

MANITOBA ) Order No. 35/06  
 )  
THE HIGHWAYS PROTECTION ACT ) March 9, 2006

BEFORE: Graham F. J. Lane, C.A., Chairman  
Monica Girouard, C.G.A., Member

APPEAL BY MANITOBA TRANSPORTATION AND  
GOVERNMENT SERVICES, OF HIGHWAY TRAFFIC BOARD  
PERMIT NO. 256-05 - ADVERTISEMENT SIGN ON  
PROVINCIAL TRUNK HIGHWAY NUMBER 12 IN STEINBACH

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## 1.0 EXECUTIVE SUMMARY

The Department of Transportation and Government Services (TGS) appealed Highway Traffic Board (HTB) Permit 256-05, which authorized South Eastern Regional Shopping Centre (SERSC) to replace an electronic advertising sign located on SERSC's mall property adjacent to Provincial Trunk Highway 12 (PTH 12) within the City of Steinbach.

The intersection of PTH 12 and Park Road, located immediately south of SERSC's mall property and the location of the sign, is the site of the second highest number of annual traffic accidents (for an intersection of its particular nature) in Manitoba. The intersection with the highest number is just down the road, at the junction of PTH 12 and PTH 52.

TGS's objection was supported by accident levels at the intersection of PTH 12 and Park Road, and by its opinion, highway safety being a primary responsibility of the Department, a topic on which it has expertise, that SERSC's contemplated sign represents an unnecessary distraction for motorists. In particular, TGS objected to the sign's double-sided electronic message board, and the intended frequency by which the message would change.

Though accepting the contention of SERSC that other factors are contributing factors to the elevated accident experience (exit and turning lanes) and noting that, by means of a prior HTB permit, SERSC operated a sign with a message board at its location for twenty years (despite evidence that HTB and TGS did

not support the particulars of the operation of the sign), the Public Utilities Board (Board) grants TGS's appeal and supports TGS's draft policy on changeable variable electronic message signs.

If SERSC and TGS are able to arrive at a consensus as to sign design and operating parameters, perhaps representing a reasonable balance between TGS's safety concerns and SERSC's economic interests, the Board would entertain a jointly brought motion to vary.

By this Order, the Board also makes a number of recommendations to both HTB and TGS.

## **2.0 INTRODUCTION**

By letters dated January 12 and 22, 2006, TGS appealed HTB Permit 256-05. TGS's concern was with the double-sided electronic message board component of SERSC's replacement sign, with LED display panels, providing for changing messages directed to both north and south bound motorists on PTH 12 travelling past SERSC's shopping mall. The existing and currently (electronically) disabled sign has been in place since 1985, it contains an electronic message board.

TGS's appeal was heard by way of a public hearing held at 1:15 p.m., Tuesday, February 28, 2006, in the Council Chambers of the City of Steinbach, Manitoba. Prior to the hearing, the Board received written presentations by TGS and SERSC, which were shared with the parties.

### 3.0 HEARING SUMMARY

*TGS'S case:*

TGS cited safety risks as sufficient grounds for the Board accepting its appeal and varying HTB Permit 256-05.

TGS presented a draft of a proposed policy on changeable/variable message signs that would not permit SERSC's intended use of a new sign, and opined that the policy would be finalized and taken into account by the HTB in future.

The draft policy provides that changeable variable electronic message signs are restricted to:

- urban and suburban locations only;
- off the highway right-of-way and on the right side of the highway where placed a minimum of 200 metres from traffic signals, advance-warning devices, signed/marked crosswalks, yield or merge areas, and traffic interchanges or roundabouts;
- where adjacent highway speed limits are 80 km/h or less
- (areas) without a high incidence of collisions/crashes, compared to other similar locations on the highway system; and
- where such devices are not prohibited according to local by-laws, etc.

The draft policy also includes standards for changeable/variable message signs, these being:

- a maximum of two selectable messages;
- a minimum of thirty minutes duration per message;
- a maximum of four words per message;
- exclude "running, flashing, blinking messages, changes in colour, etc.";
- no lighted or animated backgrounds;
- only the message text illuminated;
- require message elements which automatically dim during night time operation;
- exclude "time and temperature" displays (as they violate the "30 minute duration" criterion);
- include only white or yellow luminous elements;
- font sizes consistent with industry legibility standards, considering traffic speeds and offset viewing distance; and
- luminous elements with a night time maximum intensity of (to be set by TGS) or less.

TGS objected in particular to a condition attached to HTB Permit 256-05 restricting the operation of SERSC's proposed electronic message board to "thirty-second" interval changes, finding that "thirty seconds" was too short a period of time and represents an unnecessary safety risk, being an undesirable distraction for motorists.

TGS cited:

- a) actual traffic speeds in the vicinity of SERSC's property (indicated to be regularly in excess of the posted limits); the high volume of traffic (traffic volumes in the vicinity of the mall have increased 60% since 1994, and further

- expected traffic volume perhaps at an annual rate of 3.8%);
- b) considerable truck traffic (TGS indicated that 10% of the traffic on PTH in the vicinity of SERSC's property were trucks); and
  - c) a high level of accidents experienced at the intersection of PTH12 and Park Road.

TGS opined that the planned operation of the proposed sign represented an unnecessary distraction for motorists and represented an undue safety risk.

TGS acknowledged that SERSC had operated an electronic message board sign at the proposed location since 1986, but, after indicating the Department's historical opposition to the previous sign with message board, opined that circumstances had also changed.

The Department expressed the following further concerns with the proposed new sign, observing that the proposed sign approved by HTB Permit 256-05 was at considerable variance from its proposed new policy:

- close proximity of the message board to PTH 12;
- collisions at the intersection of Park Road and PTH 12 were reported to make the intersection the second highest collision site for the intersection type in Manitoba, i.e. suburban intersections with traffic signals;
- increased commercial, signage and traffic density in the vicinity of SERSC's mall since 1986; and

- concern that if the sign is allowed to be installed and operate as planned, an undesirable precedent will be established, which may lead to further increases in traffic risk as other property owners acquire and operate similar message board signage.

TGS reviewed its past opposition and HTB concerns with respect to the previous sign, suggesting that the HTB had been inconsistent in its approach to signage, by its issuance of Permit 256-05, noting:

- though HTB issued the permit that authorized SERSC's previous message board sign, it later had strong reservations concerning its approval but was barred from amending its permit because of limited jurisdiction;
- HTB had refused to grant a permit for an electronic board sign located on a provincial highway near Altona, though such a sign was now operating;
- HTB had given verbal approval with respect to Permit 256-05, and in so doing had not indicated to SERSC that there were conditions to its approval, conditions that were contained in the permit as issued; and
- HTB granted a permit to a local Steinbach church located on PTH 52 leading to an intersection with PTH 12, without realizing that the church's sign included an electronic message board that was now operating.

TGS opined that HTB had again issued a permit that did not reflect valid safety concerns raised by TGS, and by means of its



proposed new policy TGS intends to assist the HTB in its future decisions.

TGS requested that the Public Utilities Board grant its appeal, and order HTB to issue a new permit recognizing TGS'S traffic/road risk concerns.

*SERSC's case:*

SERSC's existing sign, to be replaced by the sign authorized by HTB's Permit 256-05, has been in place since 1986, and, as previously indicated, had an operative electronic message board (now disabled, awaiting the new sign).

SERSC advised that its proposed new sign has been designed such as to be less of a safety risk than the one that was in place.

SERSC's submission accepted TGS'S evidence with respect to the high level of traffic accidents on PTH 12 near the mall, citing safety risks not related to the proposed sign.

SERSC provided the Board with a copy of a letter from the Chief Administrative Officer of the City of Steinbach suggesting the City had no concerns with SERSC's proposed sign. Also included in SERSC's submission was a copy of Board Order No. 172/03, which relates to a sign with an electronic message board located near Altona, Manitoba.

A summary of SERSC's position on HTB Permit 256-05 follows.

The sign replaces an existing sign (established pursuant to HTB Permit 7701) that also had an electronic message board. SERSC noted that:

- a) the original sign predated any regulations regarding electronic message boards;
- b) restrictions were never applied, and hearings to consider restrictions later considered by the HTB were scheduled only to be cancelled; and
- c) the Town of Steinbach (now City) and UMA Engineering (UMA), did not consider the sign and its message board a traffic risk; UMA was engaged by SERSC in 1985/86 at the time a permit was being sought.

SERSC submitted copies of correspondence from UMA's 1986 study that concluded the sign and its electronic message board was not a hazard to traffic.

SERSC noted that in 2005, following consultations with the HTB, it made an application to the HTB for a new permit to provide for a replacement sign with message board and LED display panels. SERC reported that:

- a) on the day following the HTB hearing on SERSC's permit application, held on November 15, 2005, SERSC called the HTB and was verbally advised that its application had been approved and a permit would be issued;
- b) SERSC received no indication at that time that any conditions were attached to the permit;

- c) upon receiving verbal approval, it commissioned the replacement sign at a cost of \$38,000, the sign was manufactured (SERSC advised that it would lose 50% of its investment if it cannot use the replacement sign); and
- d) it received the permit on December 13, 2005, the permit containing ten conditions and advised of a thirty-day appeal period (during which the permit could be appealed to the Public Utilities Board).

SERSC advised that the new sign was manufactured in response to mall tenants seeking to increase visibility, particularly by means of the LED panels.

SERSC reported improvements from the current/previous sign that would reduce any safety risks:

- a) new technology improving the readability of the sign;
- b) increased readability has allowed for a reduction in the overall size of the panel and message board, as compared to the previous sign; and
- c) the flashing and scintillating neon aspects of the previous sign are not included with the new sign.

SERSC noted that since the installation of the original sign in 1986, events had occurred supporting Permit 256-05:

- a) the speed limit on PTH 12 in the vicinity of the sign and the mall was reduced to 70 km/hr; and
- b) signal lights with warning lights installed for the intersection of Park Road and PTH 12.

SERSC also observed that the current HTB sign policy has been applied inconsistently, noting:

- a) HTB's permit for the church located adjacent to PTH 52 does not restrict its electronic message board (the sign is in operation);
- b) although the HTB and the Board ruled against an application to establish a sign with an electronic message board on a highway near Altona, the sign remains in operation; and
- c) that there were alleged instances of unlicensed signs adjacent to provincial highways throughout Manitoba.

With respect to TGS'S assertion that SERSC's sign poses a safety risk, SERSC opined that the level of motor vehicle accidents and motorist confusion at and/or approaching the intersection of PTH 12 and Park Road were more the result of inadequate road design than distraction caused by the sign.

SERSC cited the absence of safer exit and turning lanes as being the cause of the high accident experience. (TGS did not dispute the criticism of the current road design and acknowledged that road design was likely a factor in the high accident experience at the intersection. TGS noted that it lacked the budget to address the road design deficiencies.)

SERSC submitted that while safety risks should be given consideration, no evidence had been presented at the hearing by TGS supporting the premise that the sign has been, in its past configuration, or would be, by its new design, a hazard.

In conclusion, SERSC submitted that it had followed proper procedures and, accordingly, the appeal of TGS should be denied and its permit should stand.

#### 4.0 BACKGROUND

SERSC applied to the HTB for a permit to replace an advertising sign, located on SERSC's property adjacent to PTH 12 in Steinbach, with a sign with an enhanced electronic message board.

By Permit 256-05 dated December 13, 2005, HTB granted the application subject to ten conditions (the conditions were provided subsequent to initial unqualified verbal approval). The conditions included:

- a) the establishment of an expiry date for the permit, that being November 15, 2010, and requiring a renewal application at that time;
- b) an indication that the sign should conform to all existing and future sign regulations and policies; and
- c) a requirement for 30-second intervals between messages to be displayed on the electronic message board.

The existing sign was approved by the HTB on May 14, 1985, by Permit 7701. A condition to that permit stated:

*"lighting shall not include flashing, running or rotating lights" and "(the) sign is subject to future sign regulations."*

As previously indicated, subsequent to granting of the permit and the installation of the sign, TGS and the HTB expressed concern with the electronic message board component.

HTB called for a "show cause" hearing as to its interest in adding a condition to its permit, reportedly one similar to the condition to Permit 256-05 requiring 30-second intervals between messages.

The attempt to hold the "show cause" hearing was blocked by a Queen's Bench decision that the HTB had no statutory authority (express or implied) under *The Highways Protection Act* to modify a permit or to add a condition to a permit.

Section 44(3) of *The Public Utilities Board Act* states:

"The Board may review, rescind, change, alter, or vary any decision or order made by it."

## 5.0 BOARD FINDINGS

The Board understands the Department to be seeking an end result that would reduce safety risks on PTH 12 within Steinbach, and involve:

- a) limiting the frequency of message changes displayed on SERSC's intended electronic message board to once every thirty minutes, rather than once every thirty seconds; and
- b) the use by TGS, HTB and future sign permit applicants of a draft sign policy shared with the Board and SERSC prior to the February 28, 2006 Board hearing.

SERSC sought an upholding of HTB Permit 256-05, with conditions as stated, to allow for the installation and operation of a new sign with message board.

*Motor vehicle accidents are serious:*

The Board notes and shares the concern of all parties for the safety of motorists, their passengers and pedestrians.

Transport Canada reported that 2,730 Canadians died as a result of motor vehicle accidents in 2004, and a further 148,666 were injured, 17,533 seriously.

Approximately three people die each week in Manitoba due to motor vehicle accidents, and thousands are injured annually due to such accidents. Leaving aside the human toll associated with motor vehicle accidents, the annual direct and indirect economic cost to Manitoba society may approach or exceed \$1 billion.

Recognition of the human and financial cost of motor vehicle accidents supports TGS's concerns as expressed in its appeal of HTB Permit 256-05, and its objective of establishing a new policy to govern changeable/variable message board signage.

*The Public Interest and Prioritization of Interests:*

While the Board appreciates the financial and operational problems that may be faced by SERSC and its tenants that may

arise if HTB Permit 256-05 was to be varied, it is obliged to seek a determination of what is in the public interest in matters that come before it. Priorities should be established, and, for the Board, safety for the well-being of society comes before economics.

The Board shares in TGS's objective to improve road safety. The Board chooses not to contribute to a further deterioration of existing road and traffic conditions by unnecessarily adding to distractions that already face motorists.

The Board also shares TGS's desire for consistent application of sound road safety policies. That said, the Board notes:

- a) the original/existing sign with electronic message board was installed prior to any provincial sign policy being in place;
- b) the anomaly cited by SERSC with respect to the local area church which is operating an electronic message board sign on PTH 52, in a manner contrary to TGS's draft policy and not specifically provided for by HTB's permit;
- c) the existing HTB policy on signs is less restrictive than TGS's draft policy (HTB's policy was adopted in August 1991, and was interpreted by HTB to allow for the issuance of Permit 256-05); and
- d) TGS acknowledges the presence of unlicensed signs and signs inconsistent with both the existing HTB policy (and, in the case of a sign near Altona, contrary to the Public Utilities Board's decision in Order 172/03.)



*SERSC's Previous Sign, and Permit 7701:*

With respect to HTB Permit 7701, which provided for the installation of an electronic message board sign by SERSC in 1985, the Board notes from the evidence that HTB became uncomfortable with its decision but was unable to amend it because of a lack of jurisdiction to do so.

Despite condition No. 7 of Permit 7701, which has SERSC's sign "subject to future sign regulations", for reasons unknown to the Board, HTB did not interpret its August 1991 policy on advertising signs to enable it to vary Permit 7701. In the Board's view, the August 1991 policy may have allowed HTB to restrict the operations of SERSC's electronic message board between the issuance of the policy and the recent disablement of the message board.

Articles 5(1) and 5(2) of the August 1991 policy state:

"5(1) An on or off-premises sign which is a potentially dangerous distraction to the operator of a motor vehicle on a highway shall not be erected or located in the controlled area.

5(2) The following types of on or off-premises signs may be deemed to be a potentially dangerous distraction:

A) Signs which have variable illumination, including any moving, flashing, scintillation, blinking or travelling lights, or reflective paint or material;

- B) A sign, any portion of which is capable of, or is intended to move;
- C) Signs containing running or changing messages;
- D) Signs containing chevrons or arrows, whether or not lighted;
- E) A sign, which is located so close to another sign as not to allow a reasonable reader to read and understand it when travelling at the maximum rate of speed permitted on the highway."

Nor, to the Board's knowledge, did HTB find it desirable to propose an amendment to *The Highways Protection Act* to provide HTB with the authority to add, modify or amend a condition to a permit.

Finally, with respect to Permit 7701, TGS did not appeal the issuance of Permit 7701 to the Public Utilities Board. The Board notes that only thirty days is permitted to make such an appeal, and those days may well have been taken up by HTB's efforts with respect to the intended "show cause" hearing that was struck by the Court.

Nonetheless, SERSC, though well aware of HTB and TGS concerns with respect to the 1986 sign, continued to operate the sign with message changes below 30 seconds until its decision to install a new sign and sought Permit 256-05.

*Changed circumstances and intentions:*

Traffic volumes have increased since 1986, as have other distractions and accidents. There is reason to believe that, if the Board denies the appeal of TGS, other merchants on PTH 12 may eventually seek message board signs further complicating road safety risks as traffic density continues to increase.

The Board finds considerable merit in TGS's draft policy with respect to electronic message boards, and recommends that TGS continue with its implementation approach (circulation to interested parties, including the HTB).

As well, the Board supports TGS's intentions to address unlicensed and signage at-variance with past decision, adjacent to provincial highways.

*The Altona situation:*

Specifically, as to the Altona situation, which was drawn to the Board's attention by both TGS and SERSC, the subject of Board Order 172/03, the Board will research the situation and, if the sign barred by the Board is still in operation, will take steps to remedy the situation.

In Order 172/03, Board denied the installation of an electronic sign with changing messages designed to replace a static message to be located near Altona on PTH 30. The Board notes that

although its Order supported the sign policy of the HTB and denied the applicant, the Town of Altona, it appears that the sign with an electronic message board is operative.

The Board understands that HTB has not issued any permit authorizing the sign, though may have provided permission to the Town to install the sign on the basis that message board changes be restricted to once each 24 hours.

The Board intends to review the status of the Altona sign, and has taken the matter under advisement. If the HTB has approved the sign, the Board will seek reasons as its understanding is that the advertising sign policy of the HTB has not changed, while the road safety risks cited by the Board in Order 172/03 still exist.

*Rationale for Permit 256-05 and De Novo Hearing:*

The Board observes that no evidence was provided to support the basis for the 30-second interval condition placed on Permit 256-05 by the HTB, and, in fact, that no reasons are regularly provided by HTB for its decisions. In the absence of stated reasons, the Board must rely upon the *de novo* nature of its hearings of appeals of HTB permits.

In considering this matter, the Board notes road safety risks with the proliferation of signs along the Province's highways. On the approach to the Town of Steinbach, there is a significant

number of unlicensed signage, erected without apparent concern for the safety of the motoring public.

As previously indicated, the Board is concerned with the Altona situation and an electronic message sign established by a Steinbach-area church with the authority of a HTB permit lacking adequate conditions. The Board is also concerned with the HTB's acknowledged practice of giving verbal approval of permits prior to issuing the permit, and failing to provide reasons for its decisions.

The Board notes the enhanced capability of modern sign technology. This capacity must be understood and consistently regulated in order to protect the safety of the motoring public, passengers and pedestrians. Distraction is a major problem for motorists.

The Board also notes the difference in approach between the tolerance for message board signs in suburban and rural areas than in urban areas, where the travelling speed is less.

The Board remains persuaded by its position in Order 172/03, that in order to protect the safety of the motoring public and to consistently and fairly regulate advertising signs, it is preferable if not necessary for TGS and the HTB to establish a sign policy. The reasonable objective of achieving safe road conditions requires clearly laid out policy, established on a good technical basis and consistently applied.

The Board is of the opinion that Permit 256-05 is inadequate for the circumstances and the operation of the electronic message board as intended by SERSC will provide a dangerous distraction for motorists.

The Board has this view because of:

- a) the speed limit in the area, which reduces in fairly quick succession from 100 km/hr to 70 km/hr to 50 km/hr,
- b) the acknowledged deficiencies of the present exit and turning lanes near SERSC's property, PTH 12 and Park Road,
- c) increasing density of population and development,
- d) risk of precedent, and
- e) high volumes of traffic noted in the area, being not only the users of the highway but also those attracted to the area by the large number of shopping outlets, including SERSC's property.

The Board shares the concern of TGS that allowing HTB Permit 256-05 to stand will set a precedent for the many businesses along PTH 12 in the area of SERSC's property, now with stationary signs.

The Board notes that both parties acknowledged the high incidence of accidents in the vicinity of the sign indicating that improvements to the road design would alleviate the problem. It was suggested that additional and better-designed exit and turning lanes would reduce driver confusion and improve the safety of the intersection. The Board appreciates the advice on this matter but, until such time as those changes are

made, the Board has to deal with the environment in the vicinity of the sign as it is today.

The Board also noted generally that the vicinity of the sign is visually busy, with signs from other businesses as well as the signal light and the signal warning light.

The Board may or may not have reached a different decision if the existing speed limit in the area of SERSC's property, PTH 12 and Park Road was 60 km/hr or less, but it is not. To change a speed limit requires different process, outside of the Board's jurisdiction.

As to the design of the sign, specifically the approach to messaging, the Board notes the marked difference in the position of the parties, namely the 30-second interval allowed by the HTB in contrast to the 30-minute interval sought by TGS.

This Board has no intention of extending its reach to determining the specific design of signs and acceptable practices for electronic message boards.

The Board suspects that there may be a set of rules to govern the operation of the new sign that could possibly satisfy both SERSC and TGS. However, until such time as such a consensus is brought before the Board in a motion to vary this Order, the Board will address the situation as presented.

The Board will, therefore, amend condition ten of HTB Permit 256/05 to read that the sign is allowed on condition that the requirements of TGS's draft Sign Policy dated February 16, 2006 are adhered to.

SERSC and TGS are invited to bring forward to the Board a motion to vary this Order, upon reaching a consensus as to a more acceptable approach to sign operation.

#### **6.0 RECOMMENDATIONS**

The Board recommends that:

1. TGS proceed to circulate its draft sign policy to all interested parties (including HTB, sign companies and permit holders) and, when satisfied with the result, formally adopt it;
2. TGS and SERSC meet to discuss whether TGS' draft policy may be so amended to allow for a joint submission to the Public Utilities Board seeking a variance to this Order;
3. TGS and HTB consider a finalized sign policy for enactment as a regulation of *The Highways Protection Act*;
4. TGS address the presence of unlicensed and/or non-approved signs adjacent to highways within its jurisdiction, to ensure adherence to law, regulation and accepted policy;
5. HTB review the message board sign on PTH52 approaching the intersection with PTH 12, the highest accident intersection of its kind in Manitoba, to determine if the adoption of a new sign policy, as contemplated herein, would allow it to reconsider the permit previously issued;



6. HTB and TGS review the situation of the Altona sign, the subject of Board Order 172/03 as cited herein, to determine if that sign should continue to operate given Order 172/03 and TGS's draft policy with respect to electronic signs;
7. TGS review HTB sign permits with related conditions for compliance with TGS policy within the thirty day period allowed for appeals of HTB decisions to the Public Utilities Board;
8. TGS view, as soon as practicable, signs erected, following the issuance of a HTB permit, for compliance with both HTB conditions and TGS policy and take corrective action for variances;
9. HTB consider providing reasons for its decisions, at least for contested cases;
10. HTB consider expanding its conditions associated with permits to conform with the specificity required when dealing with electronic signs with changeable messages; and
11. HTB consider withholding verbal approval of permits until such time as all conditions to the permit are known.

**7.0 IT IS THEREFORE ORDERED THAT:**

1. The sign authorized by Highway Traffic Board Permit No. 256-05 may only operate under the following conditions:
  - a) excepting for condition 10 of Permit No. 256-05, all other terms are in effect;
  - b) all messages are to be limited to four (4) words;
  - c) all the words in a message are to be changed simultaneously;



**Appendix A**

**APPEARANCES:**

Mr. Ben Rogers, P.Eng.	Director, Traffic Engineering Branch (Winnipeg), Department of Transportation and Government Services (the Appellant)
Mr. Richard Nichol	Senior Access Management Analyst, Highway Planning and Design, Department of Transportation and Government Services
Mr. Glenn Cuthbertson, P.Eng.	Traffic Signing Engineer, Department of Transportation and Government Services
Ms. Karen Toews	Access Management and Utilities Review Technologist, Department of Transportation and Government Services
Mr. Jeremy Funk	South Eastern Regional Shopping Centre
Mr. Allan Stewart	Counsel to South Eastern Regional Shopping Centre
Mr. Ken Pankratz	Signex Manufacturing