant requests a decision from Judge Caldarelli in advance of the hearing. Applicant does not object to this request. Exhibit and Witness Lists submitted by Wednesday, June 28."
12	6/9/23	PARTIES' THIRD REQUEST TO MODIFY SCHEDULING ORDER is ALLOWED.
13	6/20/23	RESPONSE BRIEF filed by Office of Outdoor Advertising.
14	6/28/23	PARTIES' FOURTH REQUEST TO MODIFY SCHEDULING ORDER submitted by email dated 6/28/23 from Tucker DeVoe: "Further to this, counsel for the parties have conferred, and based on ongoing discovery, propose one modification to the schedule below: Exhibit and Witness Lists submitted by Wednesday, July 13."
15	6/28/23	PARTIES' FOURTH REQUEST TO MODIFY SCHEDULING ORDER is ALLOWED.
16	7/20/23	SCHEDULING ORDER "In accordance with 700 CMR 3.19(3), a hearing will be held on the above-referenced matter at the following time and place: September 12, 2023, at 10:00 am., 10 Park Plaza, Suite 2310, Boston, MA. Please report to the Conference Room in Office of Real Estate & Economic Development. All motions and requests for rulings made by the parties in their respective position papers and responses are taken under advisement and will be ruled upon based on testimony and evidence presented at the hearing."

17	8/14/23	APPLICANT'S REQUEST FOR SUMMONS filed by W.N. Realty Inc. by counsel, Matthew Connolly and Valerie Moore. "Applicant respectfully requests that the Office of the Administrative Law Judge issue a summons to Edward J. Farley, OOA's former Executive Director, to appear at the Hearing to be held in connection with this proceeding. The parties have conferred and OOA does not object to this request. Further, OOA has agreed to make the following current MassDOT employees available at the hearing, subject to the right to object at the hearing: John Romano, Neil Boudreau. Jason Bean, Marc Plante, Christopher Chaves Applicant may also seek to call current MassDOT employee Eileen Fenton, Esq. at the hearing. OOA objects to Applicant calling Ms. Fenton based on, among other things, the attorney-client privilege. However, Ms. Fenton will be present during the hearing as OOA's representative, and the Parties have agreed to reserve argument on the objection, should any be necessary, until the hearing."
18	8/14/23	APPLICANT'S REQUEST FOR SUMMONS taken under advisement.
19	8/17/23	STATUS CONFERENCE held as scheduled
20	8/22/23	APPLICANT'S REQUEST FOR SUMMONS is ALLOWED. Copy of Subpoena delivered to Edward J. Farley by email (efarley@masslottery.com) "to appear at an adjudicatory proceeding in Suffolk County, at Ten Park Plaza, Room 2310, Boston, Massachusetts 02116, on September 12, 2023, at 10 a.m. and from day to day thereafter until completed to testify and give evidence in the above-captioned action."
21	8/24/23	SUBPOENA served on Edward J. Farley at Massachusetts State Lottery Commission by Thomas Cabral, Process Server. Copy of return of service received on 8/28.
22	8/30/23	REQUEST TO APPEAR AND TESTIFY REMOTELY from Edward J. Farley via telecommunication. Parties notified of request; no objections raised.
23	9/6/23	EDWARD J. FARLEY'S REQUEST TO APPEAR AND TESTIFY REMOTELY is ALLOWED.
24	9/12/23	HEARING held as scheduled.
25	10/3/23	CORRESPONDENCE dated 10/3/23 received from Town of Rockland Board of Selectmen, Michael P. O'Laughlin, Chair.
26	10/19/23	TRANSCRIPT of 9/12/23 Hearing Received.
27	10/31/23	FINAL AGENCY DECISION DECISION The Federal State Agreement's prohibition on locating signs adjacent to or within 500 feet of an interchange does not apply to Route 3, a non-interstate highway. Therefore, OOA's denial of applications #2022D010 and 2022D011 based on that prohibition was improper. There is no other reason for OOA's denial of the permits. OOA is directed, therefore, to approve applications #2022D010 and 2022D011 and grant electronic sign permits to WNR to locate outdoor advertising facing Route 3 at 61 Accord Park Drive in Rockland.

Maura Healey, Governor
Kimberley Driscoll, Lieutenant Governor
Monica Tibbits-Nutt, Acting Secretary & CEO

OFFICE OF THE ADMINISTRATIVE LAW JUDGE

To: Matthew Connolly, Esq.
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Re: W.N. Realty LLC
Appeal of Denial of Electronic Billboard Applications
#2022D010 and 2022D011

NOTICE OF FINAL AGENCY DECISION

Pursuant to M.G.L. c. 30A, 700 CMR 3.19, and 801 CMR 1.02, the Office of the Administrative Law Judge hereby gives notice of a decision in the above-captioned matter.

A copy of the decision is attached. The decision is subject to judicial review in accordance with G.L. c. 30A, §14.

The parties have been notified by email on this date.

Dated: October 31, 2023

____
By: Lisa Harol, Administrator

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION

FINAL AGENCY DECISION

APPEAL OF W.N. REALTY LLC
DENIAL OF ELECTRONIC BILLBOARD APPLICATIONS
#2022D010 AND 2022D011

This decision addresses an appeal by W.N. Realty LLC ("WNR") concerning the denial of two applications for outdoor advertising permits to erect electronic billboards at 61 Accord Park Drive / Route 3 in the town of Rockland.

By letter dated March 23, 2023, WNR requested an appeal hearing to contest the decision of the Office of Outdoor Advertising ("OOA") to deny the applications. On September 12, 2023, I held a hearing in accordance with the requirements of M.G.L. c. 30A, 700 CMR 3.19, and 801 CMR 1.02. WNR appeared and was represented by Matthew Connolly, Esq. The OOA was represented by Tucker DeVoe, Esq. and Eileen Fenton, Managing Counsel. The following witnesses appeared and gave sworn testimony and evidence concerning the matters at issue in the appeal:

John Michalak, Nitsch Engineering
John Romano, Director, Office of Outdoor Advertising
Marc Plante, MassDOT Transportation Program Planner
Christopher Chaves, MassDOT Transportation Program Planner
Jason Bean, MassDOT Transportation Program Planner
Neil Boudreau, MassDOT Assistant Administrator for Traffic and Safety
Edward Farley, former Director, Office of Outdoor Advertising

FINDINGS OF FACT

After consideration of the testimony and evidence presented at the hearing, I make the following findings of fact:

1. By letter dated June 18, 2022, WNR submitted two applications to the OOA for electronic sign permits to locate outdoor advertising facing Route 3 at 61 Accord Park Drive in Rockland.[1] OOA assigned numbers 2022D010 and 2022D011 to the applications.

2. At the proposed location, Route 3 has four lanes (two lanes in each direction northbound and southbound), divided by a median. On each side of the highway there is a shoulder or breakdown lane.[2] Route 3 is a Freeway Primary Highway.[3]

3. The applications were denied by the OOA by letter dated February 23, 2023, "because the proposed electronic signs are located adjacent to or within 500 feet

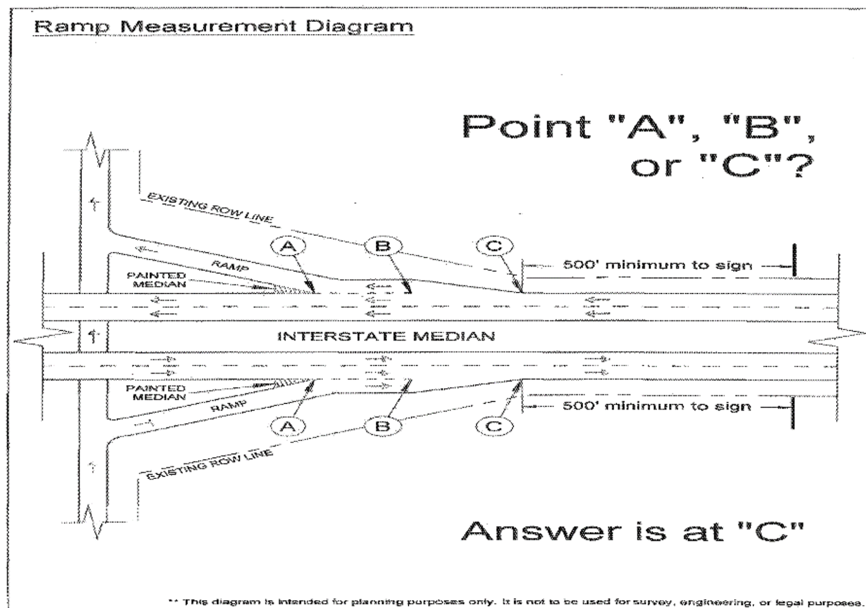
[1] WNR Exhibit 1.
[2] WNR Exhibits 6 and 20.
[3] John Romano, Hr'g Tr., 79:10-18.

of an interchange or intersection at grade . . . measured along the interstate highway from the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main traveled way . . ." [4]

4. OOA's denial was based on application of the so-called "Interchange Rule", also referred to as the "Ramp Rule", contained in the spacing requirements of the Federal State Agreement between the Commonwealth and the United States.[5] The provision reads as follows:

> **2.) Interstate Highways and Freeway Primary Highways:**
>
> a.) Spacing between signs along each side of the highways shall be a minimum of 500 feet.
>
> b.) No sign may be located adjacent to or within 500 feet of an interchange or intersection at grade, information center, or rest area measured along the Interstate highway from the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main traveled way. This subsection (b) does not apply in cities and towns of over 50,000 population.

5. When measuring distances from interchanges and intersections at grade, OOA establishes a point at the exit from or entrance to the main traveled way, referred to as "Point C", where the main traveled way transitions to an exit ramp or where an entrance ramp transitions to the main traveled way. It measures along the roadway from that point to determine whether the proposed sign location meets the 500-foot spacing requirement in the Interchange Rule.[6] The measurement is illustrated in the diagram below:[7]



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[4] WNR Exhibit 6.
[5] WNR Exhibit 26.
[6] Neil Boudreau, Hr'g Tr., 136:11-137:4, 140:23-141:3, 142:14-20, 143:3-7, 152:14-153:6 (discussing OOA's general approach to establishing "Point C").
[7] WNR Exhibit 6.

6. With respect to the proposed electronic signs at 61 Accord Park Drive in Rockland, OOA established Point C at the "start of ramp deceleration taper for [the] exit ramp." That point was defined by pavement markings creating the taper that moves traffic from the main traveled way on Route 3 to the exit ramp leading to Route 228.[8]

7. Based on OOA's measurement, the location of the proposed electronic signs at 61 Accord Park Drive is to the left or west of Point C, i.e., adjacent to or within 500 feet of the Route 3/Route 228 interchange.[9]

8. Other than non-compliance with the Interchange Rule, there is no other reason for OOA's denial of permits to locate outdoor advertising facing Route 3 at 61 Accord Park Drive in Rockland.[10]

DISCUSSION

WNR raises several issues on appeal, which are addressed below. The issues are a mix of law and fact concerning the application of the Interchange Rule and the interpretation of the Federal State Agreement. Therefore, I have addressed all issues presented such that if, upon judicial review pursuant to M.G.L. c. 30A, § 14, any ruling is set aside or modified, the remaining issues are fully adjudicated. I have cited testimony, exhibits, and legal support relied upon in reaching my decision.

I. OOA's Methodology for Measuring Distances from an Interchange

WNR challenges the approach used by OOA in applying the Interchange Rule with respect to measuring the distance from the Route 3/Route 228 interchange to the location of the proposed electronic signs at 61 Accord Park Drive. Specifically, WNR objects to OOA's consideration of pavement markings when determining "the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main traveled way", a.k.a. Point C.[11] It argues that the language of the Interchange Rule should be read literally, such that the starting point for measuring distances from an interchange should be the point at which the physical pavement or asphalt widens.[12] OOA contends that the point of "pavement widening" may also occur when the pavement of the main traveled way widens at a point where pavement markings create a deceleration or acceleration taper at an exit or entrance ramp.[13]

Both interpretations are logically sound. Therefore, an ambiguity exists concerning the term "pavement widening" as used in the Interchange Rule because it is susceptible of more than one meaning.[14] In weighing the respective positions of the parties, it is appropriate to consider the policy objective behind the Interchange Rule. The standard stems from a mandate contained in the Highway Beautification Act of 1965 that required the Secretary of Commerce to report to Congress

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[8] WNR Exhibit 6; Neil Boudreau, Hr'g Tr., 136:7-137:4.
[9] WNR Exhibits 6 and 20.
[10] John Romano, Hr'g Tr., 91:25-92:5.
[11] *See* Boudreau, Hr'g Tr., *supra* note 6.
[12] *See* Michalak, Hr'g Tr., 22:10-21.
[13] *See* Boudreau, Hr'g Tr., 136:7-137:4.
[14] *Jefferson Ins. Co. v. Holyoke*, 23 Mass. App. Ct. 472, 474 (1987) ("An ambiguity exists . . . when the language contained therein is susceptible of more than one meaning.")

all standards, criteria, and rules and regulations to be applied in carrying out the Act.[15] Proposed standards for regulation of outdoor advertising were provided to Congress in a 1967 report,[16] which included the following standard for spacing requirements:

> 2. Interstate highways and freeways on the primary system:
>   A. Spacing between signs along each side of the highway shall be a minimum of 500 feet. Double faced, back- to-back and Vtype signs are prohibited.
>   B. No sign may be located within 2,000 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).

The Secretary of Transportation explained to Congress that the proposed Interchange Rule was a safety measure intended to reduce distractions as drivers approached an intersection to turn off an exit ramp or to merge onto the highway.[17] Although the precise language and distance requirement of the Interchange Rule that is contained in the Commonwealth's Federal State Agreement varies from the original 1967 draft, the main concept is the same. For driver safety, there needs to be a buffer area, in this case at least 500 feet, that is free from billboard distractions as drivers approach an interchange to exit from or merge onto the highway.

To determine the distance from the Route 3/Route 228 interchange to the location of the proposed electronic signs at 61 Accord Park Drive, OOA measured from the point at which the main traveled way expanded to a deceleration taper to the exit ramp, which taper was defined by pavement markings on the roadway. This is consistent with the language of the Interchange Rule as stated in the Federal State Agreement. The measurement is to be made "from the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main traveled way." OOA applied this requirement by measuring from the point at which the pavement of the main traveled way widens to the deceleration taper at the exit ramp from Route 3 to Route 228. The fact that the point of pavement widening is defined by pavement markings creating the taper rather than a physical expansion of the asphalt is a distinction without a difference, especially considering the basic purpose of the Interchange Rule, which is to ensure that drivers are afforded at least 500 feet without billboard distractions prior to the point at which they enter or exit the main traveled way.

In contrast, WNR's proposed method for measuring distances from interchanges presents inconsistencies with respect to the safety goals that the Interchange Rule is intended to address. For example, WNR's literal "pavement widening" approach is unworkable at interchanges where there is no discernable physical widening of the asphalt at an exit or entrance ramp.[18] If there is no

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[15] Public Law 89-285, §303(b).

[16] Dept. of Commerce, Report to Congress, *Report on standards, criteria, and rules and regulations as required by section 303(b) of Highway Beautification Act of 1965* (January 10, 1967).

[17] *Review of Highway Beautification*, Hearings on H.R. 7797 Before the Subcommittee on Roads, 90th Congress 90-1 at 962-4 (1967)(Alan S. Boyd, Secretary of Transportation, discussing rationale for proposed Interchange Rule: "The Federal Highway Administration, on the basis of studies it has made, is thoroughly and completely satisfied that signs within 2,000 feet of the intersection of the turnoffs are unsafe . . . if there are signs, commercial as well as directional signs, the driver can become confused. The second thing is . . . that you are obviously assuming that your driver is always on the right-hand lane so he can get into the ramp without having to weave across the other traffic lanes, and some of our citizens do not drive that way . . . We have a slide which shows accident rates related to the nearness of intersections . . . that had some bearing on our judgment in this matter.")

[18] *E.g., see* Michalak, Hr'g Tr., 22:18-21 (acknowledging that there are ramp locations where the pavement does not actually widen).

physical pavement widening at an exit from or entrance to the main traveled way, as is the case at the Route 3/Route 228 interchange, WNR's approach measures the distance from a point *beyond* the exit from or entrance to the main traveled way,[19] not *at* the exit from or entrance to the main traveled way, which is inconsistent with the plain language of the Rule. Consequently, the method fails to provide the required 500-foot buffer area for drivers approaching the interchange.

WNR's method is also flawed for the reason discussed in the Secretary of Transportation's testimony to Congress regarding the Interstate Rule.[20] The Rule is intended to create a 500-foot buffer that is free from billboard distractions for ***all*** drivers approaching an interchange, no matter which lane they are travelling in. Based on testimony from WNR's expert, the method proposed by WNR considers only decision points for drivers travelling in the right lane.[21] It appears to not consider decisions that drivers in other lanes within the main traveled way might have to make as they approach an intersection. As a result, with respect to the Route 3/Route 228 interchange, WNR's method again fails to provide the required minimum 500-foot billboard free buffer to all drivers approaching that interchange.

II. Application of the Administrative Procedure Act

WNR claims that the Interchange Rule is unenforceable because it is not included in MassDOT's regulations for outdoor advertising and was not promulgated in accordance with the Administrative Procedure Act (APA), M.G.L. c. 30A, §§ 1 *et seq*. Alternatively, if the Interchange Rule itself is enforceable, WNR argues that OOA's current methodology for measuring distances from interchanges constitutes a change in interpretation or policy that requires rulemaking pursuant to the APA.

The APA details procedures that State agencies must follow when adopting new regulations. A regulation "includes the whole or any part of every rule, regulation, standard or other requirement of general application and future effect, including the amendment or repeal thereof, adopted by an agency to implement or interpret the law enforced or administered by it."[22] Among other requirements, prior to promulgating a regulation, a State agency must "give notice and afford interested persons an opportunity to present data, views, or arguments."[23]

The Interchange Rule, however, is a federal standard promulgated by the Secretary of Transportation under Title 23. As noted above, the Interchange Rule has its origin in the mandate contained in the Highway Beautification Act of 1965 that required the Secretary to report to Congress all standards, criteria, and rules and regulations to be applied in carrying out the Act.[24] Public hearings were held in each of the 50 States, Puerto Rico, and the District of Columbia to

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[19] *See, e.g.,* WNR Exhibit 20.
[20] Testimony of Alan S. Boyd, Secretary of Transportation, *supra* note 17.
[21] Michalak, Hr'g Tr., 30:8-22 (". . . there's got to be a point where the driver needs to make a decision. He's already in the off-ramp lane, so there's no decision being made. So, when you refer to the acceleration lane or an on-ramp, you actually need to pay attention to what other vehicles are doing. Like we alluded to a concept of a decision point where the driver has to decide whether he's going right or left. And then he's also trying to merge onto another highway. You know, similar to Rockland, you know, you're traveling in this [right hand] lane. There's no decisions, there's no other vehicles entering or exiting until you get this point and you have to decide am I going right or left, and the pavement widens consistent with what our understanding of the regulation was, but you're also trying to merge onto another highway. So, that would -- you would be accelerating here."); *also see* WNR Exhibit 20.
[22] G.L. c. 30A, § 1(5).
[23] G.L. c. 30A, § 3.
[24] Public Law 89-285, §303(b).

gather relevant information on which to base such standards, criteria, and rules and regulations.[25] Prior to the hearings, a "Suggested Draft of National Standards for Outdoor Advertising Controls", which included a version of the Interstate Rule, was published in the Federal Register.[26] The Secretary of Transportation then promulgated the final proposed standards and criteria in its 1967 report to Congress that represented "the Department's position on which discussions will be based in reaching agreement with the individual States for control of outdoor advertising."[27]

Pursuant to G.L. c. 93D, §3, the Legislature has expressly mandated that all permits issued thereunder comply with standards promulgated by the Secretary of Transportation and with the Federal State Agreement:

> Under the procedures set forth in chapter ninety-three, the [department] is authorized to issue permits for the erection and maintenance of signs, displays and devices . . . provided, however, that the erection and maintenance thereof would comply with applicable ordinances and by-laws, *with standards promulgated by the Secretary of Transportation under Title 23, United States Code, and with agreements between the department and the said Secretary authorized by section seven of this chapter.* [emphasis added]

Accordingly, the Interchange Rule is not a regulation as defined in the APA. It is a standard promulgated by the Secretary of Transportation under Title 23, a version of which is contained in the Federal State Agreement. Compliance with the standard is mandated by statute, not by rule or regulation adopted by MassDOT or OOA.

The secondary argument pressed by WNR is fact-based. The testimony and evidence presented by WNR were primarily from its traffic engineering expert, who conducted an analysis and comparisons at various billboard locations based on his understanding of OOA's methodology of measuring distances from interchanges. These were founded on assumptions about OOA's distance measurements at a specific billboard location based on email exchanges with MassDOT's Assistant Administrator for Traffic and Safety.[28] The analysis and comparisons, in my view, are unreliable because the information communicated by the Assistant Administrator, which underpins the assumptions used by WNR's expert, was referring to an entirely different location.[29]

I also find that there is and has been reasonable consistency in how OOA measures distances from interchanges. The diagram shown above at Findings of Fact #5 accurately represents the methodology used by OOA to measure the distance. OOA establishes so-called "Point C" at the point of pavement widening at the exit from or entrance to the main traveled way. As discussed above, whether that the point of pavement widening is defined by pavement markings creating a taper or a physical expansion of the asphalt is a distinction without a difference. Traffic engineers might have differences of opinion concerning the precise point of pavement widening at a particular interchange; however, the basic methodology used by OOA is straight-forward and consistently applied.

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[25] Public Law 89-285, §303(a); Highway Beautification, Public Hearings, 31 Fed. Reg. 1162-66 (Jan. 28, 1966).
[26] *Id.*
[27] Dept. of Commerce, Report to Congress, Letter of Transmittal from Alan S. Boyd, Under Secretary of Commerce for Transportation, *supra* note 16.
[28] *E.g., see* WNR Exhibits 10 and 12.
[29] Michalak, 58:25-59:17; Boudreau, Hr'g Tr., 141:13-23

After considering the testimony and evidence presented at the hearing, I find that WNR has failed to meet its burden of proof to establish that OOA has adopted, amended, or changed a rule, regulation, or standard within the meaning of the APA.

III. Bona Fide Local Zoning Authority

WNR raised the issue of whether OOA should defer to the town of Rockland's local zoning decisions in lieu of the controls provided in the Federal State Agreement. WNR refers to the following provision of the Federal State Agreement:

> Whenever a bona fide State, County or local zoning authority has made a determination of customary use as to size, lighting and spacing, such determinations will be accepted in lieu of controls provided by this agreement in the zoned commercial and industrial area within the geographical jurisdiction of such authority; provided such determination is enforced and is consistent with the purposes of the Highway Beautification Act of 1965 and the Department submits certification to the Administrator as notice of effective control.

This issue is beyond the scope of any remedy that the hearing officer could provide pursuant to 700 CMR 3.19. As a factual matter, WNR concedes that there has been no submission of certification by the Department to the FHWA Administrator pertaining to the town of Rockland's zoning authority in general or with respect to the location of the proposed electronic signs at 61 Accord Park Drive. Therefore, the required pre-condition to even consider the matter has not occurred. For these reasons, I decline to rule on this issue.

IV. Does the Interchange Rule Apply to Non-Interstate Highways?

WNR questions whether the Interchange Rule applies to non-Interstate highways. Route 3, the location of the proposed electronic signs at 61 Accord Park Drive, is not an interstate. It is classified as a Freeway Primary Highway. Therefore, if the Interchange Rule does not apply to non-Interstate highways such as Route 3, then it presents no impediment to OOA granting the permits for the proposed electronic signs. Here, WNR strikes paydirt.

The Interchange Rule contained in the Federal State Agreement reads as follows:

> **2.) Interstate Highways and Freeway Primary Highways:**
>
> a.) Spacing between signs along each side of the highways shall be a minimum of 500 feet.
>
> b.) No sign may be located adjacent to or within 500 feet of an interchange or intersection at grade, information center, or rest area measured along the Interstate highway from the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main traveled way. This subsection (b) does not apply in cities and towns of over 50,000 population.

When interpreting an agreement under Massachusetts law, "[t]he objective is to construe the contract as a whole, in a reasonable and practical way, consistent with its language, background, and purpose."[30] "If the words of a contract are plain and free from ambiguity, then they must be construed in accordance with their ordinary and usual sense."[31] The fact that the

[30] *Rubin v. Murray*, 79 Mass. App. Ct. 64, 75-76 (2011).
[31] *Fried v. Fried*, 5 Mass. App. Ct. 660, 663 (1977).

parties disagree with respect to the interpretation of the agreement does not make the agreement ambiguous.[32]

The plain language of the Interchange Rule as it appears in the Federal-State Agreement has no ambiguity as to its application. In the Agreement under the heading "SPACING OF SIGN STRUCTURES", Section 2 provides spacing requirements for "Interstate Highways and Freeway Primary Highways".[33] The provision contains two subsections. Subsection (a) addresses spacing between signs and refers to distances "along each side of the highways." The use of the word "highways", a general term in plural form, indicates that the spacing requirement applies to both categories of highways defined in the Agreement and referenced in Section 2. The parties agree with this interpretation of subsection (a), i.e., that the spacing requirement between signs applies to both Interstate Highways and Freeway Primary Highways.[34]

In contrast, Subsection (b) addressing spacing from interchanges refers to measuring distances "along the Interstate highway". The reference to a specific category of highways defined in the Federal State Agreement, to the exclusion of other defined highways, manifests an intent to include one and not the other. Also, the use of the singular, specific, and precisely defined term "Interstate highway" and not the general term "highways" as used in the previous subsection can be read in only one way: that the spacing requirement in this provision of the Agreement is intended to apply only to Interstate highways and not to Freeway Primary highways. When general and more broadly inclusive language in an agreement is inconsistent with more specific language, the more specific language controls.[35]

Section IV makes it clear that when interpreting the Agreement, "[t]he provisions shall constitute the minimum acceptable standards." Also, Section 4(c) under the heading SPACING OF SIGN STRUCTURES states that the spacing requirements, including the Interchange Rule at Subsection 2(b), "are to be considered the minimum standards for spacing and shall not prevent the Outdoor Advertising Board from enforcing standards which are more restrictive." Thus, reading the Agreement in its entirety, the lower standard or less restrictive interpretation is intended to prevail over one requiring a heightened standard or more restrictive interpretation.

Even *arguendo* if the language were ambiguous, I reach the same conclusion given the parties' intentions and their situation when they executed the Agreement. Interpretation of an agreement "turn[s] on the particular language used against the background of other indicia of the parties' intention."[36] It should be construed "with reference to the situation of the parties when they made it and to the objects sought to be accomplished."[37]

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[32] *Jefferson Ins. Co. v. Holyoke*, *supra* note 14.
[33] The "Interstate System" is defined in the Federal-State Agreement at Section I-D as "that portion of the national system of interstate and defense highways located within the Commonwealth of Massachusetts, as officially designated, or as may hereafter so designated by the Department and approved by the Secretary of Transportation pursuant to the provisions of Title 23, United States Code. The "Freeway Primary Highway System" is defined at Section I-E as "that part of the Federal aid primary highway system, which is subject to limited access restrictions."
[34] OOA Response Brief at 11-12; W.N Realty Reply Statement at 11.
[35] *Rush v. Norfolk Elec. Co.,* 874 N.E.2d 447, 453 (Mass. App. Ct. 2007); *also see* Restatement (Second) Contracts §203(c)("specific terms and exact terms are given greater weight than general language".)
[36] *Starr v. Fordham*, 420 Mass. 178, 190; *Shea v. Bay State Gas Co*., 383 Mass. 218, 224-25 (1981).
[37] *Id.*; *also see* Restatement (Second) Contracts § 202(5)("Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.")

As discussed above, the Interchange Rule has its origin in the mandate contained in the Highway Beautification Act of 1965 that required the Secretary of Commerce to report to Congress all standards, criteria, and rules and regulations to be applied in carrying out the Act.[38] In his 1967 report to Congress, the Secretary offered proposed standards for the regulation of outdoor advertising that represented "the Department's position on which discussions will be based in reaching agreement with the individual States for control of outdoor advertising in zoned and unzoned commercial and industrial areas."[39]

The proposed standard that appeared in the 1967 report to Congress for spacing with respect to interchanges was as follows:

> 2. Interstate highways and freeways on the primary system:
>   A. Spacing between signs along each side of the highway shall be a minimum of 500 feet . Double faced , back- to-back and Vtype signs are prohibited.
>   B. No sign may be located within 2,000 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).[40]

The standard proposed by the federal government as its starting point for discussions with the individual States for the federal-state agreements prohibits signs within a specified distance of an interchange on both Interstate highways and freeway primary highways. That prohibition is expressed by specific reference to both categories of highways in subsection B in the phrase "measured along the interstate highway or freeway". The deviation from the proposed national standard, specifically the omission of the reference to the freeway primary highway in the equivalent provision of the Commonwealth's Federal State Agreement, indicates an intent by the parties to include Interstate highways and exclude Freeway Primary highways from the Interchange Rule as applied in Massachusetts.

The legislative history in Massachusetts pertaining to the language used in the Federal State Agreement also indicates an intent to apply the Interchange Rule only to Interstate highways in the Commonwealth. In 1967, the General Court ordered a review of the Commonwealth's implementation of the Federal Highway Beautification Act.[41] The report issued in response to that order advised the Legislature of the national standards proposed by the Secretary of Commerce, including the Interchange Rule requiring that distances be "measured along the interstate highway or freeway".[42]

The report also included discussion concerning the position of the outdoor advertising industry with respect to such standards. The industry expressed concern that the proposed interchange criteria would practically exclude all outdoor advertising from limited access roads in highly urban, commercial, and industrial areas in the Commonwealth. To address that concern, the industry stressed that "any workable regulations must distinguish between the primary and Interstate systems, and as to both systems, distinguish again between the urbanized area and the

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[38] Public Law 89-285, §303(b).
[39] Dept. of Commerce, Report to Congress, Letter of Transmittal from Alan S. Boyd, Under Secretary of Commerce for Transportation, *supra* note 16.
[40] *Id.* at 48 (emphasis added).
[41] House, Order No. 3950 of 1966; Senate, No. 1004 of 1967.
[42] Senate, No. 1239 of 1967, Legislative Research Council Report relative to Highway Beautification and Abandoned Vehicles at Appendix B (March 29, 1967).

area of 'natural beauty' which is the concern of Congress."[43] Given that the language used in the Federal State Agreement for the Interchange Rule references only the interstate and also exempts densely populated, i.e. urban areas, it is not unreasonable to conclude that the Commonwealth negotiated terms that varied from the federal standard in order to address specific industry concerns raised prior to execution of the Agreement.

Regardless the reason, both the Federal Government and the Commonwealth were fully aware of the proposed national standard prior to execution of the Federal State Agreement, indicating that the omission of any reference to the freeway primary highway in the Interchange Rule was intentional. This is also evidenced in the legislative history of G.L. c. 93D. The Governor proposed legislation to bring the Commonwealth into compliance with the Highway Beautification Act.[44] The bill was referred to the House Ways & Means Committee, which reported approval of an amended and substituted bill that contained an Interchange Rule that excludes non-interstate highways and mirrors the language appearing in the Federal State Agreement.[45] In the final legislation that ultimately became M.G.L. c. 93D, the specific spacing requirements were removed. However, the legislative history shows that the differences between the national standard and the version of the Interchange Rule in the Federal-State Agreement were known to and considered by the Legislature.

At the agency level, the minutes of the meetings of the Commonwealth's Public Works Commission confirm that a version of the Federal State Agreement was presented at its December 22, 1971 meeting. The Commissioners voted "to approve and adopt the . . . agreement subject to any amendments approved by the Board of Commissioners on or before the effective date of December 21, 1971 and before transmission of this agreement to the Federal Highway Administration."[46] The minutes of the following meeting on December 29, 1971 document that the Commissioners approved and adopted one or more revisions prior to executing the Federal State Agreement that became effective December 31, 1971 and that remains in effect today. The vote recorded states: "Voted: Commissioners executed revised agreement."[47] Although the meeting minutes do not identify the precise revisions made, they confirm that the Public Works Commission scrutinized and deliberated about language of the Federal State Agreement. As a result, I draw the reasonable inference that the plain language of the Interchange Rule in the Federal State Agreement means what it says and reflects the intent of the Commission when it executed the Agreement.

The federal government's negotiations of Federal-State Agreements with other states are also instructive.[48] When the Interchange Rule is intended to apply to the Interstate and other highways, the federal government and the individual states reflect that intent by express reference

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[43] *Id.* at 53, 56.
[44] House No. 5725 of 1971.
[45] House No. 6398 of 1971 at lines 151-159.
[46] Meeting Minutes, Public Works Commission, Item 19 (December 22, 1971).
[47] Meeting Minutes, Public Works Commission, Item 9 (December 29, 1971).
[48] Federal State Agreements, FHWA resources at https://www.fhwa.dot.gov/ipd/value_capture/resources/value_capture_resources/row_use_agreements.aspx

to both highways.[49] In states where the Interchange Rule is intended to apply to the Interstate only, reference is made only to the Interstate.[50]

The OOA's course of performance in administering the Federal State Agreement also supports the above interpretation of the Interchange Rule. There have been instances where OOA directors, legal staff, and inspectors have taken actions or expressed opinions consistent with the view that the Interchange Rule in Massachusetts applies only to Interstate highways and not the Primary Freeway highways, including the following:

- Former OOA Director Edward Farley, who served in that role for over seven years, and OOA legal counsel Chris Quinn, advised that the Interchange Rule did not apply to Route 9 because that highway is not an interstate.[51]
- OOA Director John Romano confirmed to FHWA that OOA had made a determination that the Interchange Rule did not apply to non-interstate highways. By email dated May 26, 2016, he stated: "In the past it was determined by the former director and legal counsel that the ramp measurement did not apply to non-interstate roads based on interpretation of the language in the Fed/State agreement. I will defer to that decision if you did not have some different guidance for us."[52]
- In 2017, OOA proposed changes to the Interchange Rule in the Federal State Agreement that would not be necessary if the Rule applied to non-interstate highways. The proposed change reads: "No sign may be located adjacent to or within 500 feet of an interchange . . . along the interstate, primary system or national highway system roadway . . ."[53]

[49] Wyoming: "measured along the interstate or controlled-access facility"; Wisconsin: "measured along the Interstate or Freeway highway"; Virginia: "measured along the Interstate or freeway"; Utah: "measured along the interstate highway or freeway"; Texas: On Interstate and Freeway Highways . . . such distance shall be measured along the Highway"; Tennessee: "measured along the Interstate or controlled access highways on the primary system"; South Dakota: "measured along the Interstate or controlled access highway"; South Carolina: "measured along the Interstate or freeway"; Rhode Island: "measured along the Interstate or freeway highway"; Pennsylvania: "measured along the interstate or limited access primary"; Oregon: "measured along the Interstate or Freeway"; Oklahoma: "measured along the interstate highway or freeway"; New York: "measured along the Interstate or freeway"; Nevada: "measured along the Interstate or freeway"; New Mexico: "measured along the Interstate or limited access primary highway"; New Jersey: "measured along the Interstate or freeway"; New Hampshire: "with respect to an interstate or limited access federal-aid primary highway . . . shall be measured along the edge of the main travelled way of any such highway"; North Dakota: "measured along the Interstate or freeway"; North Carolina: "measured along the Interstate or freeway"; Montana: "measured along the Interstate or freeway"; Mississippi: "measured along the Interstate or Freeway"; Michigan: "Along interstate highways and freeways . . . The 500 feet shall be measured . . ."; Louisiana: "measured along the Interstate or Freeway"; Kansas: "measured along the freeway or interstate highway"; Indiana: "measured along the Interstate or limited access Primary highway"; Illinois: "measured along the Interstate or expressway"; Georgia: "measured along the Interstate or freeway"; Delaware: "measured along the interstate or freeway"; Connecticut: "measured along the Interstate or Limited Access Primary Highway"; Colorado: "measured along the Interstate or freeway"; Minnesota: "On interstate highways or fully controlled access freeways . . . measured along such highway"; Alabama: "On interstate highways and freeway primary highways. . . Such distances shall be measured along the highway"; Idaho: "along any Interstate or primary freeway highways within the actual 'interchange area'"; Arizona: "No outdoor advertising shall be erected at interchanges . . . on interstate highways and primary freeways".

[50] Nebraska: "Signs along the Interstate highways . . . measured along the Interstate"; Florida: "measured along the Interstate"; California: "On Interstate highways . . . Such distances shall be measured along the highway".

[51] WNR Exhibit 45.

[52] WNR Exhibit 46.

[53] WNR Exhibits 27, 28 and 29.

- OOA's field inspector expressed his understanding that the Interchange Rule does not apply to Route 3. By email dated November 16, 2018, Christopher Chaves stated: "It is my opinion that since [Route 3] is not classified as an interstate highway, that the ramp rule does not apply to this highway."[54]

OOA offered a half-hearted contract interpretation argument relying on the header in the Federal State Agreement appearing above the Interchange Rule that reads "Interstate Highways and Freeway Primary Highways." I have already considered and discussed the interpretation of the plain language of the Agreement in the paragraphs above.

The remaining argument raised by OOA on this issue is that deference should be given to FHWA guidance advising that the Interchange Rule in the Federal State Agreement applies to both Interstate and Freeway Primary Highways.[55] For the reasons discussed above, that guidance is inconsistent with the plain language of the Agreement and the context within which it was negotiated and executed. To the extent that 23 CFR § 750.705(b) requires the Commonwealth to effectively control outdoor advertising and "comply, at a minimum, with size, lighting, and spacing criteria contained in the agreement between the Secretary and the State", it does so by following the clear language in the Federal State Agreement by ensuring that the Interchange Rule is applied to proposed outdoor advertising along the interstate highways in Massachusetts in cities and towns with populations less than 50,000. If FHWA desires to expand the application of this requirement to additional highways or to more densely populated areas, it cannot do so through guidance; it would need to renegotiate the terms of the Federal State Agreement. Alternatively, if OOA desires to make the same change, it may promulgate rules or regulations to enforce more restrictive standards pursuant to its authority under G.L. 93D § 3 and Section 4(c) of the Federal State Agreement.

FINAL AGENCY DECISION

The Federal State Agreement's prohibition on locating signs adjacent to or within 500 feet of an interchange does not apply to Route 3, a non-interstate highway. Therefore, OOA's denial of applications #2022D010 and 2022D011 based on that prohibition was improper. There is no other reason for OOA's denial of the permits.

OOA is directed, therefore, to approve applications #2022D010 and 2022D011 and grant electronic sign permits to WNR to locate outdoor advertising facing Route 3 at 61 Accord Park Drive in Rockland.

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October 31, 2023

Albert Caldarelli
Administrative Law Judge

[54] WNR Exhibit 50.
[55] OOA Exhibits 12 and 13.