PHILADELPHIA OUTDOOR,
Petitioner,
v.
NEW JERSEY EXPRESSWAY AUTHORITY: AND THE OUTDOOR ADVERTISING SECTION, NEW JERSEY DEPARTMENT OF TRANSPORTATION,
Respondents.

Initial Decision: May 5, 1986 Final Agency Decision: August 4, 1986

Superior Court, Appellate Division Decision
Appears at: 221 *N.J. Super.* 207

SYNOPSIS

Petitioner applied to respondent Outdoor Advertising Section, Department of Transportation, for a permit to place a commercial advertising sign on a site adjacent to the Atlantic City Expressway, pursuant to the Outdoor Advertising Act and regulations adopted thereunder. *N.J.S.A.* 54:40-50 *et seq.*; *N.J.A.C.* 16:41A-1.1 *et seq.* Respondent New Jersey Expressway Authority objected on the basis that the proposed sign would be detrimental to the safety of the traveling public. The application was denied and petitioner requested a hearing. The matter was transmitted to the Office of Administrative Law.

The administrative law judge assigned to the case found that respondent did not meet the burden of proof to establish that the area of the Expressway in question was uniquely hazardous. The law allows denial of an advertising sign permit if it will interfere with the safety of the traveling public. *N.J.A.C.* 16:41A-3.2(a). However, the proof must establish the diversionary nature of the sign, which, in turn must be correlated with the uniqueness of the section of roadway in order to demonstrate that there will be impairment in public safety. Accordingly, it was ordered that petitioner's application for an outdoor advertising permit be granted.

Upon review by the Department of Transportation, this initial decision was adopted. The Commissioner noted that respondents failed to correlate frequency or severity of accidents and the presence

of outdoor advertising on stretches of road with characteristics similar to those at issue in this case. Unless and until the Legislature elects to ban all outdoor advertising signs on the Expressway, permits can only be denied when the conditions outlined in *N.J.A.C.* 16:41A-3.2(a) are clearly proven.

Joseph T. Wilkins, Esq., for the petitioner (Joseph T. Wilkins, P.C., attorney)

Cosmo A. Giovinazzi, III, Esq., for the respondent—New Jersey Expressway Authority (Gruccio, Pepper, Giovinazzi, DeSanto and Mann, P.A., attorneys)

Robert D. Blau, Deputy Attorney General, for the respondent—Outdoor Advertising Section, New Jersey Department of Transportation (W. Cary Edwards, Attorney General of New Jersey, attorney)

VOLIVA, JR., ALJ:

STATEMENT OF THE CASE

Philadelphia Outdoor, petitioner, made application to the Outdoor Advertising Section (Section), New Jersey Department of Transportation, respondent, for an outdoor advertising permit, which would allow the placement of a commercial advertising sign on a site adjacent to and visible from the Atlantic City Expressway, pursuant to the Outdoor Advertising Act (Act) and the regulations adopted thereunder. *N.J.S.A.* 54:40-50 *et seq.; N.J.A.C.* 16:41A-1.1 *et seq.* The New Jersey Expressway Authority (Authority) objected to the application on the basis that the proposed sign would be detrimental to the safety of the traveling public on the Expressway and on the basis that the proposed sign would be incompatible with the aesthetics of the Expressway.* *N.J.A.C.* 16:41A-3.2(a)1 and 2.

PROCEDURAL HISTORY

Philadelphia Outdoor filed its application for an outdoor advertising permit, number 53094, dated October 31, 1984, with the Section. An amended application was submitted by letter, dated December 13, 1984. On May 6, 1985, the Section conducted an informal hearing with the applicant and the Authority. By letter dated May

* The Authority did not pursue the aesthetics issue at hearing.

14, 1985, the Section notified the parties that the application would be denied. By letter dated May 28, 1985, the petitioner requested a hearing. On June 7, 1985, the Section transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.* A prehearing conference was held on August 30, 1985. The matter was heard on November 18, 20, 21 and 22, 1985. The record closed on March 5, 1986, upon receipt of the final post-hearing brief. The period for the submission of the initial decision was extended until May 5, 1986.

FINDINGS OF FACT

(A) UNDISPUTED FACTS

Philadelphia Outdoor filed an application, number 53094, for an outdoor advertising permit with the Section. The proposed sign location is adjacent to the travelled lanes of the Expressway. The Authority objected to the application. On May 14, 1985, the Section denied the application. The reason for the denial was that the proposed sign would interfere with the safety of the traveling public.

Philadelphia Outdoor is owned by Leslie Kaplan and his wife. Mr. Kaplan is the manager and has been involved in the outdoor advertising industry for the past 23 years. The applicant's principal office is in Gladwyn, Pennsylvania. The applicant has a facility in Pennsauken, New Jersey. The applicant both leases and purchases sign locations. Mr. Kaplan is involved in the design, supervision of fabrication and installation, maintenance and operation of the business. The applicant owns approximately 50 billboards located throughout the South Jersey/Philadelphia area along major roadways and bridges. Specifically, the applicant has signs located in New Jersey adjacent to Routes 38, 70 and 130, and in Philadelphia along the Schuykill Expressway, and on both the Benjamin Franklin and Walt Whitman Bridges, all of which have extremely high traffic counts. Mr. Kaplan testified that high traffic counts are important to his business; *i.e.,* the greater the circulation, the greater the revenues. In addition to commercial advertising, Philadelphia Outdoor also displays non-commercial/public interest messages, although some of these messages are revenue producing. The witness acknowledged that some messages take a greater amount of time to read than others. The advertisers select the art work placed on the signs.

The petitioner proposes to place a sign at a location adjacent to the westbound lanes of the Expressway at mile post (mp) 6.65 in Egg Harbor Township, Atlantic County. The proposed sign is to be located on a parcel of property which is owned by Lafayette Construction and is immediately adjacent to the right-of-way of the Expressway. The applicant has a lease with Lafayette, which provides the applicant with access to the site via local roadways. The proposed site is in the vicinity of the intersection of the Expressway with the Garden State Parkway. However, it is not anticipated that the proposed sign will be visible to the motorists traveling on the Parkway.

The petitioner's interest in the site location is predicated directly upon its proximity to the Expressway and upon the fact that the Expressway services motorists traveling to and from the Atlantic City area.

The proposed sign is to be ground-mounted on a single pole, will be double faced (visible to both eastbound and westbound traffic on the Expressway), with a base elevation of 40 feet and dimensions of 16 feet by 60 feet (1,920 square feet total). The sign will be illuminated at night. This sign is to be used for commercial advertising. The purpose of commercial advertising is to attract attention to signs in order to convey a message. It was stipulated that the proposed sign is a form of speech which is commercial in nature.

In April 1964, the Authority adopted a regulation which prohibited the placement of advertising devices and posters within the right-of-way of the Expressway. Also, on March 19, 1981, the Authority adopted resolution 81-1, which established its policy of opposition to the placement of billboards along the right-of-way of the Expressway.

The Expressway is a limited-access highway. It was designed for a speed limit of 70 miles per hour, but currently has a posted limit of 55 mph. The geometrics of the roadway in the vicinity of the proposed sign are gradual in nature, but are more restrictive than those over the remainder of the roadway.

A motorist proceeding westbound on the Expressway would encounter flashing lights warning of curves ahead, various official signs and "S" curves between mp 5.2 and mp 6.5. At approximately mp 6.5 and at several other locations, motorists would have the opportunity to observe official signs which state that the exit ramp for the Parkway northbound is ahead. At mp 6.55 the motorist would proceed under the Fire Road overpass, on which are placed official signs informing of the Parkway exist northbound. The motorist would

first be able to observe the proposed sign (the side which faces westbound traffic) as well as the exit ramp upon exiting the overpass. The sign would be approximately 800 feet west of the overpass. At mp 6.6 the deceleration lane for the northbound parkway exit begins. At mp 6.65 is the proposed sign location. At mp 6.7 the ramp separates from the main travelled lane of the Expressway. The ramp speed is 35 miles per hour. The sign is approximately 430 feet from the separation of the ramp from the main travelled lane of the roadway.

A motorist proceeding eastbound on the Expressway toward Atlantic City would first have the opportunity to observe the sign (that side visible to eastbound traffic) at the top of the overpass of the Expressway over the Parkway at approximately mp 6.72. Immediately thereafter, the motorist would encounter an exit ramp from the Expressway to the Parkway northbound and an entrance ramp from the Parkway northbound to the Expressway eastbound. Thereafter, and immediately preceding entry of the Fire Road overpass, the motorist would observe flashing lights, which warn of the "S" curves. The flashing lights are at a location approximately perpendicular to the proposed sign location along the eastbound lanes of traffic on the Expressway.

The exit and entrance ramps to and from the Parkway each consist of a single lane.

The parties agreed to the following stipulations:

1. Eastbound traffic in the vicinity of the proposed billboard site is moderately heavy on weekday mornings during the period associated with the morning rush hour. Eastbound traffic in the vicinity of the proposed billboard is moderately heavy on Friday evenings, Saturday afternoons and evenings, and Sunday afternoons, especially in the summer months.
2. There are concession agreements between the Authority, Roy Rogers and Sunoco, whereby Roy Rogers operates the restaurant at the Farley Service Area, and Sunoco operates the service station at the same location.
3. The concession agreements are long-term (in excess of one year), and food and gasoline are provided as a convenience to the traveling public so that the public will not have to leave the roadway to eat or obtain fuel. The concession agreements provide revenue to the Authority.
4. The signs alerting the public to the existence of these services were erected with the permission of the Authority.

The Authority plans to commence construction of a third travelled eastbound lane, from mp 4.2 in Pleasantville to mp 33 at the

intersection of the Expressway with Route 73. Construction is scheduled to commence in the spring of 1986 and be completed by the summer of 1988. In the future the Authority plans to add a third travelled westbound lane to the Expressway between mp 4.2 and mp 33. However, it is possible that the Authority will add to the first phase of construction a third travelled lane between the Pleasantville Toll Plaza at mp 4.2 and the intersection of the Expressway with the Parkway. This construction would be adjacent to the proposed sign location.

Between 1966 and 1977, the Expressway's traffic volume increased gradually and at a minimal rate of less than two percent annually. Since the advent of casino gambling in May 1978 and continuing until 1984, the Expressway's traffic volume accelerated dramatically at annual double-digit rates. Between 1978 and 1983, the Pleasantville Toll Plaza had the highest rate of increase in traffic volume of any toll road worldwide. At mp 6.65, in the vicinity of the proposed sign, the Expressway has an average annual daily traffic count of 41,408 vehicles (two-directional traffic). In 1984, traffic consisted of 50.8 percent westbound and 49.2 percent eastbound. Approximately 41 percent of all traffic in the vicinity of mp 6.72 exits or enters the Expressway from or to the Parkway. The average annual daily traffic count which exists from the Expressway westbound to the Parkway is 6,820 vehicles. However, during August, the busiest month on the Expressway, the count is 10,140 vehicles. Peak traffic times on the Expressway westbound are weekdays between 4:30 and 6:00 p.m. year-round, and on Sunday afternoons between May 30 and September 15. During peak periods vehicles which attempt to exit from the Expressway westbound to the Parkway northbound occasionally block westbound traffic on the Expressway. At other times, traffic flows freely on the Expressway at the posted limit of 55 mph.

Westbound motorists on the Expressway who proceed through either the Pleasantville Toll Plaza at mp 4.2 or the Egg Harbor Toll Plaza at mp 17 (approximately 10 miles past the Parkway interchange) most frequently ask for directions to the Parkway or to New York.

Witnesses on behalf of both parties, although primarily on behalf of the Expressway, testified to observations of westbound traffic in the vicinity of the Parkway northbound exit. More specifically, motorists were observed as they exited from under the Fire Road overpass. Motorists maneuvered their vehicles from the left travelled lane of the roadway across the right travelled lane and onto the ramp. This is an inappropriate vehicular maneuver. Other motorists stopped their

vehicles on the shoulder of the main line of the roadway beyond ramp separation, and then backed up their vehicles and proceeded on the ramp toward the Parkway northbound. Although the percentage of traffic which made these unsafe manuevers was in dispute, and cannot be resolved here, it was apparent that such maneuvers occur on a regular basis.

Mr. Kaplan is a member of various outdoor advertising industry groups, including the Outdoor Advertising Association of America, which is a legislative and lobbying organization; the Institute of Outdoor Advertising, which is a marketing and research organization; and the Pennsylvania Outdoor Advertising Association. Mr. Kaplan testified that he was fully familiar with the trade journals published by these various organizations, which include updates on legal issues affecting the industry. Mr. Kaplan had no knowledge of any litigation in which it was alleged that outdoor advertising caused accidents or contributed to any injury to a motorist associated with a traffic accident. Such a development would have a tremendous industry-wide impact. Further, the applicant maintains liability insurance which does not provide for such an event. Mr. Kaplan further testified that he was unaware of any studies concerning the relationship, if any, between outdoor advertising structures and vehicular accidents.

Mr. Kaplan further testified that high traffic counts, *i.e.,* daily circulation, are essential to the outdoor advertising business. Revenues relate directly to daily circulation, as construction costs are relatively constant. In essence, motorists are important to the economic well-being of the outdoor advertising industry. Nevertheless, although circulation is the key factor affecting value, a sign company does not seek a location where it believes an unsafe condition would exist and does not attempt to direct vehicular traffic.

Driving is a multiple-function task and the major source of information is visual. There are three components which comprise the driving task; the driver, the vehicle and the roadway. Each component is variable and can impact upon safety. If a component deteriorates, the driving task demands increases and makes performance more difficult. Task demands are cumulative. A driver constantly takes in and processes information, which is both related and not related to the performance of the driving task. The driving task consists of three levels: positional, situational and navigational. Drivers will attempt to process all demands unless there is an overload of the driving task. However, drivers have a limited capacity to process information and perform the driving task. An overload situation exists when a driver's

ability to perceive and process information, *i.e.,* react, is strained. Drivers will then load-shed and attend to the levels according to their priority. If a driver is busy and a high level of response time is required, the addition of an irrelevant function can result in improper load-shedding and can lead to an accident. A traffic headway, *i.e.,* the driver's perception/reaction time, from 1.8 to 2.5 seconds is considered safe and reasonable, and is the standard used in roadway design. The time for a person to read a billboard (fix upon and perceive) is approximately 0.5 ± seconds. Nighttime traffic behaves more erratically and makes the driving task more difficult. This is because a driver's visual accuracy decreases at night. Illumination makes signs more prominent and can capture and hold a driver's attention for a greater length of time than during daylight hours.

There are a variety of factors which can have an effect upon highway safety. Accident studies and police reports of accidents are not reliable means to determine the cause of an accident. Accidents are extremely rare events, and are measured in per million vehicle miles. Accidents are rarely caused by a single factor. There is no evidence of a direct and effect relationship between accidents and any factor, including the presence of outdoor advertising.

All of the preceding evidence is undisputed and believable and is thus **FOUND AS FACT.**

(B) DISPUTED FACTS

In dispute was whether the proposed sign would have an adverse impact upon highway safety on the Expressway.

The petitioner relied upon the testimony of Mr. Kaplan that the diversionary nature of outdoor advertising has never been cited as a casual factor for automobile accidents.

The Authority produced Jerry A. Wachtel, a human factors psychologist currently employed by the United States Nuclear Regulatory Commission, and Dr. Ned E. Walton, president and chief executive officer of Walton and Associates, Inc., as experts to testify on its behalf.

Mr. Wachtel was well-qualified to testify to his opinions of the diversionary nature of outdoor advertising and of the potential effect of the placement of the proposed sign upon the safety of the Expressway. Concerning the diversionary nature of outdoor advertising, the witness was of the opinion that such signs are designed to attract attention from passing motorists and, as a direct result, he concluded

that the presence of outdoor advertising correlates to a driver distraction from the task, which can be detrimental during periods of high task demand. Mr. Wachtel also testified that the Expressway in the vicinity of the proposed sign location is unique. More specifically, there is a high percentage of buses using the roadway, the safety headways are small, there are numerous official signs necessary for the performance of the driving function and interchanges are the least safe areas of limited-access highways, *i.e.,* they have a higher accident rate than the remainder of the roadway. The safety aspects of interchanges are due to vehicular turning movements, lane changes, speed changes and acts of driver decision-making. The witness was of the opinion that in the event of a high test demand situation, and in consideration of the distracting influence of outdoor advertising, a combination could overload a driver and contribute to the creation of unsafe conditions under certain circumstances, which are regularly predictable.

Dr. Walton was well-qualified to testify to his opinion of the diversionary nature of outdoor advertising and of the potential effect of the placement of the proposed sign upon the safety of the Expressway. The witness was of the opinion that the presence of outdoor advertising does have a negative effect upon driver performance by the diversion of attention from the driving task and, therefore, impairs safety. Nevertheless, the witness conceded that no direct cause and effect relationship between the presence of signs and accidents have ever been established. However, the witness stated that the preponderance of the studies indicate on a gross basis a negative relationship between billboards and accidents. Dr. Walton further testified that the area in the vicinity of the proposed sign is unique, because the intersection of two major facilities creates major concerns. In addition, the headway is approximately 1.8 seconds and any interruption would be critical. This indicates the need for an additional travelled lane. The witness believed that the distracted influence of outdoor advertising would contribute to driver overload and that the presence of the sign would endanger the interest of public safety; more specifically, the sign would contribute to an unsafe condition.

The witnesses' opinions concerning the attractive nature of outdoor advertising appear to be obvious, especially given the purpose and design characteristics of such signs. These opinions are further supported by this state's statute and rule enactments, which regulate the placement and characteristics of such signs. However, the generally attractive nature of outdoor advertising does not necessarily estab-

lish a distractive or diversionary characteristic which would divert a driver's attention from the driving task. The opinions merely establish the potential for such a result. This potential diversionary factor cannot be given much weight because the experts also opined that during periods of high task demand, drivers load-shed and attend to those demands which have the highest priority. There was no sufficient evidence to establish that drivers would improperly load-shed.

The witnesses did establish that the Expressway in the vicinity of the proposed sign, just as almost any other area of any roadway, is unique. Further, it was established that this area of the Expressway can be more hazardous than the remainder. However, the witnesses did not establish that this area of the Expressway was uniquely hazardous. Although Dr. Walton testified to a 1.8-second headway, this was the result of high volumes during peak traffic, and should be rectified by the addition of a third travelled lane.

Accordingly, the witnesses' ultimate opinions concerning the potential negative impact upon safety of the Expressway by the placement of the proposed sign were not supported. Rather, the conclusions were based upon assumptions not borne out by the evidence.

After consideration of the entire record in this matter, I further **FIND** that:

1. Outdoor advertising signs have a generally attractive nature, which is established by their purpose and design characteristics.
2. It was not established that outdoor advertising signs distract or divert a driver's attention from the driving task.
3. The area of the Expressway in the vicinity of the proposed sign is unique and, by reason of its purposes, is more hazardous than other areas of the Expressway.
4. The subject area of the Expressway was not established to be uniquely hazardous.
5. The opinions of Mr. Wachtel and Dr. Walton that the presence of the proposed signs could have a negative effect upon the safety of the travelling public on the Expressway in the vicinity of the proposed sign were based upon assumptions and were not supported by any substantial evidence, and, therefore, are accorded no weight.

DISCUSSION OF LAW AND CONCLUSION

(A) PRELIMINARY RULING

Philadelphia Outdoor contends that the statutes and regulations governing outdoor advertising are invalid on their face as violative of the right of free speech guaranteed by the First Amendment. Second, the petitioner contends that the regulatory scheme, as applied to its proposal, is unconstitutional. Administrative agencies have the power to pass on constitutional issues only when they are relevant and necessary to the resolution of a question within their express jurisdiction. *Christian Bros. Inst. v. No. N.J. Interschol. League,* 86 *N.J.* 409, 416 (1981). Accordingly, the petitioner contends that a constitutional analysis in the case at bar as a practical necessity encompasses both the facial validity and operative effect of the challenged regulatory scheme.

The core of the petitioner's argument addresses the facial validity of the regulatory scheme. The petitioner argues that the New Jersey scheme protects on-site commercial speech but bans non-commercial speech. In *Central Hudson v. Public Service Comm.,* 447 *U.S.* 557 (1980), the United State Supreme Court held that the protection available for a particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation. The Court adopted a four-part test to determine the validity of governmental restrictions on commercial speech as distinguished from more fully protected speech:

> (1) The First Amendment protects commercial speech only if that speech concerns a lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Central Hudson at 566. The petitioner concedes that these criteria have been met in the case at bar; nevertheless, the scheme in question is unconstitutional in light of the Supreme Court's holding in *Metromedia Inc. v. City of San Diego,* 453 *U.S.* 490 (1981).

In *Metromedia,* the challenged ordinance also met the criteria set forth in *Central Hudson.* However, the Supreme Court held that ordinance unconstitutional because of the substantial prohibitions it placed upon the siting of outdoor advertising. The petitioner asserts that the fundamental holding *Metromedia* is that a law which prohibits

non-commercial speech while allowing on-site commercial speech is facially invalid.

Finally, the petitioner contends that the analysis found in *Schad v. Borough of Mount Ephraim,* 452 *U.S.* 61 (1981) should be applied to the case at bar. *Mount Ephraim* involved a municipality's prohibition of live entertainment with its limits. The petitioner argues that a vital element of First Amendment analysis is that the burden of proof is never upon the proponent of speech but on the government seeking to abridge that freedom. Moreover, when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest. Accordingly, the petitioner concludes that, in the case at bar, the burden was incorrectly placed and that the challenged regulatory scheme does not further a sufficiently substantial governmental interest.

As a general rule, constitutional questions are unsuited to resolution in administrative hearing procedures. *Califano v. Sanders,* 430 *U.S.* 99, 109 (1977); *R.C. Maxwell Company v. Pinelands Commission and New Jersey Expressway Authority* (N.J. App. Div., Jan. 15, 1986, A-1648-84T7) (slip opinion at 3). The rule is typically framed in terms barring administrative agencies from passing on the constitutionality of legislation. *Johnson v. Robison,* 415 *U.S.* 361 (1974). Where the issues presented before an administrative agency raise constitutional implications, factual presentations relevant to the constitutional issues may be made to ensure an adequate record for determination on appeal. However, because administrative agencies lack proper jurisdiction to decide constitutional claims, such issues should merely be noted. *Paterson Redevelopment Agency v. Schulman,* 78 *N.J.* 378, 388 (1979). In this way, both the integrity of the administrative system and the defendant's right to judicial determination of constitutional issues will be preserved. *Ibid*

The petitioner contends that the Office of Administrative Law should decide its constitutional arguments because a constitutional analysis in this matter must encompass both the facial validity and operative effect of the challenged regulatory scheme. In support of this proposition, the petitioner cited *Christian Bros. Inst.,* which held that "[a]dministrative agencies have power to pass on constitutional issues only where relevant and necessary to the resolution of a question concededly within their jurisdiction." *Id.* at 416. However, the petitioner merely alleged that the regulatory scheme in question is unconstitutional as it is applied, and has not identified how the application impacts negatively upon its First Amendment rights. Accord-

ingly, the petitioner has only presented an argument concerning the facial validity of the regulatory scheme in question. Therefore, it is not necessary to now decide the petitioner's constitutional argument. Rather, it is proper to merely note this facial challenge for purposes of judicial review. I so **CONCLUDE.**

The Authority contends that the petitioner does not have standing to challenge the constitutionality of the statute and regulations on their face. More specifically, because the petitioner argues that on premises, non-commercial signs are not included within the regulatory scheme and, because the petitioner wishes to construct an off-site, outdoor, advertising sign for commercial purposes, which sign is subject to the regulatory scheme, the Authority contends that the petitioner has no basis to claim or anticipate that the sign which it wishes to construct would be somehow affected or prohibited by the alleged defect in the statute and regulations.

While the Authority's argument may have merit, it is not necessary to decide this issue in light of the fact that the petitioner has only presented a facial challenge to the regulatory scheme. Accordingly, the respondent's standing argument should be noted for the purposes of judicial review. I so **CONCLUDE.**

(B) THE MERITS

The Act and the regulations adopted thereunder provide for the issuance of licenses to engage in outdoor advertising, the issuance of permits for the construction, use and maintenance of advertising structures, and for the regulation of conduct pursuant to licenses and permits. *N.J.S.A.* 54:40-50 *et seq.; N.J.A.C.* 16:41A-1.1 *et seq.* The provisions of the act and regulations are administered by the Section.

The petitioner had the burden to establish, by the preponderance of the credible evidence, that it was fully qualified for the permit. Thereafter, the respondents had the burden to establish that the proposed sign would interfere with the safety of the travelling public. There was no dispute that Philadelphia Outdoor satisfied all of the objective regulatory criteria and, except for the issue of safety, qualified for approval of its permit application. Consequently, the issue centers upon the Authority's objection to the proposed sign on the basis of impairment of highway safety. *N.J.A.C.* 16:41A-3.2(a)2 and 3i.

N.J.A.C. 16:41A-3.2(a) provides, in pertinent part, that an advertising sign permit will be denied if:

. . . .

2. It would injuriously affect any public interest. In the determination of whether the issuance of a permit would adversely affect any public interest, the Bureau in addition to other factors, will consider any public sentiment as expressed by the governing authorities and agencies of the United States, State of New Jersey, county or municipality within whose boundaries the application is made;
3. It would endanger the interest of public safety, including but not limited to the following:
   i. It would interfere with the safety of the traveling public; . . .

The Authority's expert witnesses, Dr. Walton and Mr. Wachtel, established that advertising signs might have a distracting effect which may contribute to accidents, as do an infinite number of other factors. This conclusion is corroborated by inference drawn from the regulatory scheme. The fact that a cause and effect relationship cannot be clearly established does not necessarily establish the opposite conclusion.

The evidence did not establish that outdoor advertising necessarily distracts a motorist's attention from the driving task. Further, although the evidence established that this section of the Expressway is unique and presents greater safety concerns than other areas on the Expressway, it did not establish that the area was uniquely hazardous. Last, the evidence did not establish that the presence of the proposed sign could reasonably be anticipated to impair public safety.

Further, the regulations set forth standards by which the placement of signs is regulated. *N.J.A.C.* 16:41A-3.2. Given the fact that the proposed signs satisfy the objective standards, they should not create a hazard to the travelling public, barring unique circumstances. The respondents did not establish that the placement of the proposed signs would create any such unique circumstances.

In *New Jersey Turnpike Authority v. Allied Outdoor Advertising, et al.*, OAL Dkt. TRP 6053-83, decided May 7, 1984, rev'd., Department of Transportation, July 24, 1984, the Commissioner of Transportation ruled that the New Jersey Turnpike Authority's objections to a proposed sign, in part by reason of alleged impairment of highway safety, were not substantiated by the proofs. The Commissioner held that an objector must establish that a unique set of circumstances exists such that the placement of a proposed sign would result in a hazard to the travelling public. *Id.* at 2. The proofs must establish the diversionary nature of signs, which, in turn, must be correlated with the uniqueness of the section of a roadway in order to demonstrate reasonably that there will be an impairment in public safety.

The nature of the section of the Turnpike and the traffic movements thereon were substantially more complex and difficult than those established for the subject section of the Expressway. Accordingly, the subject section of the Expressway is not so unique as to warrant prohibition of the proposed signs.

I CONCLUDE that the respondents have failed to establish, by the preponderance of the credible evidence, that either sign would interfere with the safety of the travelling public.

The Authority's motives in opposing the proposed signs and its concerns for the proliferation of commercial sign placement along the Expressway are for reasons of safety. However, absent any specific proofs of impairment of highway safety, there is no basis upon which to deny the subject permit application.

DISPOSITION

It is **ORDERED** that the application of Philadelphia Outdoor for an outdoor advertising permit be granted.

This recommended decision may be affirmed, modified or rejected by **ROGER A. BODMAN, COMMISSIONER OF THE DEPARTMENT OF TRANSPORTATION,** who by law is empowered to make a final decision in this matter.

FINAL DECISION BY THE COMMISSIONER OF THE DEPARTMENT OF TRANSPORTATION, HAZEL FRANK GLUCK:

Philadelphia Outdoor Advertising (hereinafter "Philadelphia Outdoor") applied to the Outdoor Advertising Section, New Jersey Department of Transportation (hereinafter "Section"), on October 31, 1984, for permission to place a commercial advertising sign on a site adjacent to and visible from the Atlantic City Expressway (hereinafter the "Expressway"). This permit application was made pursuant to the Outdoor Advertising Act, *N.J.S.A.* 54:40-50 *et seq.* and the regulations adopted thereunder, *N.J.A.C.* 16:41A-1.1 *et seq.* An amended application was submitted by letter dated December 13, 1984. On May 6, 1985, the Section conducted an informal hearing with the petitioner and the New Jersey Expressway Authority (hereinafter "the Authority") which objected to the application. By letter dated May 14, 1985, the Section notified Philadelphia Outdoor and the Authority that the application would be denied.

The petitioner requested a hearing and the matter was transmitted to the Office of Administrative Law for determination as a contested case. Hearings were held on November 18, 20, 21 and 22, 1985, before Administrative Law Judge Richard L. Voliva, Jr. Upon receipt of the final post-hearing brief on March 5, 1986, the record was closed. Administrative Law Judge Voliva's decision was filed with the Department of Transportation (hereinafter "the Department") on May 6, 1986, and an Order extending the time limit for the rendering of a Final Decision was issued on June 24, 1986. Exceptions have been filed with the Department by both Philadelphia Outdoor and the Section.

After carefully reviewing both the initial decision in this matter and the exceptions filed by the Section and the petitioner, I have determined to accept Administrative Law Judge Voliva's recommendation that Philadelphia Outdoor's application for an outdoor advertising permit be granted. Because the Authority failed to meet its burden of proving that the driving public would be endangered by the erection of a billboard at the location in question there exists no basis upon which to rest a denial of Philadelphia Outdoor's permit application.

Unless the erection of an outdoor advertising display at a particular location is expressly prohibited by statute or regulation, a person, firm or corporation will be permitted to place such a display in the location desired. Both *N.J.S.A.* 54:40-60 and *N.J.A.C.* 16:41A-3.2(a) enumerate conditions the existence of which must preclude issuance of a permit along the section of the Expressway at issue here. If the existence of any of these conditions can be established, by the preponderance of the credible evidence, a sign permit cannot be granted. If, however, the existence of one of the conditions set forth in *N.J.S.A.* 54:40-60 or *N.J.A.C.* 16:41A-3.2(a) cannot be proven by a preponderance of the credible evidence, the sign permit must be issued.

In March 1981, the Authority adopted a resolution establishing a policy of opposition to the placement of billboards along the Expressway right-of-way. Although the Department must consider the opinions expressed by governing authorities in determining whether the public interest will be detrimentally affected by the placement of a billboard, *N.J.A.C.* 16:41A-3.2(a)2, it cannot deny a permit based solely on public sentiment. The Department can only deny a permit when the existence of the conditions delineated in *N.J.A.C.* 16:41A-3.2 can be established through demonstrable facts and relationships.

The Authority has not contended that the granting of Philadelphia Outdoor's permit application is precluded by any of the objective safety standards set forth in the Administrative Code. See, *e.g.*, *N.J.A.C.* 16:41-3.2(a)7, (a)8. Rather, the Authority's objection to Philadelphia Outdoor's application is based on the contention that the placement of an advertising sign at the proposed location would be detrimental to the safety of the travelling public. See, *N.J.A.C.* 16:41A-3.2(a)3. Although the language of the Code provision forming the basis of the Authority's opposition is broad and general, the Authority bore the burden of proving, via established facts and demonstrable relationships, that placement of the proposed advertising sign at the proposed location would create such a unique set of circumstances that the travelling public would be endangered. In other words, the Authority had to prove, by a preponderance of the credible evidence, that the placement of the proposed sign at the proposed location would subject the driving public to hazards not presented by permitted advertising signs erected at other locations.

The Authority failed to meet its burden. Even if I accept the facts as set forth in the exceptions filed by the Section and the Authority, I must conclude that the Authority failed to demonstrate a correlation between frequency or severity of accidents and the presence of outdoor advertising on stretches of road with characteristics similar to those at issue here. The Authority has also not proven that the peculiar nature of the particular section of the Expressway at issue would increase the likelihood of improper load shedding by a motorist driving past an advertising sign.

Outdoor advertising displays are designed to distract motorists driving on high volume roadways. Nonetheless, the Legislature has not seen fit to ban all such signs. Unless and until the Legislature elects to ban all future outdoor advertising signs or all future outdoor advertising signs along the Expressway, the Department will deny permits along the Expressway only when the existence of the conditions outlined in *N.J.A.C.* 16:41A-3.2(a) are clearly proven.

Accordingly, the Initial Decision is affirmed.

IT IS on this 4th of August, 1986, **ORDERED** that the application of Philadelphia Outdoor Advertising for an outdoor advertising permit be granted.

You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey courts.