

Public Necessity Rules
of the
Tennessee Department of Transportation
Environmental Division

Statement of Necessity Requiring Public Necessity Rules

Pursuant to the Federal Highway Beautification Act of 1965, 23 U.S.C. § 131, Federal law requires States to provide for the effective control of outdoor advertising in areas adjacent to Interstate and federal-aid primary highways. If the U.S. Secretary of Transportation finds that a State has failed to provide for such effective control, the Secretary is authorized under 23 U.S.C. § 131(b) to withhold ten percent (10%) of the federal-aid funds that would otherwise be apportioned to that State for transportation purposes under 23 U.S.C. § 104.

The Federal Highway Administration has adopted regulations, 23 C.F.R. § 750.701, et seq., to establish requirements that the States must meet in order to assure that there is effective control of outdoor advertising. These rules direct each State to establish size, lighting and spacing criteria in accordance with which outdoor advertising signs may be lawfully permitted in commercial or industrial areas adjacent to Interstate and federal-aid primary highways. 23 C.F.R. § 750.706. Under Federal law, a non-conforming sign is one that was lawfully erected but does not comply with the provisions of State law or State regulations passed at a later date or later fails to comply with State law or State regulations due to changed conditions (e.g., a change in zoning). 23 C.F.R. § 750.707(b). The Federal rules authorize States to adopt a “grandfather clause” whereby such non-conforming signs may be allowed to remain in place. They provide, however, that a non-conforming sign may only remain “at its particular location for the duration of its normal life subject to customary maintenance.” 23 C.F.R. § 750.707(c). More specifically, section 750.707(d)(5) of the Federal rules provides that a non-conforming sign “must remain substantially the same as it was” on the date it became non-conforming, subject to “reasonable repair and maintenance, including a change of advertising message.” Any change more substantial than such customary maintenance will cause the sign to lose its lawful, non-conforming status. 23 C.F.R. § 750.707(d)(5). In addition, section 750.707(d)(6) provides that “The sign may continue as long as it is not destroyed, abandoned, or discontinued.” The only exception to this rule is that a State may lawfully permit a destroyed sign to be “re-erected in kind” if the sign was “destroyed due to vandalism and other criminal or tortious acts.” 23 C.F.R. § 750.707(d)(6).

Current Tennessee Department of Transportation regulations for the control of outdoor advertising authorize “extraordinary maintenance” beyond customary maintenance, up to and including reconstruction, of a non-conforming sign under certain circumstances, TDOT Rule 1680-2-3-.04(1)(b), and the reconstruction of non-conforming signs that have been destroyed by natural disaster, TDOT Rule 1680-2-3-.04(2). By letter dated June 6, 2006, the Federal Highway Administration’s Tennessee Division Administrator has advised the Tennessee Department of Transportation that allowing the reconstruction of storm-damaged non-conforming signs is not in compliance with Federal law. Further,

the letter advises that the Tennessee Department of Transportation has until October 1, 2006, to bring TDOT Rule 1680-2-3-.04 into compliance with 23 C.F.R. §§ 750.707(d)(5) and (d)(6), or the Federal Highway Administration will proceed with assessing the sanction of withholding ten percent (10%) of the federal-aid funds otherwise allocated to the State of Tennessee. Therefore, to avoid this threatened loss of federal funds, and in accordance with T.C.A. § 4-5-209(a)(3), the Department of Transportation promulgates the following amendments to Chapter 1680-2-3, Control of Outdoor Advertising, as public necessity rules to become effective on October 1, 2006.

For a complete copy of the text of these public necessity rules, contact John H. Reinbold, General Counsel, Tennessee Department of Transportation, Suite 300, James K. Polk Building, 505 Deaderick Street, Nashville, Tennessee 37243, telephone number (615) 741-2941.

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Chapter 1680-2-3
Control of Outdoor Advertising

Amendments

Rule 1680-2-3-.02, Definitions, is amended by deleting paragraph (10), Extraordinary Maintenance, in its entirety and renumbering all subsequent paragraphs in the rule.

Authority: T.C.A. § 54-21-112.

Subparagraph (1)(b) of Rule 1680-2-3-.04, Control of Non-Conforming and Grandfathered Non-Conforming Advertising Devices Along the Interstate and Primary System of Highways, is amended by deleting the subparagraph in its entirety.

Authority: T.C.A. § 54-21-112.

Paragraph (2) of Rule 1680-2-3-.04, Control of Non-Conforming and Grandfathered Non-Conforming Advertising Devices Along the Interstate and Primary System of Highways, is amended by deleting the current wording of the paragraph in its entirety and substituting the following language in its place:

- (2) A lawfully permitted non-conforming device or grandfathered non-conforming device that has been destroyed or damaged beyond what may be repaired through customary maintenance may be rebuilt or repaired and continue to be permitted only if all of the following conditions are satisfied:

- (a) The destruction of or damage to the device must have been caused by vandalism or some other criminal or tortious acts, excluding any negligent or intentional acts of the permit holder or any party acting by permission of, with the knowledge of, or in concert with the permit holder and/or sign owner.
- (b) No device may be rebuilt and/or repaired without the prior written approval of the Regional Highway Beautification Office for the administrative region of the Tennessee Department of Transportation in which the device is located.
- (c) The current holder of the permit or sign owner, if different, must submit a written request for approval to the appropriate Regional Highway Beautification Office, which written request must provide, at a minimum:
 - (i) Proof of the date and cause of the destruction of and/or damage to the device, including a copy of the police report made with respect to the vandalism or other criminal or tortious act causing such destruction or damage; and
 - (ii) A general description of the manner in which it is proposed to rebuild and/or repair the device.
- (d) No post, pole or other support structure, or any component of the device other than the sign face or stringers, will be approved for replacement or repair without proof that such post, pole, support structure, or other component of the device was destroyed or damaged by an act of vandalism or some other criminal or tortious act.
- (e) The device must be rebuilt and/or repaired in such manner that it replicates the original device, including specifically as follows:
 - (i) The rebuilt and/or repaired device must remain or be rebuilt in the exact same location as the original device; and
 - (ii) The rebuilt and/or repaired device must have the same height, size, and dimensions as the original device; and
 - (iii) Each post, pole, other support structure, or other component of the device, including the sign face and stringers, must be rebuilt and/or repaired with materials that replicate the materials used to construct that same component in the original device (e.g., wood for wood, steel for steel, etc.); and

- (iv) No component may be added to the original device, including no lighting if the original sign was not illuminated, no reflective material if the original sign was not reflectorized, and no changeable message technology on the sign face if not included on the original sign.

- (f) The rebuilding and/or repair of the device must be completed within twelve (12) months after the date on which the original device was destroyed and/or damaged or the device will be treated as an abandoned outdoor advertising device.

Authority: T.C.A. § 54-21-112.

Legal Contact and/or party who will approve final copy for publication:

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Suite 300, James K. Polk Building
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Nashville, Tennessee 37243
(615) 741-2941

Contact for disk acquisition: (Same as above)

Signature of the agency officer directly responsible for proposing and/or drafting these rules:

Gerald F. Nicely
Commissioner

I certify that this is an accurate and complete copy of public necessity rules lawfully promulgated and adopted by the State of Tennessee Department of Transportation on the _____ day of _____, 2006.

John H. Reinbold
General Counsel

Subscribed and sworn to before me this ____ day of _____, 2006.

Notary Public

My commission expires on the ____ day of _____, 200_.
All public necessity rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Paul G. Summers
Attorney General and Reporter

The public necessity rules set out herein were properly filed in the Department of State on the 1st day of August, 2006, and will be effective from October 1, 2006, for a period of 165 days. These public necessity rules will remain in effect through the 15th day of March, 2007.

Riley C. Darnell
Secretary of State

By: _____