E060417

CALIFORNIA COURT OF APPEAL
FOURTH DISTRICT, DIVISION TWO

FREDERIC ELTON STEARN ,
HAROLD AND RUTH KROTZER,
AND THE COALITION TO BAN BILLBOARD BLIGHT
Plaintiffs–Petitioners–Appellants
vs.
COUNTY OF SAN BERNARDINO,
Defendant–Respondent–Appellee

GENERAL OUTDOOR ADVERTISING
(a/k/a San Diego Outdoor Advertising, Inc.)
Real Party in Interest

Appeal from a Judgment of the San Bernardino Superior Court
signed by Hon. Brian McCarville
Earlier judges: John P. Wade, Frank Gafkowski,
John Vander Feer, John M. Pacheco
Superior Court case number: SCVSS 142797
Prior Appeal: E043334 (Jan 5, 2009), review denied

APPELLANTS' OPENING BRIEF

Randal R. Morrison, SBN 126200
Sabine & Morrison
PO Box 531518
San Diego CA 92153-1518
Tel.: 619.234.2864
Email: rrmsignlaw@gmail.com
Attorney for all Appellants

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
CRC Rule 8.208

(*Check one*) X INITIAL CERTIFICATE: __ SUPPLEMENTAL CERTIFICATE
This Certificate repeats information from the
Certificate that Appellants filed on 7/15/2014.

Full Name of Interested Person/ Entity	Party	Non-Party	Nature of Interest
Frederic Elton Stearn a/k/a Fred Stearn	X		owner of affected property
Harold and Ruth Krotzer	X		owners of affected property
Coalition to Ban Billboard Blight (Board members: Dennis Hathaway, Lisa Sedano, Barbara Broide, Wendy Rosen, Ted Wu)	X		public interest advocacy group
General Outdoor Advertising website: http://generaloutdoor.com lists "other entities" as follows: San Diego Outdoor Advertising, Inc. Barstow Partners; Rialto Gateway Display, LLC; Long Beach Commerce JV; Wynn/Lynch, Inc.; Image Outdoor Media, Inc.	X		Outdoor advertising (billboard) company

The undersigned certifies that the above listed persons or entities (corporations, partnerships, firms or any other association, but not including government entities or their agencies) have either (i) an ownership interest of 10 percent or more in the party, if an entity; or (ii) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in Rule 14.5. As to General Outdoor and its affiliates, this statement is made on information and belief, based on their website.

Attorney Submitting Form:	Parties Represented
Randal R Morrison PO Box 531518 San Diego CA 92153-1518	Frederic Elton Stearn Harold and Ruth Krotzer Coalition to Ban Billboard Blight

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TABLE OF AUTHORITIES

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TABLE OF ABBREVIATIONS AND SHORT FORMS

APN	Assessor's Parcel Number
AR	Administrative Record
B&P	Business and Professions Code
BOARD	San Bernardino County Board of Supervisors
CCR	California Code of Regulations
CFR	Code of Federal Regulations
CH	Highway commercial (zoning designation)
CRC	California Rules of Court
CT	Clerk's Transcript
CUP	Conditional Use Permit
GENERAL	General Outdoor Advertising (a/k/a San Diego Outdoor Advertising)
GPA	General Plan Amendment
HBA	Highway Beautification Act (23 U.S.C. 131)
Holmstrom	Declaration of Gerda Holmstrom (CT 3:693 *et seq*.)
OAA	Outdoor Advertising Act (B&P 5200 *et seq.*)
PC Staff Rpt	Exhibits to the San Bernardino County Planning Commission Staff Report, filed July 11, 2014, specially numbered (bottom center) starting with 50
RPI	Real Party in Interest
RT	Reporter's Transcript
TPM	Tentative Parcel Map
United Outdoor	*United Outdoor v. Business, Transportation and Housing Agency* (1988) 44 Cal.3d 242
VC	Vehicle Code

I. INTRODUCTION: NATURE OF THE ACTION

This is a billboard case in two phases: A) "phony zoning" to allow new billboards in violation of the federal Highway Beautification Act (administrative mandamus); and B) "illegal installations" of new billboards in violation of state laws regarding locations for billboards (declaratory and injunctive relief). CT 1:167 *et seq.*

A. "PHONY ZONING" TO ALLOW BILLBOARDS

As specifically authorized in the prior appeal, 170 Cal.App.4th at 445, the writ petition challenges the September 12, 2006 action of the San Bernardino County Board of Supervisors ("Supervisors" or "Board") in rezoning fourteen parcels of land alongside interstate highways I-40 and I-15 from Rural Living or Resource Conservation to "CH" (highway commercial), and related conditional use permits (CUPs). All of the zoning actions were requested by RPI General Outdoor ("General") for the ***express purpose*** of allowing new billboards. See: *Stearn v. County of San Bernardino (General Outdoor)* (2009) 170 Cal.App.4th 434, 438 "Statement of Facts" and 445 fn8.

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Under the Highway Beautification Act, 23 U.S.C. 131 ("HBA") and *United Outdoor v. Business, Transportation and Housing Agency* (1988) 44 Cal.3d 242 ("*United Outdoor*"), zoning adopted "primarily to permit outdoor advertising structures is not recognized for outdoor advertising control purposes." *Id.* at pp. 248, 251, interpreting 23 C.F.R. § 750.708(b) ("Acceptance of State Zoning").

B. ILLEGAL INSTALLATION OF BILLBOARDS

The declaratory and injunctive relief claim challenges General Outdoor's installations, three years after the Board's zoning actions, of new double-sided billboards in locations that violate the "business district rule," *i.e.,* the combination of B&P 5404[1] and Vehicle Code 235.[2] The "business district rule" limits billboards to areas where commercial and industrial uses are concentrated.

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[1] B&P § 5404: "No advertising display shall be placed outside of any business district as defined in the Vehicle Code or outside of any unincorporated city, town or village, . . .

[2] Vehicle Code 235: A "business district" is that portion of a highway and the property contiguous thereto (a) upon one side of which highway, for a distance of 600 feet, 50 percent or more of the contiguous property fronting thereon is occupied by buildings in use for business, or (b) upon both sides of which highway, collectively, for a distance of 300 feet, 50 percent or more of the contiguous property fronting thereon is so occupied. . . .

II. RELIEF SOUGHT IN THE TRIAL COURT

The Second Amended Complaint and Petition (April 21, 2011 Version), CT 1:167 *et seq.*, named additional Plaintiffs/ Petitioners Mr. and Mrs. Krotzer, who own land near one of the proposed billboard sites, and The Coalition to Ban Billboard Blight, a public interest advocacy group. Said Complaint and Petition was deemed filed as of June 6, 2011, by order of Judge Van Der Feer, CT 1:164-3, 164-4. It prays:

> A. Separately as to each proposed billboard location, for a writ of (administrative) mandamus invalidating the billboard approvals and the rezonings which purported to provide a legal predicate for the CUPs;
>
> B. As to any and all billboards installed by General in locations for which this case challenges the legality of the County's CUPs, injunctions of this Court ordering General to remove such billboards at their own expense and ordering disgorgement of all revenues, or in the alternative for disgorgement of all profits derived from operation of such illegal structures. [CT 1:181]

Appellants submitted a clarifying amendment, CT 3:687, stating:

> The CUPs and the billboards constructed in reliance upon them violate the location rules for new billboards under the California Outdoor Advertising Act and the regulations adopted pursuant thereto.

Plaintiffs/ Petitioners have never sought money damages. CT 1:181-182. They have brought this action to protect their properties, and in the public interest to protect the public viewscape from the glaring intrusions of billboards which, "by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm,'" *Metromedia v. San Diego*, 453 U.S. 490, 510 (1981), and to preserve California's full federal highway funding. 23 U.S.C. 23(b).

Based upon the declaratory and relief claim, as well as the "agency misconduct" principle that allows extra-record evidence in administrative mandate cases, see *Saraswati v. County of San Diego* (2011), 202 Cal.App.4th 917, 930, Appellants sought an Order allowing depositions aimed primarily at tracking the relationship between campaign contributions made by General and its owners to Bill Postmus and his political associates, CT 1:76, 1:203 *et seq.*, and the Board's eventual approval of the zoning actions. CT 1:68-70.[3]

[3] See CT 1:76 (Judge Gafkowski's ruling of March 24, 2011), for a list of "documents that show numerous charges of political corruption against Postmus from various sources. These documents provide sufficient basis to show Stearn's allegations of 'agency misconduct' is not based purely on Stearn's wild speculation and conjecture, but rather follows other similar corruption charges against Postmus." The document list: CT 1:76.

III. JUDGMENT APPEALED FROM AND APPEALABILITY

The Judgment is at CT 3:765-767. As to the zoning issues, the Judgment denies the petition for a writ of administrative mandamus; as to the billboard installations (declaratory and injunctive relief), it states that "the ruling on the writ petition decided the entire case."

A judgment of the Superior Court is appealable, CCP § 904.1.

On October 21, 2013, Judge McCarville instructed counsel for the billboard company, Mr. Mobley, to prepare an Order or Judgment. CT 3:763, bottom of page. The time to fulfil that duty is 30 days, CRC 3.1590(f), second sentence. When Mr. Mobley failed timely to submit a proposed order or judgment, counsel for Appellants did so, per CRC 3.1590(f) third sentence, on November 26, 2013. The Judgment, signed by Judge McCarville on December 2, 2013, and entered by the clerk the same day, CT 3:765-767, disposes of all issues in the case and satisfies the "one final judgment" rule. The Notice of Entry of Judgment and the Notice of Appeal were both filed on January 7, 2014, CT 3:769-772, per CRC 2(a)(2).

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IV. LAW OF THE CASE

The prior appeal in this case, E043334 (Jan 5, 2009), *Stearn v. County of San Bernardino (RPI General Outdoor)* (2009) 170 Cal.App.4th 434, established two points as law of the case: 1) the action was not subject to the 21 day statute of limitation of CCP 1094.8, *Id.* at 440, and thus was timely filed, and 2) "administrative mandate is the proper vehicle for challenging the County's zoning and CUP decisions." *Id.* at 445.

V. FACTUAL AND PROCEDURAL BACKGROUND

A. THE COUNTY'S OWN PLANNING STAFF GAVE EARLY WARNING OF ILLEGALITY

The County planner who conducted the first internal review of General's proposals, Charles Fahie, pointed out that

> General Plan Goal D-47 states, "Provide a compatible and harmonious arrangement of land uses in the rural areas . . . This proposal to create Highway Commercial land use district to support the construction of the primary signs conflicts with [General Plan]. . . .
> * * *
> There are approximately 300 acres of land that are currently designated Highway Commercial or Rural Commercial in the Yermo area. The existing commercial acreage is anticipated to meet the commercial property needs of the area for years to come. [AR 2:578]

Put bluntly, other than the accommodation of billboards, there was no reason to make a zoning change, and doing so would conflict with the General Plan. He also warned that the proposal conflicted with the Development Code "which prohibits the construction of freeway oriented primary signs outside of a 1,000 foot radius of an established commercial or industrial use within an established commercial or industrial land use district." AR 2:579[4]

Even more importantly, Fahie pointed out that General's proposal conflicted with Business and Professions Code section 5230 (no city or county may allow an advertising display to be placed or maintained in violation of the Outdoor Advertising Act), 5404 (no advertising display shall be placed outside of any business district as defined in the Vehicle Code), 5408 (qualifications for new billboards in business areas), and the HBA. AR 2:579, top of page.

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[4] This is consistent with 4 CCR 2401.

B. AUGUST 2003: STEARN WARNED THE PLANNING DEPARTMENT

In August 2003 Appellant Stearn wrote a letter to Heidi Duron of the County's Land Use Services Department, AR 1:284 *et seq.,* and pointed out that General's proposal for a new billboard in Newberry Springs would violate the Outdoor Advertising Act, B&P 5405 and 5408.1. AR 1:284, numbered paragraph 1. He also warned that one proposed site (Whiting) had only one residence and no business. "Whiting" was in fact a long-abandoned gas station. See AR 3:901-905 (color pictures), 908-909 (statement by property owner that gas station closed down in 1968 and is only occasionally used for film and commercial production), 917 (tire business is not in operation; currently a residence).[5] Like Mr. Fahie, Stearn warned that General's proposal was contrary to the County's General Plan, AR 1:284 ¶3, and County Development Code, AR 1:285 ¶4. He noted what is now a crucial factor in this case, namely that new billboards would violate the holding of *United Outdoor* because federal regulations do not

[5] See 4 CCR 2401, Measurement of Distances from Commercial or Industrial Activity, subparagraph (d)–Examples of activities not considered commercial or industrial include. . . (5) An activity conducted in a building principally used as a residence.

recognize "zone changes especially enacted to permit outdoor advertising." AR 1:285 ¶6.

C. APRIL 2006: STEARN WARNED THE PLANNING COMMISSION

Two and a half years later, when General's billboard rezoning proposals were set to go to the Planning Commission, Mr. Stearn sent similar warnings to the planning staff, the district attorney, and county counsel, by letter dated April 8, 2006. AR 1:292-293. He noted that past County officials had been indicted for "billboard related corruption."[6] *Id.,* p. 293, first paragraph.

The Planning Commission considered General's proposals on June 22, 2006. The Staff Report pervasively shows that there was only one reason for the entire package of zoning actions: *to accommodate billboards*. See AR 1:148 under the heading "Analysis," stating:

> This project was originally submitted in 1999, with 9 applications proposing 20 signs. After a thorough evaluation of this submittal, it was determined that some of the sign locations could not be approved. The County

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[6] See: *County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, second paragraph, second sentence, concerning William McCook and various county officials.

> Development Code, as well as the State Business and Professions Code, require that billboards be located within 1,000 feet of an established commercial use, and must maintain a 750'[7] separation between signs. Six of the proposed signs did not meet these criteria. As a result, the applicant withdrew these applications and submitted the remaining seven (7) CUP applications for 14 signs. The applicant also included a request to legally establish two existing commercial businesses in order to comply with the above-mentioned Code requirements. In addition, the applicant included a Tentative Parcel Map application to reduce the amount of proposed commercial acreage.
>
> [T]he County's Development Code only allows primary, freestanding signs (billboards) in two Land Use Districts, General Commercial (GC) and Highway Commercial (HC). Therefore, the project proposes several General Plan Amendments (GPA) to change the Land Use Districts to Highway Commercial (CH). Since the proposed sign locations along Interstate 15 are within a designated Scenic Corridor, the General Plan Amendment is also required to remove this designation in order to allow the signs adjacent to the highway. [AR 1:148]

Mr. Stearn told the Commission that the proposed billboards violated many laws, including the federal HBA (23 U.S.C. 131) and the state law that enforces it, the Outdoor Advertising Act (B&P 5200 *et seq.*). See AR 1:5 at second full paragraph. He provided them with detailed references for his assertions of illegality, AR 1:21, 29-31, 37

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[7] Compare: Caltrans requirements, AR 2:706-707.

(second full paragraph); 39-64, including a copy of 23 CFR 750.708(b) ("Acceptance of State Zoning"), which is part of the federal regulations for HBA and was interpreted by the California Supreme Court in *United Outdoor*. It says:

> Action which is not a part of comprehensive zoning and is created primarily to permit outdoor advertising structures, is not recognized as zoning for outdoor advertising control purposes. [AR 1:26, right hand column, subsection (b), second sentence; also quoted at AR 1:41, item 9]

Mr. Stearn provided the Commission with a copy of a letter Congressman Jerry Lewis, dated April 27, 2006, AR 1:27-28, in which Mr. Lewis explained that in adopting the HBA:

> Congress specifically allowed outdoor advertising in valid zoned or unzoned commercial or industrial areas. The HBA acknowledges that "States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States, in this regard, will be accepted for the purposes of this Act.
>
> However, this recognition of the States' zoning authority is not unconditional. The HBA does not constitute a complete renunciation of the Secretary of Transportation's role in ensuring that in such areas the congressional purposes of the HBA will be followed. Congress has expressed concern several times about the possibility of **"sham or phony zoning"** which is done primarily to allow outdoor advertising in questionable areas. . . .

> [consideration factors listed] [¶] No one of the above factors alone is determinative. If a combination of them, however, shows that the zoning action is primarily to allow billboards in areas that have none of the attributes of a commercial or industrial area, the FHWA [Federal Highway Administration] would not be compelled to accept the zoning action. [AR 1:27-28; bolding added.]

Stearn quoted the crucial passage from *United Outdoor* (44 Cal.3d at 248), that zone changes enacted to permit outdoor advertising are not recognized for HBA purposes. AR 1:45, ¶17. And he quoted Vehicle Code 235 (concentration of businesses; fn2, above). AR 1:45, ¶20. He alerted the Commission that state law (B&P 5415)[8] requires conformance with HBA. AR 1:47 ¶26.

In spite of Mr. Stearn's highly specific–and legally accurate–warnings of illegality, the Commission voted to recommend that the Supervisors approve all the zoning actions requested by the billboard company. AR 1:6.

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[8] B&P 5415, second paragraph: "Notwithstanding any other provisions of this chapter, no outdoor advertising shall be placed or maintained adjacent to any interstate highway or primary highway in violation of the national standards promulgated pursuant to subsections (c) and (f) of Section 131 of Title 23 of the United States Code, as such standards existed on November 8, 1967." State law parallel for both subsections: B&P 5405.

Every zoning action that the Commission recommended to the Board was directly linked to General's proposal for new billboards along the federal interstate highways in undeveloped areas.

D. AUGUST / SEPTEMBER 2006: SUPERVISORS' APPROVE WHOLESALE REZONING OF PRISTINE DESERT TO ALLOW BILLBOARDS

General's billboard proposals went to first reading public hearing of the San Bernardino County Board on August 8, 2006, at which time Stearn warned the Supervisors that General's proposals were illegal under HBA and OAA. AR 1:90-92. The matter came back for second reading and vote on September 12, 2006. Both meetings were conducted by William (Bill) Postmus,[9] who was then Chairman of the Board. The planning staff's Report and Recommendation is at AR 3:1362-1364. It essentially repeats the staff report to the Commission, AR 1:146-149.

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[9] At the time, Appellants were unaware that General Outdoor and its principals had made cash and kind contributions to political action committees controlled by Postmus during the months leading up to the September 12, 2006 Board meeting. See CT 1:210 (chart of contributions, totaling $39,211, compiled from Registrar of Voters data). See also: *People v. Biane* (2013) 58 Cal.4th 381, 385, "Background" section (Postmus had pleaded guilty in a case involving charges that a land developer had made $100,000 contributions each to committees controlled by Postmus).

The Administrative Record produced by the County did not include official minutes of the Board hearing.[10] However, the result of the September 12, 2006 Board vote is stated in a letter addressed to Tim Lynch of General Outdoor, dated September 12, 2006 (the same day as the Board's vote), and signed by Heidi Duron, Senior Associate Planner, AR 3:987-988, along with attachments stating conditions of approval, as follows:

CUP for 14 freeway-oriented primary signs: AR 3:990;
CUP 1–Marine Base (four signs, two parcels): AR 3:991-994
CUP 2–Mt View (one sign, one parcel): AR 3:995-998
CUP 3–Kobayashi (one sign, one parcel): AR 3:999-1002
CUP 4–Whiting Bros. (one sign, one parcel): AR 3:1003-1006
CUP 5–Ord Street (one sign, one parcel): AR 3:1007-1010
CUP 6–Railroad (three signs, two parcels): AR 3:1011-1014
CUP 7–Towing–Impound (three signs, 6 parcels): AR 3:1015-1018

In spite of repeated and explicit warnings of illegality, the Board ignored the core principle of *United Outdoor*–that zoning adopted for the main purpose of allowing billboards does not satisfy HBA–and approved all of the billboard company's requests.

[10] Mr. Stearn has been informally advised that the Board does not keep formal written minutes.

VI. STANDARD OF REVIEW

In the first appeal of this case, this Court held:

> In an administrative mandamus action, the superior court reviews the administrative record of the respondent agency's decision making and decides whether there was a prejudicial abuse of discretion. "Abuse of discretion is established if the respondent has not proceeded in the manner required by law ...." (§ 1094.5, subd. (b).) Here, Appellant alleged, and asked the superior court to rule, that the County did not proceed in the manner required by law [FN8] because it took the zoning actions primarily to allow it to issue the CUPs for the billboards, and issued the CUPs in areas improperly zoned, *i.e.*, engaged in "phony zoning." Thus, administrative mandate is the proper vehicle for challenging the County's zoning and CUP decisions. [170 Cal.App.4th at 445]

See also: CEB California Administrative Mandamus, Third Edition, Volume 2, section 16.53 (p. 16-37 of 5/14 update).

As to the declaratory and injunctive relief claim regarding installed billboards, the standard of review is substantial evidence. *Amerco Real Estate Company v. City of West Sacramento* (2014) 224 Cal.App.4th 778, 782.

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VII. SUMMARY OF ARGUMENT

The County did not proceed in the manner required by law because the rezoning actions violate HBA and OAA, in particular the "Acceptance of State Zoning" HBA regulation.

The Administrative Record consistently shows that every zoning action proposed by the billboard company was for the principal purpose of allowing new billboards in areas that do not meet the requirement decreed by the California Supreme Court in *United Outdoor*, namely that new billboards may be erected only in areas where traditional commercial and industrial land uses are **already** concentrated, conglomerated, and dominate the area.

Further, the Declaration of Gerda Holmstrom, CT 3:693-703, including site photographs, shows that all the installed billboards violate state law regarding allowable locations for outdoor advertising displays. Specifically, "Silver Valley Towing", used as the token business within 1,000 feet of all the constructed signs, fails the "business district" requirement of B&P 5404 and Vehicle Code 235.

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VIII. ARGUMENT

A. CONGRESSIONAL INTENT: PRESERVE NATURAL BEAUTY

The Highway Beautification Act, 23 U.S.C. 131, opens with a clear statement of Congressional intent:

> (a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

In *Alper v. State* (1980) 621 P.2d 492 the Nevada Supreme Court held that both state and federal laws for highway beautification should be interpreted broadly, and said in language that is applicable here:

> If an undeveloped desert area is zoned for commercial or industrial activities, but no actual development is planned or contemplated for the near future, the area is not exempt from highway beautification laws. Billboards within such an area are subject to removal. [621 P.2d at 495]

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B. SUPERVISORS' INTENT: WHOLESALE REZONING OF PRISTINE DESERT TO ALLOW BILLBOARDS

In *United Outdoor* our state supreme court set the requirements for zoning that will legitimately allow new billboards in legal locations. In the penultimate paragraph, the Court warned:

> The [HBA] Act does not simply condition the issuance of a billboard permit on having applicants jump through the additional hoop of obtaining an appropriate zoning change from the county. As we have seen, zoning enacted to permit billboards is not recognized for outdoor advertising control purposes. (23 C.F.R. § 750.708(b).) What the Act contemplates is that plaintiff will locate its displays in an area which, for **reasons independent of a desire to permit billboards**, has obtained the mandated zoning. Under these circumstances, wholesale rezoning of the desert appears an improbable prospect. [44 Cal.3d at 251, 252]

No matter how improbable a "wholesale rezoning of the desert" may have seemed in January 1988, that is exactly what the County Board did in September 2006. And it did so at the request of General Outdoor, a major contributor to campaign committees controlled by then Chairman of the Board Bill Postmus. CT 1:210.

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C. THE REZONINGS FAIL FEDERAL HIGHWAY'S "SHAM ZONING FACTORS" TEST

In April 2004 the Chief Counsel of the Federal Highway Administration issued an Opinion Letter[11] explaining Congressional intent in adopting the HBA, and the agency's interpretation of the "Acceptance of State Zoning" regulation to enforce that intent.

The FHWA Opinion Letter is extensively quoted and discussed in *Lamar Cent. Outdoor, LLC v. State* (2008) 860 N.Y.S.2d 385 (reversed on other grounds, 64 A.D.3d 944). The *Lamar* court began by quoting the "Acceptance of State Zoning" regulation:

> Action which is not a part of comprehensive zoning **and** is created primarily to permit outdoor advertising structures, is not recognized as zoning for outdoor advertising control purposes. (23 CFR § 750.708[b] [860 N.Y.S. 2d at 388; emphasis added by the *Lamar* court]).

The word **"and"** raises the question of whether there is a two-part test for finding noncompliance with HBA. If "yes," then local zoning would be disqualified only when two conditions are concurrently met: "(1) such action 'is not a part of comprehensive zoning';

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[11] The full text of the FHWA Opinion Letter is available online at: http://www.fhwa.dot.gov/real_estate/practitioners/oac/zoningop.cfm

and (2) the zoning action was done 'primarily to permit outdoor advertising structures.'" 860 N.Y.S.2d at 387.

The Opinion Letter[12] says clearly that FHWA does not interpret its "Acceptance of State Zoning" regulation as creating a two-part test, but rather interprets it as "differentiating between legitimate commercial or industrial zones and limited purpose areas created primarily to allow outdoor advertising." *Id.* 388-389. Thus:

> Actions that are facially part of comprehensive zoning, **but in fact are merely schemes to allow outdoor advertising in rural or residential areas**, are not accepted by the FHWA as valid zoning for purposes of control of outdoor advertising. [860 N.Y.S.2d at 389; bolding added]

Accord: *Best Western Tivoli Inn v. Department of Transp*. (1984) 448 So.2d 1052 (FL App.).

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[12] "The Highway Beautification Act explicitly gives the Secretary [of Transportation] authority to promulgate regulations relative to directional signs. 23 U.S.C. s 131(c)(1). This authority has been delegated to the Federal Highway Administration, which has duly promulgated the regulations found at 23 CFR 750.153-54. When authority is thus expressly delegated, a reviewing court does not have the power to set aside the regulations simply because the court might have interpreted the statute in a manner different from the agency's interpretation." *State of South Dakota v. Adams* (1980) 506 FS 60, 66.

The mere labeling of land as commercial or industrial, such as we have in this case, is not enough for rezoning actions to be recognized for HBA purposes.

> [A] city could enact a comprehensive zoning plan that establishes in a residential area a long, narrow strip along a busy highway, label it an "outdoor advertising only" zone, and claim that it was complying with the HBA because it had "comprehensive zoning." This would be jarringly inconsistent with the intent of Congress and the FHWA to permit billboards in appropriate zones. [860 N.Y.S.2d at 389]

The FHWA Opinion lists factors to be weighed in determining if zoning actions do in fact amount to "spot zoning", "strip zoning" or "sham zoning." They include: 1) expressed reasons for the zoning change; 2) the zoning for the surrounding area; 3) the actual land uses nearby; 4) the existence of plans for commercial or industrial development; 5) the availability of utilities (such as water, electricity, and sewage) in the newly zoned area; and 6) the existence of access roads, or dedicated access, to the newly zoned area. 860 N.Y.S.2d at 388. We now apply these factors to the present case.

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1. ACTUAL LAND USES

On the "actual land uses nearby" factor, the charts at AR 1:249 and 1:265 and AR 2:478 show that for every proposed billboard site, the "existing land use" column is either "vacant" or "single family residential."[13] That is very far indeed from an area that is *already developed* and dominated by traditional commercial and industrial uses. Even more starkly, the sequence of color photos with simulations of the proposed signs, beginning at AR 1:320, and another similar set that runs from AR 3:1167 through AR 3:1174, and the color photos submitted as with Motion to Augment the Record (*etc*.), filed June 9, 2014 and approved by the Court on July 17, 2014 (same as AR 4:1787-1812, except reduced to 8.5 x 11, landscape mode) all consistently show that there is no commercial or industrial development at any of the locations. Instead they prove that General proposed to impose new billboards in wide-open, pristine desert areas along federal interstate highways, in direct and flagrant defiance of Congressional policy to preserve natural beauty through the HBA.

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[13] The railroad mentioned in paragraph 4 on AR 1:264 does not count as a business for HBA purposes. 4 CCR 2401 (d) (4).

The *Lamar* case is also a good example of the "already developed" factor in the HBA analysis. The subject property had been used as commercial for more than 45 years; "City's 2007 rezoning action simply changed the official zoning status of the Property to comport with its actual, longstanding, pre-existing use." 860 N.Y.S.2d 385, 392 (2008).

In contrast, the site descriptions in this case note that "the properties are dominated by creosote bush scrub. The creosote bush community forms a medium quality, undisturbed habitat on-site." AR 1:249 (all sites and neighboring properties listed on one chart). Put simply, other than a few single family residences, General's proposed billboard sites are all raw, wild, completely undeveloped desert land.

> A remote junction harboring a dusty service station, a small cafe, and a defunct mine would not generally justify a commercial zone and does not constitute the conglomeration of true business enterprises in which the Legislature intended to allow the placement of billboards. It is outposts of this sort, conjuring images of the grizzled prospector or the eccentric hermit, that draw many travelers to the nearly barren desert, and it is here that illuminated billboards would be most incongruous. [*United Outdoor*, 44 Cal.3d at 251.]

2. EXPRESSED REASONS FOR ZONING CHANGES

On the "expressed reasons" factor, every proposal is explicit: the reason for the zoning action is to allow new "double-sided primary freeway-oriented signs." AR 1:248, under the heading "Project Location," lists 4 sign sites (Mtn. View, Kobayashi, Whiting, Ord.) Under the heading "description of project" it lists the Proposal as "construct 4 double-sided primary freeway-oriented signs". The Vicinity Map at AR 1:146 shows the number of signs per location. Compare: *Redpath v. Missouri Highway* (1999) 14 S.W.3d 34, 38-40 (property spot zoned for outdoor advertising did not amount to commercial or industrial area for HBS purposes.)

3. WATER

The proposed billboard locations have no water facilities. AR 1:384 ¶ j and AR 1:258 (no water at Newberry / Mountain View; no water use is proposed with this development); AR 1:240 and AR 1:245 (no water at Marine Base); AR 1:258 (no water at Newberry Springs Sites; no water use proposed); AR 1:274, 279; AR 2:556; AR 2:561 (no water at Railroad and Towing).

4. SUMMARY OF FWHA FACTORS

Taken together, these FHWA factors all point inexorably and unanimously to sham zoning for billboards.

D. GETTING TO A GOOD RESULT BY ILLEGAL MEANS

During the May 24, 2013 hearing in the trial court, RT 67 *et seq.,* General's attorney Mr. Mobley argued that the purpose of the zoning actions was to develop rural areas, and that the billboard company's revenue sharing plan would provide new money to various community organizations. RT 71-73. Judge McCarville responded:

> Here, yes, I would like to see San Bernardino grow and flourish and everything else, but if you can't get there I will say legally, that might not be the thing that we can do. [RT 73:19-21.]

E. THE INSTALLED BILLBOARDS ARE ILLEGAL

1. THE RULING ON THE WRIT DOES NOT CONTROL THE LOCATION ISSUES

While the writ petition concerns the Board's actions in September 2006, the declaratory and injunction relief claim concerns actions by the sign company–installing new billboards–occurring more than three years later, some time after December 23, 2009, the date stamped on the Caltrans permit applications, CT 3: 664–668.

The dispositive motions on the installation issues were heard by the trial court on October 21, 2013, RT 89 *et seq*. For that hearing Appellants had submitted the Declaration of Gerda Holmstrom,[14] retired after 14 years as a billboard inspector for Caltrans, CT 3:693-703. Her background is stated at CT 3:694. She is familiar with all the state laws and regulations regarding billboards, and was retained to objectively determine the legality of the installed billboards. Even though the trial court judge indicated that he had considered the Holmstrom Declaration, RT 89:22-28, there is no indication that he gave it any weight at all, and instead ruled that the prior ruling on the writ decided the whole case:

> The real party in interest's motion for judgment on the pleadings is granted. When the courts have decided the administrative mandamus claim against the petitioner, the case is over. That's the court's tentative. [RT 91:20-24.]

This tentative ruling became the final ruling. It is directly contrary to well-established law. Mandamus may be, and often is,

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[14] The Holmstrom Report was originally lodged on August 26, 2013, CT 3:593 *et seq.* After the same material was filed as a Declaration on September 19, 2013, CT 3:693, the initial lodgment of the Report was withdrawn September 23, 2013, CT 3:704. The hearing on the dispositive motions was held October 21, 2013, more than a month after the filing of the Holmstrom Declaration.

pled in conjunction with other causes of action that are not subject to the evidentiary rules of mandamus. As explained in CEB California Administrative Mandamus, Third Edition, Volume Two (updated 5/14), at 16.12:

> When a complaint alleges causes of action in addition to the one that sounds in administrative mandamus, an order or judgment denying the petition for writ of mandamus is not a final judgment and is, therefore, not appealable, if other causes of action between the parties remain pending.

Authority: *Griset v. Fair Political Practices Commission* (2001) 25 Cal.4th 688, 697:

> There is no statute that makes an order denying a writ of administrative mandate petition separately appealable when, as here, the petition has been joined with other causes of action that remain unresolved. (See Code Civ. Proc., § 904.1.)

More authority: *Moreheart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743 (five causes of action, including writ of mandate):

> [A]n appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining").

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F. THE INSTALLED BILLBOARDS VIOLATE THE "BUSINESS DISTRICT" RULE

The Holmstrom Declaration explains why each of the installed billboards violates state law. CT 3:693 *et seq.*

The relevant statutes and regulations have the core purpose of ensuring that California remains in compliance with HBA, and thus avoids the risk having the state having its highway funds "reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State..." 23 U.S.C. 131(b). *United Outdoor,* 44 Cal.3d at 245, citing to *South Dakota v. Volpe* (1973) 353 F.Supp. 335.

General provided the trial court with documents purporting to be Caltrans billboard permits. CT 3: 664, 666, 668. Each is date stamped by Caltrans as received on December 23, 2009. Given that dating, they provide an "earliest possible" date for General's installation of new billboards. Each application form includes "Section 5: Display Location Information." The precise name of the "business activity within 1,000 feet" varies slightly from one application to another: Silver Valley Towing & Impound (CT 3:664, 665); Silver

Valley Towing (CT 3:666, 667); Silver Valley Towing and Police Impound, CT 3:668, 669; however, all give the same address under section 5, Display Location Information. That address is "48066 Yermo Road in Unincorporated San Bernardino County."

Thus, for the installed billboards to be legal, Silver Valley Towing–by any name–must be within a "business district as defined in the Vehicle Code", B&P 5404. 4 Cal Code Regulations, 2401:

> (a) A Display is placed in a business area when the Display is on property zoned as commercial or industrial by the local zoning authority and is within 1,000 feet of a commercial or industrial activity.

Ms. Holmstrom did a field inspection of General's installed billboards on February 20, 2010, CT 3:696 ¶15, and then wrote a Report based on that inspection and relevant laws and regs.

As to the Towing location ("Silver Valley Towing"), she first quoted Vehicle Code 235, CT 3:702 ¶24 (see fn2, above), applied it to her on-site observations, and concluded:

> Based on my personal visit to the Silver Valley Towing location, I conclude that the location does not qualify as a "business district" as defined in Vehicle Code Section 235. The distances between the Silver Valley Towing location and any other businesses, or land in use for business, would be measured in miles, not a few hundreds of feet. Thus, all of the constructed billboards

violate state law pertaining to location of new billboards along federally funded highways, irrespective of zoning factors. [CT 3:702, ¶25]

IX. APPELLANTS WERE WRONGFULLY DEPRIVED OF THEIR RIGHT TO DISCOVERY

The parties appeared before Judge Frank Gafkowski on March 24, 2011, CT 1:66 *et seq.*, RT 25 *et seq.* He approved the filing of the then-current Second Amended Complaint (not the same as the April 21, 2011 version, approved by Judge Van Der Feer, and deemed filed June 6, 2011, CT 1:164-3,4). Judge Gafkowski indicated that "discovery will not be absolutely precluded. In other words, it may be required to file a motion to have it, but we will deal with it then." RT 29: 11-14. For the full background and tentative, see CT 1:66-81.

However, on June 6, 2011, Judge Pacheco recognized that there was a new cause of action for declaratory and injunctive relief, and said that he wanted to defer a ruling on the right to discovery until after the new complaint had been tested by demurrer. RT 37:19-40:2.

The discovery issue came up again on July 7, before Judge Van Der Feer, RT 45. However, the discovery matter was deferred to

September 19, 2011, RT 50:16, because the sign company had filed an ANTI-SLAPP motion. RT 48:20-26. It was denied.

The ruling on Petitioner's request for an order allowing discovery was finally decided on January 17, 2012, by Judge McCarville, who ruled: "The court finds that the request of discovery in depositions are not reasonably related or calculated to lead to admissible evidence, therefore the request for a deposition is denied." RT 64:6-9.

This ruling is obviously inconsistent with Judge Gafkowski's ruling that discovery would not be precluded, RT 29:11-14. Far more importantly, it disregards the right to discovery which the Petitioners/ Appellants have under the declaratory and injunctive relief claim. As noted above, that claim was not and is not controlled by the writ petition. It concerns different actors (the sign company, not the Supervisors), different actions (installing billboards, not adopting legislative actions) and a different time period (post December 2009, in contrast to the Board's actions in September 2006). Therefore, it is not subject to the normal evidentiary rules applicable to administrat-ive mandate, CCP 1094.5(c), (e), *Western States Petroleum Ass'n v.*

Superior Court (1995) 9 Cal.4th 559, 578; CEB California Administrative Mandamus, Third, §4.1.

A fundamental policy of California law is that the right to discovery is broadly interpreted. *Emerson Electric Co. v. Superior Court (RPI Grayson)* (1997) 16 Cal.4th 1101, 1107 (discovery statutes "must be construed liberally in favor of disclosure"; "appellate courts in passing on orders granting or denying discovery should not use the trial court's discretion argument to defeat the liberal policies of the statute.") In light of this important state policy, on remand the Appellants should be allowed to depose key people with personal knowledge of how the challenged zoning actions got approved, especially in light of the documented donations that General and its owners made to Postmus. CT 1:210.

X. CONCLUSION

The San Bernardino County Supervisors subverted Congressional intent and violated both the HBA and the OAA when they approved General's requests for zoning actions with the principal purpose of allowing new billboards along federal interstate highways I-40 and I-15 in wide-open areas of undeveloped desert.

For HBA purposes, it is not enough that those areas might be developed some day. California Supreme Court precedent requires that new billboards be allowed only areas that are *already developed and dominate* the area.

The complete lack of existing commercial or industrial areas is clearly illustrated in the site photos prepared by General, located at Augmentation 1-26, and others at AR 4:1787 to 1812. On both the *United Outdoor* test, and the Acceptance of State Zoning test (as elucidated in the FHWA Opinion Letter), the County's 2006 rezoning actions totally fail to satisfy HBA. The County utterly failed to proceed in the manner required by law.

The installed billboards violate the "business district" rule because the token "business use" anchor–Silver Valley Towing–is only a remote residence with a dead car junkyard in the back.

Appellants request that this Court once again reverse the judgment of the San Bernardino Superior Court, and on remand direct that court to: 1) grant the administrative writ on the challenged zoning actions as violating the HBA; 2) declare the installed billboards as illegal or in the alternative to give due consideration to

the Holmstrom Declaration and such other evidence as the parties may provide, 3) order removal of all illegally installed billboards, 4) award costs and fees to Appellants; and 5) grant such other relief as the Court deems just and proper.

Respectfully submitted:

Sabine and Morrison

by: _____
Randal R Morrison
Attorney for all Appellants

CERTIFICATION OF WORD COUNT [CRC 8.204(c)(1)]

The text of the foregoing brief consists of 6,509 words (all pages with Arabic numbers), as counted by Corel WordPerfect Version X6, the word processing program used to create the brief. The main body text is Times New Roman, 14 point, double spaced except for block quotations (which are single spaced) and footnotes, which are Times New Roman, 13 point. The margins are 1.5 inches right and left, 1.0 inches top and bottom. The Certificate of Interested Entities or Persons is in 10 point Ariel.

Dated: August 31, 2014

_____

Randal R Morrison
Attorney for Appellants

PROOF OF SERVICE

COURT: California Court of Appeal, Fourth District, Division Two (Riverside)
CIVIL NO.: E060417 (Stearn v. County of San Bernardino (RPI: General Outdoor)
HEARING DATE: n/a

I certify that I am over the age of 18 years and not a party to this action, that my employment address is Sabine & Morrison, 110 Juniper Street, PO Box 531518, San Diego California 92153-1518, which is in the same county where service by mail (if such manner is indicated below) occurred. I served the document(s) described herein as follows:

1. Name and mailing address(s) of person(s) served:

Counsel for Respondent/RPI General Outdoor (1 copy) Gary S. Mobley, Esq. 17011 Beach Blvd Ste 900 Huntington Beach, CA 92647	Counsel for Respondent/ Defendant County of San Bernardino (1 copy) Mitchell Norton, Esq. Ofc. of County Counsel 385 N Arrowhead Ave 4th Fl San Bernardino, CA 92415
4 copies Kamala Harris, Attorney General CA Dept of Justice 455 Golden Gate Ave San Francisco, CA 94102	4 copies Supreme Court of California 350 McAllister Street San Francisco, CA 94102-4797

2. Manner of service:

First class mail, package or envelope sealed, first class postage fully prepaid, deposited in U.S. Mail receptacle at San Diego California.

3. Document(s) served:

APPELLANTS' OPENING BRIEF

I declare under penalty of perjury that the foregoing document is true and correct. Executed at San Diego, State of California, this second day of September, 2014.

_____

Name and signature of person authorized to make service
Sherry H. Morrison