The research team reviewed and analyzed what the DOT can currently accommodate within its right-of-way (ROW), as well as the uses that ROW can currently be utilized for according to federal statutes. Included within this review is a synopsis of the current federal rules regarding the use and accommodation policies for ROW. A review of how the highway beautification act also intersects into the use of ROW and adjacent property to ROW was also undertaken.

**Summary**

Over the past thirty years federal regulations, Federal Highway Administration (FHWA) and American Association of State Highway and Transportation Officials (AASHTO) guidance have been relatively consistent in keeping ROW protected from other potential uses and, except for the accommodation of utilities, have (i) restricted rest-area commercialization and (ii) actively managed the use of billboards and other types of ‘blight-creating’ uses such as, junk yards, and car storage yards adjacent to ROW. One area that stood out, in terms of the practice of utilizing ROW for alternate uses, has been the long-standing policy of utility accommodation within, across, and adjacent to ROW. Utility accommodation was historically viewed as *beneficial for the public good*, and the practice of bundling together transmission of goods and electrons began with placement of the telegraph system within the railroad ROW in the nineteenth century. During the twentieth century multiple utility systems including electricity transmission, oil and gas pipelines, and telecommunications cables, were laid across or adjacent to ROW and more recently have been laid longitudinally under the ROW. So the bundling of transportation and utility uses is a long-standing practice in the U.S.

Current regulations essentially require that ROW acquired with federal dollars is used for *highway purposes.* There is an exception to this within the regulations, if the Administrator (DOT) approves another use – either temporary or permanent – that they consider is in the public interest and will not impair the highway use, or interfere with safety. This type of language is mirrored throughout the ROW and Real Property Language in 23 CFR Sub-chapter H – Right of Way and Environment, and in 23 CFR Part 645 B that covers utility accommodation. Therefore, future or alternative uses that the State DOTs or FHWA may want to utilize ROW for can be accommodated, with approval. However, FHWA may want to consider amending this language to change the ‘tone’ or what some might consider the overarching ‘policy framework’ if they want to encourage on the policy front different or alternative uses of ROW. This will also assist the DOTs in overcoming, what has been anecdotally commented upon in other research projets that half the battle in accommodating new or alternative uses will be to change the mindset of engineers within the state DOTs who have hitherto considered the ROW as an untouchable element.

As an example, a recent interview conducted with a staffer in the Texas DOT regarding value extraction from DOT property (lease of a DOT owned cell tower) showcased how the staffer felt that the DOT should not be making any money from the public asset, and that the private company was just coming to the DOT to ‘get a cheaper deal to lease cell-tower space’. Caltrans in an interview for the same research also commented that if the DOT wanted to develop an ‘asset-management’ type program to maximize utilization of the DOTs real-estate portfolio this should NOT be housed within the ROW Division at the DOT but should be a stand-alone division staffed with professional real-estate professionals.

**Federal ROW Acquisition and Use: Statute Review**

Acquisition of ROW: 23 CFR Part 1 – General: Section 1.23

23 [Code of Federal Regulations](http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=69038596f74496b2a96cbd4617454188&rgn=div5&view=text&node=23:1.0.1.1.1&idno=23) (CFR)[[1]](#footnote-1) Part I Section 1.23 Rights-of-Way stipulates the purposes where ROW can be acquired for federal aid highway projects. The interest that shall be acquired under Section 1.23 (a) shall be of such nature and extent *as are adequate for the construction, operation and maintenance* of a project. The use for which ROW is acquired is for *highway purposes*.

Paragraph (b) states that except as provided under paragraph (c) of this section, all real property, *including air space*, within the ROW boundaries of a project shall be *devoted exclusively* to *public highway purposes*. Paragraph (b) also notes that state highway departments are responsible for preserving such ROW free of all public and private installations, facilities or encroachments, *except for those approved under paragraph (c)* and those that the Administrator approves as constituting a part of a highway or as necessary for its operation, use or maintenance for public highway purposes such as, information sites established and maintained under Section1.35 of the regulations.

The exception in Section1.23(c) allows for temporary or permanent occupancy *or use* of the ROW approved by the Administrator as either being in the *public interest* and will not *impair* the highway or *interfere with free and safe flow* of traffic thereon.

Funding and Reimbursement: 23 CFR Sub-chapter H – Right of Way and Environment: Part 710 Right of Way and Real Estate Section 710.203

23 CFR Section710.203 details the conditions under which a DOT will be funded and reimbursed for ROW acquisition. In general the section requires the project to have been included in the Statewide Transportation Improvement Program (STIP), the DOT has executed a project agreement, NEPA provisions have been complied with, and costs have been incurred in conformance with State and Federal law requirements.

Real Property Control: 23 CFR Sub-chapter H – Right of Way and Environment: Part 710 Right of Way and Real Estate: Section 710.401

This subpart describes the acquiring agency's *responsibilities to control the use of real property* required for a project where Federal funds participated in *any phase* of the project. Prior to *allowing any change in access control or other use or occupancy* of acquired property along the Interstate, the DOT must gain FHWA approval for such change or use. The DOT is required to specify in their ROW Operations Manual, *procedures for the rental, leasing, maintenance, and disposal of real property* acquired with money under 23 CFR. The DOT shall assure that local agencies follow the State's approved procedures, or the local agencies own procedures if approved for use by the DOT.

Real Property Management: 23 CFR Sub-chapter H – Right of Way and Environment: Part 710 Right of Way and Real Estate: Section 710.402

Under Section 710.403 (a) the DOT has to assure that all properties within the boundaries of the federally-aided facility *are devoted* *exclusively* *to the purposes of that facility* and is preserved free of all other public or private alternative uses, unless these have been permitted by regulation or FHWA. The *alternative use must be consistent* with the continued operation, maintenance, and safety of the facility and the use *shall* not result in the exposure of the facility's users or others to hazards.

The DOT under sub-section (c) *shall* evaluate the environmental effects of disposing or leasing property and must obtain FHWA approval under 23 CFR Part 771. DOTs are required to charge current fair market value or rent for the use or disposal of these property interests, including access control, if the properties were obtained with 23 CFR funding. An exception to this is provided under Sub-section 710.403 (d) (1) through (5) of this section. If property is no longer needed for a project and was acquired with public funding, the principle guiding disposal would normally be to sell the property at fair market value and use the funds for transportation purposes. The term fair market value as used for acquisition and disposal purposes is defined by State statute and/or State court decisions. Exceptions to the general requirement for charging fair market value may be approved in the following situations:

1. With FHWA approval, when the DOT clearly shows that an exception is in the overall public interest for social, environmental, or economic purposes; nonproprietary governmental use; or uses under 23 U.S.C. 142(f), Public Transportation. The DOT manual may include criteria for evaluating disposals at less than fair market value. Disposal for public purposes may also be at fair market value. The DOT shall submit requests for such exceptions to the FHWA in writing.
2. Use by public utilities in accordance with 23 CFR Part 645.
3. Use by Railroads in accordance with 23 CFR Part 646.
4. Use for Bikeways and pedestrian walkways in accordance with 23 CFR Part 652.
5. Use for transportation projects eligible for assistance under 23 U.S.C, provided that a concession agreement, as defined in section 710.703, shall not constitute a transportation project.

Under §710.403 (e) the Federal share of net income from the sale or lease of excess real property shall be used by the DOT for activities eligible for funding under 23 CFR. Under this provision, the project income derived from this sale does not create a federally-aided project. No FHWA approval is required for property disposal that is located outside of the limits of the ROW if federal funds were not used in the property acquisition (§710.403(f)). Highway facilities where federal funds were used for ROW purchase or construction may be relinquished to another governmental agency for continued highway use under the provisions of 23 CFR 620, subpart B (§710.403(g)).

Air Rights on the Interstate: 23 CFR Sub-chapter H – Right of Way and Environment: Part 710 Right of Way and Real Estate: Section 710.405

Section 710.405 promulgates FHWA policies regarding the management of airspace on the interstate for non-highway purposes. The section’s preamble notes that while it deals with approval for actions on the highway, DOT contemplated airspace use, *must* assure that such occupancy, use, or reservation is in the public interest and does not impair the highway or interfere with the free and safe flow of traffic as provided in 23 CFR 1.23. (710.405 (a)). This section applies to interstate facilities that received any assistance through 23 CFR.

The sub-part does not apply to non-interstate highways, railroads, and public utilities that cross or otherwise occupy federally aided ROW, relocations of railroads/utilities for which reimbursement is claimed under 23 CFR Part 140 Subparts E and H, and bikeways and pedestrian walkways under 23 CFR Part 652 (710.405 (2) (i through iv).

The DOT may grant rights for temporary or permanent occupancy or use of Interstate airspace if the DOT has acquired sufficient legal right, title, and interest in the ROW of a federally assisted highway to *permit the use of certain airspace for non-highway purposes*; and where such airspace *is not required presently or in the foreseeable future* for the safe and proper operation and maintenance of the highway. The DOT must obtain prior FHWA approval, except where paragraph (c) of the section applies (710.405 (b)).

Under Paragraph (c) the DOT may make ROW available - without charge - to a publicly owned mass transit authority for public transit purposes where it serves the public interest, and can be accommodated without impairing safety, or future highway improvements. The section allows an individual, organization, company or public agency to submit a written request to the DOT for an airspace lease. If the DOT recommends approval, it must submit an application to FHWA along with supplemental documentation describing the project and any proposed lease agreement. The submission is required to comply with provisions in FHWA’s [Airspace Guidelines](http://www.fhwa.dot.gov/realestate/index.htm.) (710.405 (d)).

Comment: This section provides an opportunity to utilize this type of exception for a public purpose type of alternative use or a value extraction project. Examples could include transit, such as High Speed Rail, and utility accommodation or production for example solar panels, wind turbines or transmission lines.

Leasing of Property: 23 CFR Sub-chapter H – Right of Way and Environment: Part 710 Right of Way and Real Estate: Section 710.407

Under 710.407 (a) the leasing of real property acquired with 23 CFR funds, shall be covered by an agreement between the DOT and lessee which must contain provisions to insure the *safety and integrity* of the federally funded facility. It shall also include provisions governing lease revocation, removal of improvements *at no cost* to the FHWA, adequate insurance to hold the State and the FHWA harmless, nondiscrimination, and access by the State Transportation Department (STD) and FHWA for inspection, maintenance, and reconstruction of the facility. Section 710.407 (b) provides that where the proposed use requires changes in the existing transportation facility, such changes shall be provided without Federal funds unless otherwise specifically agreed to by the DOT and the FHWA. Section 710.407 (c) requires that any proposed uses of the ROW shall conform to the current design standards and safety criteria of the FHWA for the functional classification of the highway facility in which the property is located.

Comment: This sub-section provides a DOT with opportunities to consider real property leases for implementation of alternative uses or value extraction applications on the ROW.

Federal Assistance: 23 CFR Sub-chapter H – Right of Way and Environment: Part 710 Right of Way and Real Estate: Section 710.603

This section covers direct federal acquisition/federal assistance where the DOT is unable to acquire the required ROW or is unable to obtain possession with sufficient promptness. The provisions, are for acquiring any land and or improvements needed in connection with any project on the interstate system, defense access roads, public lands highways, park roads, and Indian reservation roads (§710.603 (a)).

The state is required to furnish FHWA – to allow it to make the necessary finding to proceed with the acquisition – with information regarding the necessity for acquisition, a statement of the specific interests in lands to be acquired, including the proposed treatment of control of access, and the State DOTs intentions regarding the acquisition, and subordination or exclusion of outstanding interests, including utility easements in connection with the acquisition.

Comment: A strong rationale would be required for a DOT to justify requesting assistance with the acquisition of ROW for an alternative use or value extraction purposes that are not germane to highway purposes. Although the FHWA memo that was produced in 2009 regarding the location of high voltage transmission lines within ROW does note, that if the DOT has a policy of co-location, federal funds can be utilized for purchase of ROW for these types of projects.

Sale of ROW: 23 CFR Sub-chapter H – Right of Way and Environment: Part 710 Right of Way and Real Estate: Section §710.409

23 CFR §710.409 deals with the disposal of real property interest that is deemed in excess to transportation needs. Under §710.409 (a) real property can be sold or conveyed to a public entity or a private party. Sub-section (b) requires that Federal, State, and local agencies are given the opportunity to acquire the property that is going to be disposed where the interest has potential use for parks, conservation, recreational or other related purposes, and wherein state law allows such a transfer. The State DOT is required to notify the appropriate resource agencies regarding the disposal intention.

Sub-section (c) allows the DOT to retain excess property to restore, preserve, or improve the scenic beauty, and environmental quality adjacent to the transportation facility. If a property is transferred at less than fair market value for a public purpose interest that is approved by FHWA, sub-section (d) requires that the deed provides for the property to revert back to the DOT for failure to continue public ownership and use. If the property is sold at a fair market value no reversion clause is required. Under this section any disposal activity described in 23 CFR §710.403(d)(1) for less than fair market value require a public interest determination and FHWA approval consistent with that section.

Comment: Under federal statute there is latitude for the DOT to consider implementing some alternative uses or value extraction applications – permanent or temporary – and for proceeds to be used for activities that are eligible under Title 23 CFR funding provisions.

**Federal Statute: Utility Guidance**

Guidance on the accommodation of utilities in ROW can be found in both federal and state codes, and State DOT’s ROW manuals. At the federal level, 23 CFR governs utility accommodation policy in Sub-chapter G Engineering and Traffic Operations at Part 645 Utilities, and also in 23 CFR Sub-chapter H Right of Way and Environment at Part 710. The American Association of State Highway Officials (AASHTO) also played a pivotal role in the development of a national policy regarding utility accommodation and installations on freeways throughout the 1950’s, 60’s and 70’s. It is assumed for the purpose of this review that utilities could also include production from solar and wind components, as well as transmission lines needed to connect the production components with the electricity grid.

Longitudinal access for utilities on DOT ROW became a more standard practice in the latter part of the twentieth century. FHWA and DOTs have developed regulations and guidance for such accommodation. Over the past two to three years, many requests have also come into FHWA regarding the longitudinal accommodation of transmission infrastructure associated with renewable energy technologies. As a consequence FHWA issued guidance in 2009 on “Longitudinal Accommodation of Utilities from Renewable Energy Facilities” (FHWA, 2009).

Utility Accommodation: 23 CFR Part 645B

23 CFR Sub-chapter G Engineering and Traffic Operations Part 645 sets out the regulations for accommodating utility facilities and private lines in the ROW of federal aid or direct federal highway projects. Section 645.205 (a) notes that it is in the *public interest* for utility facilities to be accommodated in the ROW of federal highways as long as such use and occupancy of the ROW *does not* *adversely affect highway or traffic safety or its aesthetic quality*. Section 645.205 (b) notes that by tradition and practice highway and utility facilities have frequently coexisted within common ROW or along the same corridors and that it *is* *essential* that these public service facilities be *compatibly designed and operated*. In the design of new highway facilities consideration should be given to the utility service needs of the area traversed if the service is provided by utility facilities on or near the highway. Joint highway and utility planning is encouraged for federal highway projects.

However, the section also provides in §645.209 (3) that states are not precluded from adopting more restrictive policies for longitudinal utility installation along ROW. For provision of private lines under §645.209 (e), state DOTs are required to establish uniform policies for controlling such permitted use. *Longitudinal installations must conform with 23 CFR §1.23(c).* For scenic areas, new utility installations are not permitted in highway ROW or on other lands except in a few circumstances, which include:

* aerial installations where placement underground is not technically feasible,
* other locations are not available, or are unusually difficult or costly, or are less desirable from the standpoint of aesthetic quality, and
* the proposed installation will be made at a location, and will employ suitable designs and materials, which give the greatest weight to the aesthetic qualities of the area being traversed.[[2]](#footnote-2)

Section 645.211 lays out the accommodation policies and requires that consideration shall be given to the effect of utility installations on to *safety, aesthetic quality, and costs or difficulty of highway and utility construction and maintenance.* Section 645.211 (c) outlines standards for regulating use and occupancy of ROW. Sub-section (5) allows a DOT to deny a utility's request to occupy ROW based on state law, regulation, local ordinances or the DOT’s utility policy. However, where these provisions are cited as the basis for disapproving a utility's request to use and occupy ROW, measures *must be* *provided* *to evaluate the direct and indirect environmental and economic effects of any loss of productive agricultural land or any impairment of the productivity of any agricultural land that would result from the disapproval*. The environmental and economic effects on productive agricultural land together with the possible interference with or impairment of the use of the highway and the effect on highway safety are all elements that must be considered in the decision to disapprove any proposal by a utility to use ROW.

Section 645.211 (e) requires DOTs to include in their utility accommodation plan, the detailed procedures, criteria, and standards it will use to evaluate and approve individual applications for utilities on freeways under the provisions of §645.209(c) of this part. DOTs may develop such procedures, criteria, and standards by class of utility. In defining utility classes, consideration may be given to distinguishing utility services by type, nature or function, and their potential impact on the highway and its user. Section 645.211 (f) notes that the means and authority for enforcing the control of access restrictions applicable to utility use of controlled access highway facilities should be set out in the DOTs utility accommodation plan.

Under Section 645.215 (a) states are required to submit a statement to FHWA on (a) the authority of utilities to use and occupy ROW; (b) the department’s power to regulate this use and identification of any areas on the federal aid highways where the DOT is without legal authority to regulate use by utilities, and (c) any policies and procedures that the DOT employs to facilitate accommodation of utilities within the ROW of federal aid highways. Once FHWA determines that the DOT’s policies meet the requirements and satisfies provisions of 23 CFR §1.23 and §1.27 it can then approve their use on Federal-aid highway projects in that State.

Comment: These sections provide the DOT with opportunities to accommodate utility activities along an existing interstate. This could ensure that other pristine locations or productive agricultural lands are not traversed by utility facilities or transmission lines, which would allow this land to be preserved for agricultural or other uses for future generations. However, it also allows the DOT – if they so choose – to develop more prescriptive policy approaches for accommodation of renewable transmission opportunities.

FHWA 2009 Utility Accommodation Longitudinal Guidance

In 2009 FHWA released [guidance on longitudinal accommodation of utilities in the interstate system ROW](http://www.fhwa.dot.gov/realestate/guidutil_a.htm). This was as a consequence of the emerging interest in the production and distribution of renewable energy and proposals that were coming into the states to locate transmission lines in ROW. The guidance describes steps to determine whether the accommodation should be conducted under 23 CFR Part 645 Subpart B or 23 CFR Part 710.

The guidance encouraged states to review their accommodation policies and make updates and modifications to consider renewable energy and other items outlined in the memo. The guidance is intended to complement FHWA’s 6th Edition of the Program Guide: Utility Relocation and Accommodation on Federal-Aid Highway Projects released in January 2003 (FHWA, 2003), but notes that much of the discussion contained in the document is *considered applicable to other freeways and similar transportation facilities.* The guidance provides steps to determine whether the facility serves the public and meets the definition of utility and can thus be accommodated under 23 CFR 645 Subpart B.

The guidance in reviewing other longitudinal accommodation considerations, notes that other federal policies, laws, regulations, and standards may come into play in the decision making process. One area that is discussed is planning. Noting that U.S.C 134, 135, and 23 CFR 450 established FHWA requirements for statewide and metropolitan transportation planning, the guidance goes on to say that while utility interests are not explicitly addressed in the regulations, it is nevertheless *appropriate to include a utility element in the undertaking of a multimodal, systems-level corridor or subarea planning study or in the development of the long-range statewide and or/metropolitan transportation plan*. Discussions in these documents, the memo notes would supplement, rather than supplant, the information contained in utility accommodation policies. FHWA encourages coordination with utility interests in a strategic planning process that identifies roles and responsibilities of the DOT in the accommodation of longitudinal utility facilities within the ROW of the interstate system. Specific proposals for longitudinal installation along the interstate system could then be evaluated for compatibility with applicable metropolitan or statewide long-range transportation plans.

FHWA *encourages* DOT’s in this memo to include in their policy discussion of how utility accommodation can be *better integrated into their transportation planning process at the state, regional, and corridor levels*. This focus would place states in a better position to handle accommodation questions systematically rather than on a case-by-case basis. The memo also encourages FHWA Division staff to:

* work with DOTs to integrate consideration of utility facilities in statewide strategic plans, highway system metropolitan transportation plans and corridor transportation plans.
* work with their DOTs to conduct a review and assessment of the DOT’s utility accommodation plan to ensure it adequately meets current needs.

Comment: Given the policy focus of this guidance, there is latitude for the states to program for the installation and accommodation of utilities, which could include generation assets such as turbines or solar panels (especially to achieve RPS goals) within their transportation planning activities.

**Federal Highway Beautification Controls**

Another area that must be taken into consideration when reviewing value extraction applications in the ROW is federal and state law regarding highway beautification, which restricts outdoor advertising and *displays and devices* adjacent to the highway system. This issue could come into play where the DOT may partner with an entity who may want to place a sign to advertise the partnership or a specific value extraction application that is being developed. Such a sign will have to fall within the series of classes (1 to 4) permitted by FHWA. The DOT would also need to be cognizant that the actual application itself does not fall foul of the provisions within the Highway Beautification Act. For example, ensuring that no stray light or light movement are visible from the ROW, or that the application does not have any moving parts which could impact safety.

In 1959, the US Congress passed the Federal-Aid Highway Act of 1958 (Pub. L. 85–381, 72 Stat. 95) where Congress declared that:

1. *To promote the safety, convenience, and enjoyment of public travel and the free flow of Interstate commerce and to protect the public investment in the National System of Interstate and Defense Highways, hereinafter called the Interstate System, it is in the public interest to encourage and assist the States to control the use of and to improve areas adjacent to such system by controlling the erection and maintenance of outdoor advertising signs, displays, and devices adjacent to that system.*
2. *It is a national policy that the erection and maintenance of outdoor advertising signs, displays, or devices within 660 feet of the edge of the ROW and visible from the main-traveled way of all portions of the Interstate System constructed upon any part of ROW, the entire width of which is acquired subsequent to July 1, 1956, should be regulated, consistent with national standards to be prepared and promulgated by the Secretary of Transportation.*

23CFR Part 750—Highway Beautification

23 CFR Sub-chapter H Right of Way and Environment Part 750 Highway Beautification, Section 750.102 sets out the terms to be used in the standards of this part and the definitions that underlie the act including what *acquired ROW* means, and how to measure the centerline of the highway. Protected areas are *all areas inside the boundaries of a state, which are adjacent to and within 660 feet of the edge of the ROW of all controlled portions of the Interstate System within that State*. Where a controlled portion of the Interstate System terminates at a State boundary, which is not perpendicular or normal to the centerline of the highway, protected areas also means all areas inside the boundary of such State, which are within 660 feet of the edge of the ROW of the Interstate Highway in the adjoining State (§750.102 (k)).

For the purposes of this sub-section Section 750.102 (k) (1)) *Scenic area* means any public park or area of particular scenic beauty or historical significance designated by or pursuant to State law as a scenic area. Under Section 750.102 (m) *Sign* means any outdoor sign, display, device, figure, painting, drawing, message, placard, poster or billboard, which is designed, intended, or used to advertise or inform, as well as any part of the advertising or informative contents that is visible from any place on the main-traveled way of a controlled portion of the Interstate System. The precise measurement of the distance guidance can be found in Section 750.103. Distance is measured horizontally along a line that is normal or perpendicular to the centerline of the highway.

Permitting and Erecting of Signs in Protected Areas: 23 CFR Sub-chapter H – Right of Way and Environment: Part 710 Right of Way and Real Estate Section 750.104

Section 750.104 restricts the permitting or erection of signs in certain protected areas. These include signs that are illegal under state or federal laws that are in effect at the location of such signs or activities, obsolete signs, signs that are not clean and in good repair, not securely affixed to a substantial structure, and not consistent with standards laid out in this part of the regulations. Section 750.105 prescribes signs that are permitted in protected areas. Table 1 provides the definitions of these various classes of signs.

**Table 1: Classes of Signs**

|  |  |
| --- | --- |
| Class 1: Official Signs | Class 3: Signs within 12 miles of advertised activities |
| Directional or other official signs or notices erected and maintained by public officers or agencies pursuant to and in accordance with direction or authorization contained in State or Federal law, for the purpose of carrying out an official duty or responsibility. | Signs not prohibited by State law, which are consistent with the applicable provisions of this section and §§750.106, 750.107, and 750.108 and which advertise activities being conducted within 12 air miles of such signs. |
| Class 2: On-Premise signs | **Class 4: Signs in Specific interest of travelling public** |
| Signs not prohibited by State law, which are consistent with the applicable provisions of this section and §750.108 and which advertise the sale or lease of, or activities being conducted upon, the real property where the signs are located. Not more than one such sign advertising the sale or lease of the same property may be permitted under this class in such manner as to be visible to traffic proceeding in any one direction on any one Interstate Highway. Not more than one such sign, visible to traffic proceeding in any one direction on any one Interstate Highway and advertising activities being conducted upon the real property where the sign is located, may be permitted under this class more than 50 feet from the advertised activity. | Signs authorized to be erected or maintained by State law, which are consistent with the applicable provisions of this section and §§750.106, 750.107, and 750.108 and which are designed to give information in the specific interest of the traveling public. |
| (b) A Class 2 or 3 sign, except a Class 2 sign not more than 50 feet from the advertised activity, that displays any trade name, which refers to or identifies any service rendered or product sold, used, or otherwise handled more than 12 air miles from such sign may not be permitted unless the name of the advertised activity, which is within 12 air miles of such sign is displayed as conspicuously as such trade name.  (c) Only information about public places operated by Federal, State, or local governments, natural phenomena, historic sites, areas of natural scenic beauty or naturally suited for outdoor recreation and places for camping, lodging, eating, and vehicle service and repair is deemed to be in the specific interest of the traveling public. For the purposes of the standards in this part, a trade name is deemed to be information in the specific interest of the traveling public only if it identifies or characterizes such a place or identifies vehicle service, equipment, parts, accessories, fuels, oils, or lubricants being offered for sale at such a place. Signs displaying any other trade name may not be permitted under Class 4.  (d) Notwithstanding the provisions of paragraph (b) of this section, Class 2 or Class 3 signs which also qualify as Class 4 signs may display trade names in accordance with the provisions of paragraph (c) of this section. | |

Section 750.106 provides standards for Class 3 and 4 signs that are within informational sites. Under this section informational sites for the erection and maintenance of these classes of advertising signs, can be established in accordance with §1.35 of 23 CFR. The location and frequency of these sites are determined by agreement between the DOTs and the Secretary consistent with the following provisions (750.106 (a)):

1. No sign may be permitted which is not placed upon a panel.
2. No panel may be permitted to exceed 13 feet in height or 25 feet in length, including border and trim, but excluding supports.
3. No sign may be permitted to exceed 12 square feet in area, and nothing on such sign may be permitted to be legible from any place on the main-traveled way or a turning roadway.
4. Not more than one sign concerning a single activity or place may be permitted within any one informational site.
5. Signs concerning a single activity/place are permitted within more than one informational site, but no Class 3 sign, which does not also qualify as a Class 4 sign, may be permitted within any informational site more than 12 air miles from advertised activity.
6. No sign may be permitted, which moves or has any animated or moving parts.
7. Illumination of panels by other than white lights may not be permitted, and no sign placed on any panel may be permitted to contain, include, or be illuminated by any other lights, or any flashing, intermittent, or moving lights.
8. No lighting may be permitted to be used in any way in connection with any panel unless it is so effectively shielded as to prevent beams or rays of light from being directed at any portion of the main-traveled way of the Interstate System, or is of such low intensity or brilliance as not to cause glare or to impair the vision of the driver of any motor vehicle, or to otherwise interfere with any driver's operation of a motor vehicle.

Section 750.107 provides standards for Class 3 and 4 signs that are outside informational sites but within protected areas. No Class 3 or 4 signs other than those permitted by this section may be erected or maintained within protected areas outside informational sites. The standards that must be adhered to under paragraph (a) require:

1. Class 3 signs, which are visible only to Interstate highway traffic not served by an informational site within 12 air miles of the advertised activity;
2. Class 4 signs, which are more than 12 miles from the nearest panel within an informational site serving Interstate highway traffic to which such signs are visible; and
3. Signs that qualify both as Class 3 and 4 signs may be permitted in accordance with either paragraph (a)(1) or (2) of this section.

The erection or maintenance of signs permitted under paragraph (a) of this section may not be permitted in any manner inconsistent with the following provisions:

1. In protected areas in advance of an intersection of the main-traveled way of an Interstate highway and an exit roadway, such signs visible to Interstate highway traffic approaching such intersection may not be permitted to exceed the following number:

|  |  |
| --- | --- |
| Distance from Intersection | Number of Signs |
| 0-2 miles | 0 |
| 2-5 miles | 6 |
| More than 4 miles | Average of 1 sign per mile |
| *The specified distances shall be measured to the nearest point of the intersection of the traveled way of the exit roadway and the main-traveled way of the Interstate highway.* | |

1. Subject to the other provisions of this paragraph, not more than two such signs may be permitted within any mile distance measured from any point, and no such signs may be permitted to be less than 1,000 feet apart.
2. Such signs may not be permitted in protected areas adjacent to Interstate ROW upon any part on the width of which is constructed an entrance or exit roadway is constructed.
3. Such signs visible to Interstate highway traffic, which is approaching or has passed an entrance roadway, may not be permitted in protected areas for 1,000 feet beyond the furthest point of the intersection between the traveled way of such entrance roadway and the main-traveled way of the Interstate highway.
4. No such signs may be permitted in scenic areas.
5. Not more than one such sign advertising activities being conducted as a single enterprise or giving information about a single place may be erected or maintained in such manner as to be visible to traffic moving in any one direction on any one Interstate highway.

In Section 750.108 general provisions are laid out for this sub-section for Class 3, 4 and for Class 2 signs. Here no Class 3 or 4 signs may be permitted to be erected or maintained pursuant to §750.107, and no Class 2 sign may be permitted to be erected or maintained, in any manner inconsistent with the following:

1. No sign is permitted which attempts or appears to attempt to direct movement of traffic or which interferes with, imitates or resembles any official traffic sign(al) or device.
2. No sign may be permitted which prevents the driver of a vehicle from having a clear and unobstructed view of official signs and approaching or merging traffic.
3. No sign may be permitted which contains, includes, or is illuminated by any flashing, intermittent or moving light or lights.
4. No lighting may be permitted to be used in any way in connection with any sign unless it is so effectively shielded as to prevent beams or rays of light from being directed at any portion of the main-traveled way of the Interstate System, or is of such low intensity or brilliance as not to cause glare or to impair the vision of the driver of any motor vehicle, or to otherwise interfere with any driver's operation of a motor vehicle.
5. No sign may be permitted which moves or has any animated or moving parts.
6. No sign may be permitted to be erected or maintained upon trees or painted or drawn upon rocks or other natural features.
7. No sign may be permitted to exceed 20 feet in length, width or height, or 150 square feet in area, including border and trim but excluding supports, except Class 2 signs not more than 50 feet from, and advertising activities being conducted upon, the real property where the sign is located.

The one exclusion for this part is that it does not apply to markers, signs, and plaques in appreciation of sites of historical significance where an agreement has been made between the State and the Secretary, unless the agreement expressly makes all or any part of the standards applicable (750.109). Section 750.110 allows the states to elect to prohibit signs permissible under the standards in this part without forfeiting its rights to any benefits provided for in the act.

Directional and Official Signs: 23 CFR Sub-chapter H – Right of Way and Environment: Part 710 Right of Way and Real Estate Section 750.153

Sub-part B Sections 750.153 and 750.154 outline national standards for directional and official signs. These were developed to protect the public investment in highways, promote safety and recreational value of public travel, and preserve *natural beauty* (Section 750.151 (a) (1)). Sub-section 2 provides that directional and official signs and notices, shall include, but not be limited to, signs and notices pertaining to natural wonders, and scenic and historical attractions, and as required or authorized by law. These signs must conform to national standards regarding lighting, size, number, and spacing. Section 750.152 delineates the national standards that apply to directional and official signs located within 660 feet of the ROW of the interstate and federal-aid primary systems, and to signs located beyond 660 feet outside of urban areas, visible from the main travel way, developed to be read from the main travelled way. These standards do not apply to directional and official signs erected on the highway ROW. Section 750.153 sets out definitions for signs under this sub-section.

Standards for Directional Signs 23 CFR Sub-chapter H – Right of Way and Environment: Part 710 Right of Way and Real Estate Section 750.154

Section 750.154 sets out the standards for directional signs. Prohibited signs include:

* Signs advertising illegal activities or regulations in effect at the location of those signs or at the location of those activities.
* Signs located in such a manner as to obscure or otherwise interfere with the effectiveness of an official traffic sign, signal, or device, or obstruct or interfere with the driver's view of approaching, merging, or intersecting traffic.
* Signs erected or maintained upon trees or painted/drawn upon rocks/natural features.
* Obsolete signs.
* Signs which are structurally unsafe or in disrepair.
* Signs which move or have any animated or moving parts.
* Signs located in rest areas, parklands, or scenic areas.

Signs cannot exceed the following size, including border and trim, but excluding supports.

🡼 Maximum area 🡽

🡿 150 square feet 🡾

🡸 Maximum length 20 feet 🡺

🡸 Maximum height 20 feet 🡺

Signs may be illuminated, subject to the following:

1. Signs that contain, include, or are illuminated by any flashing, intermittent, or moving light or lights are prohibited.
2. Signs that are not effectively shielded so as to prevent beams or rays of light from being directed at any portion of the traveled way of an Interstate or primary highway that are of such intensity/brilliance to cause glare or to impair the vision of the driver of any vehicle, or otherwise interfere with the driver's operation of a vehicle are prohibited.
3. No sign may be illuminated as to interfere with the effectiveness of or obscure an official traffic sign, device, or signal.

Location of a directional sign must be approved by the DOT. No directional sign may be located within 2,000 feet of an interchange, or intersection at grade along the Interstate System or other freeways. The distance is measured along the Interstate or freeway from the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main traveled way. Nor can a directional sign be located within 2,000 feet of a rest area, parkland, or scenic area. No two directional signs facing the same direction of travel shall be spaced less than 1 mile apart and not more than three directional signs pertaining to the same activity and facing the same direction of travel may be erected along a single route approaching the activity. Signs located adjacent to the Interstate System shall be within 75 air miles of the activity; and signs located adjacent to the primary system shall be within 50 air miles of the activity.

The content of the message on directional signs is restricted to the identification of the attraction or activity and any directional information that will be useful for the traveller to locate this activity. This can include, for example, mileage, route, or exit numbers. Descriptive words/phrases, and any pictorial or graphical type representation is prohibited. For privately owned attractions or activities, the directional signing is limited to natural phenomena; scenic attractions; historic, educational, cultural, scientific, and religious sites; and outdoor recreational areas. These attractions must also be regionally or nationally known, and of outstanding public interest for them to be eligible.

States were required to develop specific selection methods and criteria to be used in determining whether or not an activity qualifies for this type of signing. Under Section 750.155 these can be more restrictive with respect to directional and official signs and notices along the Federal-aid highway systems than the national standards.

Sub-part(s) D and E Sections 750.301 through 750.308 and 750-501 through 750.503 sets out provisions for federal participation in the cost of acquiring property interests necessary for removal of nonconforming advertising signs, displays/devices on Federal-aid Primary and Interstate Systems, regardless of whether Federal funds participated in their construction; as well as procedures for states to seek exemptions for directional or information signs.

Outdoor Advertising Control: 23 CFR Sub-chapter H – Right of Way and Environment: Part 750 Outdoor Advertising Control Sub-chapter G –Part 750.701

Section 750.701 sets out the regulations relating to the control of outdoor advertising. The purpose of these requirements is to assure effective State control of outdoor advertising in areas adjacent to Interstate and Federal-aid primary highways. States are allowed under this subpart to establish more stringent outdoor advertising control requirements along Interstate and Primary Systems than provided herein. These provisions are applicable to all areas adjacent to the interstate and primary systems except that within urban areas, these provisions apply only within 660 feet of the nearest edge of the ROW. The provisions do not apply to the Federal-aid Secondary or Urban Highway Systems.

Section 750.704 stipulates that signs that are adjacent to the interstate and Federal-aid Primary Systems which are visible from the main-traveled way and within 660 feet of the nearest edge of the ROW, and those additional signs beyond 660 feet outside of urban areas, which are visible from the main-traveled way and erected with the purpose of their message being read from such main traveled way, shall be limited to the following:

1. Directional and official signs and notices shall conform to national standards promulgated by the Secretary in subpart B, part 750, chapter I, 23 CFR, National Standards for Directional and Official Signs;
2. Signs advertising the sale or lease of property upon which they are located;
3. Signs advertising activities conducted on the property on which they are located;
4. Signs within 660 feet of the nearest edge of the ROW within areas adjacent to the Interstate and Federal-aid Primary Systems, which are zoned industrial or commercial under the authority of State law;
5. Signs within 660 feet of the nearest edge of the ROW within areas adjacent to the Interstate and Federal-aid Primary Systems that are unzoned commercial or industrial areas, as determined by agreement between the State and the Secretary; and
6. Signs lawfully in existence on October 22, 1965, which are determined to be landmark signs.

Outdoor advertising signs are required to comply with the size, lighting, and spacing requirements that are determined by the State and the Secretary. 23 U.S.C. 131 does not permit signs to be located within zoned or unzoned commercial or industrial areas beyond 660 feet of the ROW adjacent to the Interstate or Federal-aid Primary System, outside of urban areas. 23 U.S.C. 131 requires signs not permitted under §750.704 of this regulation be removed by the State.

States are required under Section 750.705 to prohibit the creation of new signs (other than those that fall within Section 750.404 (a) (1) through (6) discussed above). States are also required to assure that signs erected under 750.704 (a)(4 and 5) comply with size, lighting, and spacing criteria, and that signs erected under 750.704 (a) (1) comply with the national standards contained in subpart B, part 750, chapter I, 23 CFR. Illegal signs must be removed expeditiously and nonconforming signs must be removed with just compensation provided within the time period set by 23 U.S.C. 131 subpart D, part 750, chapter I, 23 CFR which sets policies for the acquisition and compensation for such signs. States are also required to establish criteria for determining which signs have been erected with the purpose of their message being read from the main-traveled way of an Interstate or primary highway, except where State law makes such criteria unnecessary. Where a sign is erected with the purpose of its message being read from two or more highways – one or more of which is a controlled highway – the more stringent of applicable control requirements apply.

Sub-section 750.706 sets the requirements for signs located in zoned and unzoned commercial and industrial areas within 660 feet of the nearest edge of the ROW adjacent to the Interstate and Federal-aid primary highways. States are required to set by law or regulation that was in conformity with the Secretary criteria for size, lighting, and spacing of outdoor advertising signs located in these zones. The sub-section allows States to adopt more restrictive criteria. Under this agreement, criteria that permit multiple sign structures to be considered as one sign for spacing purposes must limit multiple sign structures to signs that are physically contiguous, or connected by the same structure or cross-bracing, or located not more than 15 feet apart at their nearest point in the case of back-to-back or “V” type signs.

Sub-section750.706 (c) notes that where the agreement and State law permits control by local zoning authorities, these controls may govern in lieu of the size, lighting, and spacing controls set forth in the agreement, subject to the following:

* The local zoning authority's controls must include regulation of the size, lighting, and spacing of outdoor advertising signs, in all commercial and industrial zones.
* The regulations established by the local zoning authority may be either more or less restrictive than the criteria contained in the agreement, unless State law or regulations require equivalent or more restrictive local controls.
* If the zoning authority has been delegated, extraterritorial jurisdiction under State law comes into play. If the local zoning authority exercises control of outdoor advertising in commercial and industrial zones within this extraterritorial jurisdiction, control by the zoning authority may be accepted in lieu of agreement controls in such areas.
* The State shall notify the FHWA where local control applies and is required to periodically assure itself that the size, lighting, and spacing control provisions of zoning ordinances accepted under this section are actually being enforced.
* However, even if the local jurisdiction exercises these local zoning controls, the State is not relieved of the responsibility of limiting signs within controlled areas to commercial and industrial zones.

Section 750.707 applies to nonconforming signs that must be removed under State laws and regulations. These provisions also apply to nonconforming signs located in commercial and industrial areas within 660 feet of the nearest edge of the ROW, which come under the so-called grandfather clause contained in State-Federal agreements.

Section 750.708 sets out the parameters for acceptance of state/local zoning laws. 23 U.S. C 131 (d) provides that signs “may be erected and maintained within 660 feet of the nearest edge of the ROW within areas . . . which are *zoned industrial or commercial* under authority of State law.” As States have full authority under their zoning laws to zone areas for commercial or industrial purposes, actions by States in this regard will be accepted for the purposes of this Act. State and local zoning actions will be taken pursuant to the enabling statute or any constitutional authority. Actions that are not part of comprehensive zoning, or are created specifically to permit outdoor advertising structures are not recognized as zoning for outdoor advertising control purposes. If a local government has not zoned in accordance with the state statutory authority, it is not authorized to zone and the definition of an unzoned commercial or industrial area under the stipulations of the State-Federal Agreement then applies to this political subdivision or area. Even if commercial or industrial activities are permitted as an *incident* to the other primary land uses in this area, it is not considered to be a commercial/industrial zone for advertising control purposes.

Section 750.709 governs on-property or on-premise advertising. Signs that solely consist of the name of the establishment or establish its principal or accessory products/services is an on-property sign (§750.709 (a)). If a sign principally consists of brand or trade name advertising and this advertised product or service *is only incidental* to the principal activity, or if it brings rental income to the property owner, it is considered the business of outdoor advertising and not an on-property sign. Section 750.709 (c) finds that a sale or lease sign, which also advertises a product or service not conducted upon and unrelated to the business or selling or leasing of the land on which the sign is located, is not an on-property sign.

Signs that are exempt from control of 23 U.S.C. 131 include those that solely advertise the sale or lease of property on which they are located or advertise activities conducted on the property on which they are located. These signs are subject to regulation (subpart A, part 750, chapter I, 23 CFR) in those States that have executed a bonus agreement, 23 U.S.C. 131(j). State laws or regulations shall contain criteria for determining exemptions. These may include:

* A property test for determining whether a sign is located on the same property as the activity or property advertised.
* A purpose test for determining whether a sign has as its sole purpose the identification of the activity located on the property or its products or services, or the sale or lease of the property on which the sign is located.

The criteria must be sufficiently specific to curb attempts to improperly qualify outdoor advertising as “on-property” signs. For example, prohibit signs on narrow strips of land contiguous to the advertised activity when the purpose is clearly to circumvent 23 U.S.C. 131.

Under Section 750.710 landmark signs are permitted that were in existence before October 22, 1965 and where the State, with Secretary approval, determines they are landmark signs including, signs that are on natural surfaces or farm structures, or are of artistic or historical significance and where preservation is consistent with 23 U.S. 131. Within this section reasonable maintenance, repair, and restoration is permitted. However, substantial changes in lighting, size, or message content will terminate this status (750.710 (c)).

Section 750.711 governs structures that have never displayed advertising material. This includes poles, which have never displayed advertising or informative content. These are subject to control and/or removal when advertising content is affixed and it becomes visible from the main-traveled way. On this occurrence an outdoor advertising sign will be considered to have been erected, that must comply with the state law in effect. Signs may be reclassified under 750.712 from legal-conforming to nonconforming (and be subject to removal). If this occurs, they will be eligible for just compensation payment when removed.

Comment: The federal and state programs for highway beautification provide models for how the DOT may want to implement certain alternative use or value extraction applications. This could be viewed in terms of how to administer the application, the type of fees that could be set, other administrative provisions, and penalties for violation. The program also provides an elementary model for how a DOT could consider implementing some of the types of alternative uses or value extraction applications in partnership with the private sector, or agencies and other local jurisdictions.

1. Code of Federal Regulations can be accessed at: <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=69038596f74496b2a96cbd4617454188&rgn=div5&view=text&node=23:1.0.1.8.39&idno=23#23:1.0.1.8.39.2.1.2> [↑](#footnote-ref-1)
2. Suitable designs include, but are not limited to, self-supporting armless, single-pole construction with vertical configuration of conductors and cable (§645.209 (h) (1 - through iii). [↑](#footnote-ref-2)