State of California
Office of Administrative Law

In re:
Department of Transportation

Regulatory Action: Title 4
California Code of Regulations

Adopt sections:
Amend sections: 2241, 2242, 2243, 2244, 2245, 2270, 2271, 2272, 2401, 2422, 2422.1, 2424, 2444, 2511, 2512, 2513
Repeal sections:

DECISION OF DISAPPROVAL OF REGULATORY ACTION

Government Code Section 11349.3

OAL File No. 2009-0622-01 S

SUMMARY OF REGULATORY ACTION

The Department of Transportation (Department) proposed this rulemaking to revise its outdoor advertising regulations found in Title 4 of the California Code of Regulations. This amendment proposed to add several definitions, clarify other definitions and make substantive changes to several regulation sections. The proposed changes would include a complete re-write of the regulation applying to Redevelopment Area permit standards and the section applicable to destroyed non-conforming displays. The Department proposed to add a $300 fee for a landscape reclassification request along with other substantive changes.

DECISION

On August 3, 2009, the Office of Administrative Law (OAL) disapproved the above referenced regulatory action for the following reasons: failure to comply with the requirements for incorporation by reference set forth in California Code of Regulations, title 1, section 20; failure to comply with the clarity, necessity and authority standards of Government Code section 11349.1; failure to include an adequate response to all public comments in accordance with Government Code section 11346.9; failure to comply with procedural requirements; and for miscellaneous omissions and errors in the accompanying text and documentation.

DISCUSSION

Any regulation adopted by a state agency through its exercise of quasi-legislative power delegated to it by statute to implement, interpret, or make specific the law enforced or

administered by it, or to govern its procedure, is subject to the Administrative Procedure Act (APA) unless a statute expressly exempts the regulation from the APA (Gov. Code, secs. 11340.5 and 11346). The adoption of regulations by the Department must satisfy requirements established by the part of the APA that governs rulemaking by a state agency.

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards, a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In its review, OAL may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. OAL review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of rules and regulations that implement, interpret and make specific statutory law, and to ensure that required procedures are followed in order to provide the public with a meaningful opportunity to comment on rules and regulations before they become effective.

A. NECESSITY

Government Code section 11349.1, subdivision (a)(1), requires that OAL review all regulations for compliance with the "necessity" standard. Government Code section 11349, subdivision (a), defines "necessity" to mean

> . . . the record of the rulemaking proceeding ***demonstrates by substantial evidence the need for a regulation*** to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purpose of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion. (Emphasis added.)

To further explain the meaning of substantial evidence in the context of the "necessity" standard, subdivision (b) of section 10 of title 1 of the California Code of Regulations provides:

> In order to meet the "necessity" standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:
>
> (1) a statement of the specific purpose of each adoption, amendment, or repeal; and
>
> (2) information explaining ***why*** each provision of the adopted regulations is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An "expert" within the meaning of this section is a person who possesses special skill or

> knowledge by reason of study or experience which is relevant to the regulation in question. (Emphasis added.)

To provide the public with an opportunity to review and comment upon an agency's perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the initial statement of reasons (ISOR). (Gov. Code, sec. 11346.2(b).) The ISOR must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, "why" a regulation is needed and "how" this regulation fills that need. (Gov. Code, sec. 11346.2(b)(1).) The ISOR must be submitted to OAL with the initial notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based. (Gov. Code, secs. 11346.2(b) and 11346.5(a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably. The ISOR and all data and other factual information, studies or reports upon which the agency is relying in the regulatory action must also be included in the rulemaking file. (Gov. Code, sec. 11347.3(b)(2) and (7).)

The ISOR provided with this regulatory action is inadequate. Please see discussion below for specific examples. Neither the ISOR, nor the rulemaking record generally, specifies the purposes of each regulation or gives the rationale for the agency's determination that the adopted language is necessary to carry out the stated purposes. The ISOR fails to provide the public with the rationale for the determinations by the Department as to why the specific regulatory changes are needed to carry out the purpose for which they are proposed. This vital information should have been made available to the public during the rulemaking process so that the public was informed of the basis of the proposed action and could comment knowledgably during the public comment period.

The following sections of Title 4 of the California Code of Regulations are proposed to be amended with inadequate or no statement in the ISOR as to why the particular provision was necessary. Other regulatory provisions that need further explanation were discussed with Department personnel. This decision provides examples of the types of issues to be addressed by the Department prior to the resubmission. However, all issues discussed with the Department will have to be resolved prior to approval by OAL.

Example No. 1: Section 2244 – Displays Within Redevelopment Project Areas. [1]

§ 2244. On-Premise Display*s* Within a Redevelopment Project Areas.

~~The applicant for an advertising display to be constructed pursuant to Sections 5273, 5273.5 or 5274 of the Act shall accurately complete and submit the Outdoor Advertising Structure Permit/Application, Form ODA-002 which is incorporated by reference, with a Redevelopment project boundaries map, application, permit fees and a Certification in writing by the~~

[1] In the examples provided, proposed amendments to the California Code of Regulations are indicated in underline and deletions are indicated in strike-out.

~~Redevelopment Agency that the display is in the boundary area of a redevelopment agency project and will only advertise businesses and activities within the project where the advertising display is placed. The Redevelopment Agency shall provide the Department with a list of all qualifying businesses and activities in the specified project area. It shall be the obligation of the advertising display owner to demonstrate that any business or activity advertised meets the standards of the Act if it is not included on the list of qualifying businesses and activities provided by the Redevelopment Agency. After certifying the display meets the criteria of Sections 5273, 52.73.5 or 5274, it shall be considered an on-premise display and no permit will issue. The applicant will pay a processing review fee equal to the current amount of a permit application fee.~~

(a) Displays placed pursuant to Sections 5273 and 5273.5 of the Act shall only be placed after a permit is issued to the applicable Redevelopment Agency, and will be referred to as "Redevelopment Displays." The Redevelopment Agency shall apply for a permit on a form approved by the Department and pay all fees required by sections 5485 and 5486 of the Act. The application shall include a project boundaries map and a list of businesses and activities developed within the boundary limits, of and as part of, an individual redevelopment project that may be advertised on the display. All redevelopment display advertising copy must refer to a business (or businesses) physically located within a redevelopment project area established pursuant to Health and Safety Code Section 33300 et seq. "Product" advertising that does not refer to an actual business located within the redevelopment project area will not be allowed. The Redevelopment Agency will be responsible for insuring the display and its messages comply with all applicable legal and regulatory provisions. The Redevelopment Agency may not assign the permit.

(b) To qualify as a "business" or "activity" for the purposes of this section, the business must be open to the public or be a manufacturing facility or factory with employees present at that locale at least 40 hours a week with all necessary utilities and business fixtures. The business cannot be operated with the primary purpose of allowing advertising pursuant to this section; simply authorizing or designating employees of another business to be representatives will not qualify as a business. Any activity listed in section 2401(d) shall not be considered a business for purposes of this section.

(c) Redevelopment agencies that have approved displays pursuant to Section 5273 and 5273.5 of the Act prior to the effective date of this section, shall have ninety (90) days to submit an application after the Department mails an application to them.

(d) If any display placed pursuant to this section needs to be acquired or relocated to facilitate a public project, compensation shall be paid based on the value of the display as an on-premise display pursuant to section 5492 of the Business and Professions Code.

The ISOR states: "This proposed amendment required a major rewrite of Redevelopment Area permit standards. The proposed rewrite to the regulation is necessary to save considerable time in making these determinations and further ensures that there will be no confusion between the Redevelopment Agency and the Department." The APA requires the Department to go beyond a general statement of necessity and provide instead the specific purpose for each change along with a rationale explaining why the changes are reasonably necessary to accomplish the purpose proposed by the Department. This statement fails because it merely states a generalized purpose for the changes being made instead of answering the question of "why" this amendment is needed and "how" this amendment fills that need.

Example No. 2: Section 2422.1 - Permit Fee.

~~(a)~~ The annual fee for each advertising display shall be ~~one hundred~~ sixty dollars ~~($100.00)~~ ($60.00) commencing with the 2009 permit year. The fee shall increase ~~in the 2007-2008 fiscal year and in the 20012-2013 fiscal year by an amount equal to the increase in the California Consumer Price Index~~ to seventy dollars ($70.00) for the 2011 through 2015 permit years and to eighty dollars ($80.00) for the 2016 and 2017 permit years, and any following years until this section is amended.
~~(b) The 2006 annual permit fee shall be due by December 31, 2005 or thirty days after the effective date of this section, whichever is later.~~
~~(b) Permit holders that paid for a renewal term of five years pursuant to Business and Professionals Code, Section 5360 at ninety-two dollars ($92) per year will not be subject to paying this increase until December 31, 2008.~~

The ISOR is completely silent as to the question of "why" this amendment is needed and "how" this change fills that need. There is no reasonable necessity in the ISOR for the change in the fee as illustrated in this amendment to section 2422.1. The Department must state in the ISOR the purpose for these changes and how the changes accomplish the purpose detailed by the Department for this change in the fee.

Example No. 3: Completion Section 2512 – Request for Reclassification.

A person may make a written request to the Chief Landscape Architect, to classify a freeway or a section of freeway as a landscaped freeway, or to declassify a freeway or section of freeway classified as a landscaped freeway.
(a) The request (1) shall be in writing; (2) shall be signed and dated; (3) shall identify the section of freeway by county, route and post mile or kilometer post; and (4) shall contain a detailed statement of reasons supporting the proposed freeway classification or declassification. There will be a $300 fee for each request; such fee will be refunded if the request is granted.
(b) Within 60 days after receiving the written request, a Landscape Architect shall inspect the freeway or section of freeway covered by the request. All findings made during this inspection are presented to the Chief Landscape Architect, who shall determine whether to reclassify the freeway section. The determination of whether to reclassify is based upon whether the freeway

> section meets the criteria of the Act and these regulations on the date of determination. A field review need not be made if a review has taken place within two years of the date of the request, unless the request specifies major changes have occurred within the two years preceding the request.
> (c) Within 90 days after receiving a request for reclassification, the person making the request is notified in writing by the Chief Landscape Architect of the determination and the reasons therefore. If the request is not granted, the person making the request may appeal this determination to the Deputy Director Project Development, ~~pursuant to the provisions of Section 2241(b) of these regulations.~~ and a hearing will be conducted in accordance with the provisions of the California Administrative Procedures Act, Govt. Code Section 11500 et seq., except that the proceedings will be recorded by electronic means only, unless a party agrees in advance to pay all costs of having the proceeding transcribed by a certified court reporter. An unsuccessful appellate will be responsible for paying all costs assessed by the Office of Administrative Law.[2]

The ISOR says, "The proposed amendment to the regulation adds a $300 fee for each request for landscape reclassification. The amendment is necessary to enable the Department to cover the cost for the Department to process a formal review of the request." This $300 fee is a new fee not previously collected. More information is needed to explain why the sum of $300 is necessary for this review. There is no documentation in the file of how the Department arrived at the $300 figure. Further, the added language in subdivision (c) is not discussed in the ISOR at all. The information in the ISOR fails to demonstrate by substantial evidence the need for this amendment.

The Final Statement of Reasons (FSR) does not supplement or update any of the information in the ISOR as permitted by section 11346.9, subdivision (a)(1).

It is statutorily mandated that the Department articulate its reasons for adopting, amending or repealing a regulatory provision so that the public has an opportunity to comment on the process and the reasoning of the Board. To remedy this oversight, the Department may prepare a supplement to the ISOR that includes a discussion of all the substantive provisions of these regulations and a description of the need for including them in the proposed regulations. As provided in Government Code section 11346.8, subdivision (d), this supplement must be made available for at least 15 days for public comment pursuant to Government Code section 11347.1.

B. AUTHORITY

Government Code section 11349.1, subdivision (a)(2), requires that OAL review all regulations for compliance with the "authority" standard. Government Code section 11349, subdivision (b), defines "authority" to mean "... the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation." Government Code section 11342.1 requires that each

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[2] Here, we believe the Department means the Office of Administrative Hearings, not the Office of Administrative Law.

regulation "...be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law."

Each regulation submitted to OAL for review must satisfy the authority standard. A regulation that is beyond the scope of an agency's express or implied rulemaking authority is void. "Each regulation adopted, to be effective, shall be within the scope of authority conferred...." (Gov. Code, sec. 11342.1.) The proposed amendment to section 2241 would allow the Department to seek the recovery of administrative costs from the appellant. However, the Department does not have the authority for this change.

Business and Professions Code section 5485, subdivision (e), provides that:

> Notwithstanding any other provision of law, if an action results in the successful enforcement **of this section**, the department **may request the court** to award the department its enforcement costs, including, but not limited to, its reasonable attorneys' fees for pursuing the action. (Emphasis added.)

The proposed amendment to regulation section 2241 provides in pertinent part:

> (6) An unsuccessful appellant will be responsible for administrative costs of the appeal, including, but not limited to, any charges assessed to the Department of Transportation by the Office of Administrative Hearings....

The amended regulatory provision indicates that an unsuccessful appellant is responsible for administrative costs. While Business and Professions Code section 5485 allows the Department to request enforcement costs from the court for enforcement of section 5485, in this instance the hearings are held before the Office of Administrative Hearings. The Office of Administrative Hearings is not a court, but rather a quasi-judicial tribunal. No specific authority has been cited allowing the Department to seek reimbursement costs from the Office of Administrative Hearings.

C. CLARITY

OAL reviews proposed regulations for compliance with the "clarity" standard pursuant to Government Code section 11349.1. Clarity is defined in section 11349, subdivision (c), as follows: "[c]larity means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." The following provision included in the proposed regulations is not clear and must be improved.

Section 2241 says that the hearing shall be calendared pursuant to Government Code sections 11512 and 11517 subdivision (c). Neither of these statutory sections discusses the calendaring of cases. It is not clear, then, how cases are to be calendared. This amendment to section 2241 does not meet the "clarity" standard and must be corrected.

D. RESPONSE TO COMMENTS

Since its inception in 1947, the APA has afforded interested persons the opportunity to participate in quasi-legislative proceedings conducted by state agencies. The APA currently requires that rulemaking agencies provide notice and at least a 45-day comment period prior to adoption of a proposed regulatory action. (Gov. Code, secs. 11346.4 and 11346.5). By requiring the state agency to summarize and respond in the record to comments received during the comment period, the Legislature has clearly indicated its intent that an agency account for all relevant comments received, and provide written evidence of its meaningful consideration of all timely, relevant input. Section 11346.9, subdivision (a)(3), of the Government Code requires that the adopting agency prepare and submit to OAL a final statement of reasons which shall include:

> A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reason for making no change....

The summaries and responses to the comments submitted during this rulemaking action are contained in the FSR. As set forth below, the Department did not summarize and respond to all comments received. Further, the comments that did receive a response were not responded to fully.

Commenter number 2 as listed in the FSR comments that the amendment to section 2244 is in conflict with Business and Professions Code section 5350. This commenter also indicates that the amendment would be applied retroactively. The Department did not respond to either of these comments. The Department also failed to summarize the portion of the comment alleging that this amendment would have a retroactive impact.

Commenter number 3 in the FSR argues that the amendment to section 2244 results in a retroactive mandate for Redevelopment Agencies and also that it results in a local mandate. The Department did not summarize or respond to either of these assertions.

Commenter number 5 discusses the requirement for Redevelopment Agencies to obtain permits for displays that have already been permitted. The Department did not summarize or respond to this portion of the comment.

Commenter number 6 asks how the Department came up with certain percentages contained in the amendment to section 2422. The Department's response was that these percentages arose after discussions arising from actual controversies. However, this does not answer the actual question of how the Department decided on the very specific percentages listed in this section.

Commenter number 8 raises several issues including the application of the amendments in section 2244 to existing displays. The Department did not summarize or respond to these comments.

Commenter number 9 discusses the amendment to section 2241 allowing the Department to recover costs from an unsuccessful appellant. The Department's response to this comment is that they changed this section to limit the recovery to only the costs assessed by the Office of Administrative Law. This section has not been changed as indicated. It says, "An unsuccessful appellant will be responsible for administrative costs of the appeal, including, but not limited to, any charges assessed to the Department of Transportation by the Office of Administrative Hearings...." Additionally it would be incorrect to say the Office of Administrative Law. Rather the Department likely intended to say the Office of Administrative Hearings.

Commenter number 12 makes several suggestions for changes to section 2244 and the Department's response is that they will consider the suggestions. The APA requires more. If the suggestions were rejected, the Department needs to explain why they were rejected. If the suggestions were accepted, the Department needs to state that this occurred.

Commenter number 13 discusses section 2244 and indicates that he believes the amendment to this section amounts to an unfunded mandate. The Department failed to summarize or respond to this assertion.

Additionally there was one comment from Pete Aguilar from Arrowhead Credit Union, made during the hearing that was neither summarized nor responded to.

For the reasons listed above, the Department's responses to the comments are inadequate. If any subsequent revisions to the text of regulations are made in response to these comments, the changes to the regulation text should be made available for public comment for at least 15 days pursuant to Government Code section 11346.8 subdivision (c) and section 44 of Title 1 of the California Code of Regulations as discussed above. Additionally, the Department must summarize and respond to any comments received during the 15-day public comment period.

E. PROCEDURAL REQUIREMENTS OF THE APA

OAL must review the rulemaking record to determine whether all of the procedural requirements of the APA have been satisfied. (Gov. Code, sec. 11349.1.) The Department has failed to meet the following procedural requirements:

1. Government Code section 11346.9, subdivision (a)(1), requires in part that the FSR shall include, "An update of the information contained in the initial statement of reasons."

The Final Statement of Reasons for this rulemaking or the rulemaking record does not contain an update to the ISOR.

2. Government Code section 11346.9, subdivision (b), requires the agency submitting a rulemaking to prepare and submit to OAL "...an updated informative digest...."

There is an Updated Informative Digest (UID) in the rulemaking record, but it merely states that, "There have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Regulatory Action."

This fails to update the Informative Digest found in the ISOR. There were 15-day changes made to the text and these changes must be described in the UID.

F. INCORPORATION BY REFERENCE

OAL adopted section 20 of title 1 of the California Code of Regulations to assure that material incorporated by reference in regulations conforms to the requirements of the APA. Subsection (b) of this section provides in part:

> Material proposed for "incorporation by reference" shall be **reviewed in accordance with procedures and standards for a regulation** published in the California Code of Regulations.... (Emphasis added.)

In order to be reviewed by OAL, a document incorporated by reference **must be included** along with the regulation text submitted to OAL with the rulemaking file. The Department previously incorporated by reference several forms. In this rulemaking those forms are being deleted. Therefore, these forms must be shown with strikethrough and attached to the text pursuant to California Code of Regulations, title 1, section 8.

Subsection (c) of section 20 provides other requirements for a state agency that wishes to incorporate a document as part of a regulation by reference to that document. Subsection (c) of section 20 provides:

> An agency may "incorporate by reference" only if the following conditions are met:
> ...
>
> (4) The regulation text states that the document is incorporated by reference and identifies the document by **title and date of publication or issuance**. Where an authorizing California statute or other applicable law requires the adoption or enforcement of the incorporated provisions of the document as well as any subsequent amendments thereto, no specific date is required.... (Emphasis added.)

The provisions listed below refer to documents that have not properly been incorporated by reference as required by section 20 of title 1 of the California Code of Regulations. The incorporated documents described below must be added to the rulemaking record for review by OAL and must be made available to the public for comment for 15 days pursuant to sections 11346.8, subdivision (d), and 11347.1 of the Government Code.

Subsection (a) (1) of section 2422 of title 4 as proposed to be revised by this rulemaking states:

> Accurately complete and sign the **current Outdoor Advertising Structure Permit/Application**...." (Emphasis added.)

This "permit/application" was not included in the rulemaking record, nor is it identified by title and date. Further, such a prospective incorporation by reference by use of the word "current" (one that automatically incorporates future changes to an incorporated document) is of questionable validity. While prospective incorporation by reference could cut down on periodic rulemaking to incorporate future changes made by the body who originally issued the incorporated document, it also eliminates the opportunity for public participation in the decision to give regulatory effect to those changes. This problem has been described as follows:

> ...Prospective incorporation entirely removes from the usual rule-making process individual consideration, by the public and the agency, of each future change to the matter incorporated by reference, thereby effectively denying the many benefits of that process to those who may object to the legality or merits of the new amendments or editions. This is not an inconsiderable loss. It is equivalent to a declaration by the agency that it will not hold rule-making proceedings of any kind on the specific contents even though such changes will become effective law of the agency, and even if many of them turn out to be very controversial and of doubtful legality. Furthermore, it should be obvious that no one could effectively object to such later changes at the time the initial rule was adopted prospectively incorporating them by reference; at the time of the original rule-making proceeding in which the wholesale incorporation by reference of future changes was adopted, the specific content of those future changes would be unknown and unknowable. (Footnote omitted. Bonfield, State Administrative Rulemaking (1986) pp. 325-326.)

The validity of prospective incorporation by reference has been questioned by the Court of Appeal in a case involving a Department of Health Care Services regulation incorporating by reference standards issued by the Department of Finance.

> There is no procedural barrier prohibiting the enacting agency from adopting by reference a set of standards issued by another agency if supporting evidence is made available at a public hearing, opportunity for refutation is given, the pro and con evidence considered and the evidentiary material assembled in an identifiable record. On the other hand, an attempt to embody by reference future modifications of the incorporated material without additional hearings would have dubious validity. (See Olive Proration etc. Com. V. Agric. Tec. Com., (1941) 17 Cal.2d at P. 209, 109 P.2d 918.) [California Ass'n of Nursing Homes, Etc. v. Williams (1970) 4 Cal.App.3d 800, 814, 84 Cal.Rptr. 590.]

Additionally, in section 2244, subsection (a), the Department states, "The Redevelopment Agency shall apply for a permit on a form approved by the Department...." This also is an impermissible attempt at prospective incorporation by reference. Section 2424, subsection (a)(2), contains another instance of prospective incorporation by reference when it says, "The Permittee returns the current completed Application For Outdoor Advertising Permit Renewal...." These documents have not been included in the rulemaking record, nor are they