

IN THE BOSTON MUNICIPAL COURT DEPARTMENT
APPELLATE DIVISION

Docket No. 2005 01 CV 000477

PHILIP SCHWAN,
Appellant,

versus

MASSACHUSETTS STATE POLICE,
Appellee.

APPEAL OF A FINDING BY
THE BOSTON MUNICIPAL COURT DEPARTMENT
CHARLESTOWN DIVISION

BRIEF FOR APPELLANT

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(Transportation funding acts) (p. 11)

QUESTIONS PRESENTED

- I. Did the driver violate a lawfully posted speed limit?
- II. Did the driver violate the primary speed law, which is not to drive at "a rate of speed greater than is reasonable and proper"?

STATEMENT OF THE CASE

Defendant-Appellant Philip Schwan was charged with violating MGL 90 §17 by driving 55 MPH in a posted 30 MPH zone (Exhibit II). On November 18th, 2004, Magistrate John Whelan entered a judgment of Responsible. On January 19th, 2005, Judge Anthony Sullivan of the Boston Municipal Court Department Charlestown Division heard the *de novo* appeal and entered a judgment of Responsible.

STATEMENT OF FACTS

On May 27th, 2004 at 12:45 AM, Massachusetts State Police Trooper Brian K. Berry cited Philip Schwan for violating MGL 90 §17 by driving 55 MPH in a posted 30 MPH zone (Exhibit II). The Trooper estimated Mr.

Schwan's speed while driving eastbound through the one-way, underground tunnel in Back Bay. The weather was clear and the pavement dry. At that late hour, the divided highway was virtually empty of other traffic.

The Department of Conservation and Recreation (DCR) is the authority with jurisdiction over Storrow Drive. The DCR has consistently admitted not having any engineering studies to justify its speed limits. The evidence at this time consists of letters from the DCR stating that they have no engineering studies (Exhibits III and IV), oral statements by the DCR spokesman that there are no engineering studies and speed limits are set based on requests by police, the small text at the bottom of many DCR speed limit signs stating "STATE POLICE", and independent measurements showing that the speed limits could not be justified.

The Massachusetts Department of Highways also denies conducting an engineering study for Storrow Drive, referring all questions to the DCR. (Exhibit V)

ARGUMENT

I. THE SPEED LIMIT IN QUESTION WAS POSTED IN VIOLATION OF BOTH STATE AND FEDERAL LAW, AND IS NOT ENFORCEABLE

State and Federal laws outline the mandatory procedures for posting speed limits. Both require that the agency or department conduct an engineering study prior to posting. Neither the DCR, which has jurisdiction, nor the Massachusetts Department of Highways (MassHighway), have undertaken such an engineering study (Exhibits IV and V).

A. Federal regulations state that a mandatory engineering study is the basis for any posted speed limit.

The Manual On Uniform Traffic Control Devices (MUTCD), published by the Federal Highway Administration (FHWA), is the national standard for traffic control devices – “signs, signals, markings, and other devices used to regulate, warn, or guide traffic.” The FHWA requires that all traffic control devices on roads open to the public conform to national standards described in the MUTCD, which is incorporated by reference into federal regulations (23 CFR 655.601 et. seq.). The MUTCD states:

The U.S. Secretary of Transportation, under authority granted by the Highway Safety Act of 1966, decreed that traffic control devices on all streets and highways open to public travel in accordance with 23 U.S.C. 109(d) and 402(a) in each State shall be in substantial conformance with the Standards issued or endorsed by the FHWA.

The FHWA interpretation of its regulation emphasizes universal application: "All traffic control devices nationwide must conform to the MUTCD. There are no exceptions." (Frequently Asked Questions about the MUTCD)

States are encouraged to use the federal MUTCD verbatim, but are permitted to adopt state manuals consistent with the federal manual. In either case, federal law contemplates a uniform MUTCD applicable to the entire state, with a single agency responsible for its creation. See 23 USC 302(a), 23 CFR 655.603(b), 23 CFR 1.3; *Hill v. Coleman*, 399 F. Supp. 194, 199 (D. Del. 1975) ("The State Highway Department is the exclusive representative of a state in the vast majority of dealings with the FHWA concerning federal grant in aid under the Act.")

Section 2B.13 of the MUTCD states in part:

After an engineering study has been made in accordance with established traffic engineering practices, the Speed Limit sign shall display the limit established by law, ordinance, regulation, or as adopted by the authorized agency.

Although the manual goes on to describe other factors that may be taken into consideration when determining a posted speed limit (Exhibit I), it does not absolve the agency from the need to conduct the engineering study.

Established engineering practice requires that the primary consideration in setting a speed limit be the actual speed of traffic. Most drivers choose reasonable speeds, and the accident rate is lower for vehicles traveling above the average speed of traffic. The national standard is to set a speed limit at the 85th percentile speed of free-flowing traffic – the speed 85% of vehicles are traveling at or below – rounded up to the next multiple of 5 miles per hour. FHWA has codified this standard in section 2B.11 of the MUTCD: “When a speed limit is to be posted, it should be the 85th percentile speed of free-flowing traffic, rounded up to the nearest 10 km/h (5 mph) increment.”

B. Massachusetts is required to comply with the MUTCD regulations because it accepts Federal highway aid

If there were any doubt about the power of FHWA to prescribe standards for traffic control, Massachusetts has resolved it by accepting federal highway aid. Under its spending power, Congress has made receipt of federal highway funds conditional on compliance with federal standards. The Highway Safety Act, 23 USC c. 4, and Federal Aid Highway Act, 23 USC c. 1, both give the federal government control over traffic control devices in states accepting federal highway funds. States are required to certify compliance with FHWA regulations each time they request federal reimbursement for expenses on federal-aid projects (23 CFR 630). The Massachusetts Highway Department, as the agency responsible for receiving and distributing federal aid, has been authorized to consent on behalf of the state to conditions for such aid (MGL 81 §30). See also 23 USC 302(a), 23 CFR 1.3. The Turnpike Authority, which receives federal funds to pay for the "Big Dig," has also been explicitly authorized to accept federal aid and be bound by the provisions of 23 USC. See MGL 81A §4(r) and (t). Transportation funding acts direct the Highway Department and other

state agencies to take any action necessary to receive federal transportation funds, notwithstanding any conflicting provisions of state law. St. 2000 c. 235 §58; St. 1999 c. 55 §9; St. 1997 c. 11 §54; St. 1996 c. 113 §11; St. 1996 c. 205 70; St. 1994 c. 102 §22; St. 1991 c. 63 §1.

One may not accept the benefit of a federal program and then challenge it. *Federal Power Commission v. Colorado Interstate Gas Co.*, 348 U.S. 492, 501-502 (1955). Because the conditions on highway federal aid are clear, they are binding. *Pennhurst v. Halderman*, 451 U.S. 1, 17 (1981). Conditions on federal aid overrule any contrary provisions of state law. *O'Brien v. MBTA*, 162 F.3d 40, 43 (1st Cir. 1998). If a state wishes to dispute the supremacy of the MUTCD, it must first withdraw from the federal aid highway program.

C. Massachusetts regulations also require an engineering study prior to posting a speed limit, and describe in detail how it should be conducted.

The Highway Department has been directed by the legislature to create the state MUTCD (MGL 85 §2). While the DCR is not specifically named in that section, three arguments compel the conclusion that it

must comply. First, common sense dictates that traffic control devices on DCR roads be the same as those used elsewhere. DCR regulations do not define the meaning of traffic control devices. If the MUTCD is not in effect on DCR roads, then there is no authority defining the meaning of many signs and signals.

Second, other state laws make it clear that the DCR is required to follow the same standards. MGL 92 §35 gives the DCR the same powers as cities and towns to regulate traffic. MGL 90 §14 and §18A include the DCR among the list of agencies permitted to make rules provided they are consistent with the MUTCD. While MGL 90 §18 excludes DCR speed limits from Highway Department approval, there is no corresponding exemption from department standards in MGL 85 §2.

Appropriations bills authorize the Highway Department and DCR in identical language to establish school zones "in accordance with section seventeen of chapter ninety," which references section two of chapter eighty-five. See St. 1991 C. 33 §1 and §2(a); St. 1994 C. 272 §105. Third, the adoption of the state MUTCD for purposes of the state's federal aid program makes it binding on state agencies as well as political subdivisions, notwithstanding any statutory autonomy.

"[A]s long as a state receives federal funds for a particular purpose, its law, if contrary to conditions attached to the funds, must give way to federal law." *O'Brien*, 162 F.3d at 43.

The current version of the state MUTCD went into effect on January 17, 2001 (65 FR 78923). MassHighway adopted the federal MUTCD as the state standard for traffic control devices on February 21, 2001. The department has also supplemented the federal manual, as permitted by federal regulations. One supplement, *Procedures For Speed Zoning On State And Municipal Roadways (1998)* (PSZSMR), establishes standards and procedures for determining speed limits (Exhibit VI).

The PSZSMR is unambiguous about the need for a traffic engineering study (pages 1, 3, and 5):

Speed limits shall be established only after an engineering and traffic investigation has been conducted in compliance with established traffic engineering practices.

The foundation for the actual posting of a speed limit is a thorough traffic engineering study.

A prerequisite to establishing speed regulations and posting speed limits is a comprehensive engineering study at each location where speed control is contemplated.

It goes on to describe in detail the specific procedures for executing and interpreting this engineering study. In several instances, the manual explains how to gather accurate data, by measuring the real behavior of uninfluenced drivers. For example, a hidden and unmarked car should be used to measure drivers' speed; in this way, driver behavior will not be affected by the belief that they will be victims of a speed trap. The PSZSMR also requires separate studies to be conducted for both directions of a two-way street, if there is reason to believe that the speed of free-flowing traffic may differ.

MassHighway's standard calls for a speed limit approaching the 95th percentile speed (usually about 5 MPH above the 85th percentile, or 10 to 15 MPH above the average) when speeds exceed 40 MPH, unless the engineering study shows specific reasons for a lesser speed. A slight reduction from the 85th or 95th percentile speed may be justified based on factors like accident history, but the speed limit may not be more than 7 MPH below the 85th percentile speed (pages 19-20).

D. The MassHighway manual clearly states that limits posted without such a study are illegal and unenforceable.

From the PSZSMR (page 3, emphasis in original):

All posted regulatory speed limit signs must adhere to this approval process. If a speed limit is posted without this procedure, it is in violation of Chapter 90, Section 18, and is therefore considered illegal and unenforceable.

This paragraph requires no interpretation.

Anyone observing traffic on Storrow Drive will agree that the 85th percentile speed of free-flowing traffic – the national standard – is substantially higher than 30 MPH. This has been confirmed by an independent study, which shows that compliance with posted speed limits on Storrow is as low as 1%. By choosing such an artificially low speed limit, the DCR posted a limit which is neither “acceptable to the prudent driver [nor] enforceable by our police departments.” (PSZSMR page 1)

The authority of a court to pass judgment on an engineering study, or lack thereof, is well established in other jurisdictions. See *People vs. Goulet*, 13 Cal. App 4th Supp. 1, 9 (1992) (an engineering study existed but did not justify the

posted speed limit); *Commonwealth vs. Kandor*, 651 A.2d 1135 (Pa. Super. 1994) (formula for setting speed limit may be "complex, but not arbitrary"); *State v. Foukas*, 560 P.2d 312 (Utah 1977) (highway department could not reduce speed limit to 55 without engineering study); *State v. Morse*, 572 A.2d 1342 (Vt. 1990) (speed limit ordinance invalid without engineering study); *State v. Pierce*, 523 P.2d 1201 (Wash. 1974) (oil crisis did not justify speed limit reduction without engineering and traffic investigation).

Given that neither the state nor local agency conducted the required engineering study, the court erred in finding that the posted speed limit was a proper basis for a traffic citation. "[T]he sign was not authorized by law, and was not legally binding upon motorists." *Burgess v. Giovannucci*, 314 Mass. 252 (1943)

II. THE DRIVER WAS TRAVELING AT A SPEED THAT WAS REASONABLE AND PROPER

The basic law in almost every state, including Massachusetts, is to travel at a speed that is no

greater than "reasonable and proper" (Uniform Vehicle Code §11-801 (1992)). From MGL 90 §17:

No person operating a motor vehicle on any way shall run it at a rate of speed greater than is reasonable and proper

Section 17 goes on to establish speed limits that are in effect "unless a way is otherwise posted in accordance with the provisions of section eighteen." A speed in excess of any of these speed limits, or a speed regulation under section 18, is prima facie evidence of a violation of section 17. Section 18 explicitly excludes the DCR (formerly known as the Metropolitan District Commission) from its scope. Instead, the DCR is regulated by 540 CMR 4.00(2), which states:

No person shall operate a vehicle on any land, roadway, driveway, parkway or bridge, under the care and control of the Commission, at a rate of speed greater than is reasonable and proper having regard to traffic, the use of the way, and the safety of the public; and in no event in excess of the posted limits.

The first clause of the DCR speed regulation merely restates the basic rule. The second, however, conflicts with state law. The legislature has stated that Massachusetts speed limits are prima facie speed limits, in that exceeding a speed limit is prima facie evidence of unreasonable speed but is not conclusive

proof of a violation. The DCR regulation sets absolute speed limits, and necessarily contemplates that speeds in excess of the speed limits may be reasonable, but nevertheless prohibits such speeds. In the face of a specific law allowing a person to drive as fast as reasonable and prudent, but no faster, the DCR may not rely on a more general law to support a contrary regulation. "[W]here a subject has been fully regulated by statute, it cannot be further regulated by an administrative officer or board." *Druzik v. Board of Health of Haverhill*, 234 Mass. 129, 136 (1949)

Even if the DCR had the authority to enact such a regulation, due process requires notice that a DCR speed limit sign has a different meaning from any other in the state. There is no warning that a driver is entering a road where signs have different meanings.

Read literally, MGL 90 §17 would prohibit the DCR from setting speed limits, because it only permits changes under Section 18 and the DCR is not subject to Section 18. It is unlikely that the legislature intended this

result. The DCR has incorporated the basic rule, but not the unposted limits, into its regulations. A consistent reading of law and regulation is that (1) the basic rule is always in effect, (2) there are no unposted speed limits on DCR roads, (3) exceeding a legally posted speed limit is evidence of unreasonable speed.

A. The relevant section of Storrow Drive is not adjacent to a "thickly settled or business district", as found in the MGL 90 §17 definition of "reasonable and proper"

MGL 90 §17 has this to say about unposted speed limits:

Unless a way is otherwise posted in accordance with the provisions of section eighteen, it shall be prima facie evidence of a rate of speed greater than is reasonable and proper as aforesaid (1) if a motor vehicle is operated on a divided highway outside a thickly settled or business district at a rate of speed exceeding fifty miles per hour for a distance of a quarter of a mile, or (2) on any other way outside a thickly settled or business district at a rate of speed exceeding forty miles per hour for a distance of a quarter of a mile, or (3) inside a thickly settled or business district at a rate of speed exceeding thirty miles per hour for a distance of one-eighth of a mile

Storrow Drive through Back Bay is a divided highway, not directly adjacent to either businesses or homes. Separate entrances and exits to the highway, in addition to shoulders and barriers off-limits to

pedestrians and bicycles, provide a significant buffer between the divided highway and its surroundings. Furthermore, Mr. Schwan was clocked in an underground tunnel. Although reasonable people may disagree about the surface sections of Storrow Drive, the underground roadway has no neighbors of any kind, thickly settled or otherwise.

In the absence of unique circumstances, such as fog, wet pavement, or heavy traffic, there is no cause to argue that "reasonable and proper" is any less than this Section 17 speed limit. In fact, an independent speed study shows that even this Section 17 speed limit of 50 MPH is below the 50th percentile speed of free-flowing traffic. That study would recommend a speed limit of at least 60 MPH, based on the 85th percentile speed.

Thus, a finding that 30 MPH is the "reasonable and proper" speed limit under MGL 90 §17 is incorrect.

After considering the correct speed limit of at least 50 MPH – and more likely 60 MPH – under MGL 90 §17, a citation for a driver traveling at 55 MPH is no longer

appropriate. Speed limits set by the MUTCD standards are not intended to be strictly enforced. FHWA has clarified its interpretation of its standards in a federal register notice, stating that when a speed limit is set to the proper value, "The enforcement threshold should never be less than 5 mph above the new posted speed limit." (66 F.R. 29861 June 1, 2001)

CONCLUSION

The adoption and retention of the 30 MPH speed limit was and is arbitrary, and in violation of law. The law requires a factual basis for a speed limit and so the normal standards for judicial review of agency action do not apply. The question is not "could the DCR have found any facts to justify a 30 MPH speed limit?" The question is "*did* the DCR find facts sufficient to justify a 30 MPH speed limit?" The record shows that it did not.

The state may not set speed limits arbitrarily and may not use an illegal speed limit to punish drivers. The DCR hopes to profit from fine revenue, but it is a fundamental principle of law that "no one shall be

permitted to found any claim upon his own inequity or take advantage of his own wrong." *Stearns v. United States*, 291 U.S. 54 (1934).

The driver is not charged with driving at an unsafe speed, but only violating an illegally posted speed limit.

For these reasons, the Appellant Philip Schwan respectfully moves this court to overturn the District Court's finding of responsible, and enter a finding of not responsible.

Respectfully submitted this 7th day of April, 2005.