

MEMORANDUM

FROM: Sid Hemsley, Senior Law Consultant

DATE: May 16, 2011

RE: Temporary Traffic Control Devices under MUTCD

The City has a question relative to temporary traffic lights on a TDOT construction project. The construction project is a TDOT bridge replacement that reduces two lane traffic to one lane through the use of traffic lights. The traffic lights are portable ones being used by the bridge contractor. They have two heads that change colors in conjunction with the city's traffic lights. The city's question apparently is: Can the traffic control devices be enforced by the city police? But I also recently learned that there is another side to the same question that I will also try to address: Can the city police "work" in the construction work zone?

As far as I can determine, the express question of whether the violation of temporary traffic signs and signals placed by a construction company in connection with a highway construction project can be charged under state law or by ordinance has never arisen in Tennessee. But it has arisen in the negligence context a significant number of times. [See Gorman v. Earhart, 876 S.W.2d 832 (Tenn. 1994), Scott v. Jones Brothers Construction, Inc., 960 S.W.2d 589 (Tenn. Ct. App. 1998). Gorman itself said that:

It should be noted that all of the cases in which the Tennessee courts have dealt with the manual involved a party who was either a governmental body or a private individual who had a contractual relationship with a governmental body, or a governmental official having jurisdiction. [Case citations omitted by me.] [At 834]

All of those cases, and cases in which MUTCD has been an issue since then, involved negligence actions rather than criminal or ordinance violations, although there may have been such antecedent charges filed in those cases.

But it appears to me that traffic signs and signals located in TDOT construction zones are legal signs and signals that can generally be enforced, at least as state law violations.

Tennessee Code Annotated, § 54-5-108(b) provides that:

The department [of transportation] has full power, and it is made its duty, acting through the commissioner, to formulate and adopt a manual for the design and location of signs, signals, marking, and for posting of traffic regulations on or along streets and highways in Tennessee, and no signs, signal, marking or postings regardless of type or class of the governmental agency having jurisdiction of the streets and highways, except in conformity with the provisions contained in the manual.

The Tennessee Department of Transportation has adopted the *2003 Manual on Uniform Traffic Control Devices for Streets and Highways*. [Tenn. Comp. R. & Regs. 1680-03-01.02]. It is said by the Tennessee Supreme Court in Florida Steel Corporation v. Case Heavy Hauling, 1989 WL 138915 (Tenn.), that “...the law is well settled that duly-promulgated rules and regulations of administrative agencies have the force and effect of law. See T.C.A. § 4-5-221(c) (1985).” [At 2] However, it does not appear clear in either Tennessee Code Annotated, § 54-5-108 nor the administrative rules on MUTCD adopted by the state precisely who has the “jurisdiction” to place traffic signs and signals in construction zones or to enforce those signs and signals. It will be seen below that state traffic law authorizes TDOT to establish speed limits in certain places on state highways, but there is no comparable legislation granting that “jurisdiction” to TDOT for other temporary traffic control devices.

But a very strong argument can be made that it was the intent of the General Assembly in certain provisions of Tennessee Code Annotated, Titles 54 and 55, that will be covered below, that TDOT has broad “jurisdiction” over the state highway construction sufficient to give it the authority to approve traffic control devices placed by construction companies in highway construction zones and to enforce those devices under state law.

It has already been pointed out above that Tennessee Code Annotated, § 54-5-108(b) gives the “department” (TDOT) the authority to adopt MUTCD, and that it has done so. Section 1A.08 of MUTCD establishes a “Standard” for the “Authority for Placement of Traffic Control Devices”:

Traffic control devices, advertisements, announcements, and other signs or messages within highway rights-of-way shall be placed only as authorized by public authority or the official having jurisdiction, for the purpose of regulating, warning, or guiding traffic.

When the public agency or the official having jurisdiction over a street or highway has granted proper authority, *others such as contractors and public utility companies shall be permitted to*

install temporary traffic control devices in temporary traffic control zones. Such traffic control devices shall conform with the standards of this Manual. [Emphasis is mine.]

The significance of the “Standards” in the MUTCD is that they are *mandatory*. [See the “Support,” “Guidance,” and “Options” provisions in MUTCD]. As their names suggest, and which make up the bulk of MUTCD provisions, they are not mandatory [See Russell v. Anderson County, 2011 WL 486900 (Tenn. Ct. App.) and City of Murfreesboro v. Hooper, 2007 WL 2330853 (Tenn. Ct. App.)]

The above MUTCD Standard in Section 1A.08 authorizes the “public agency or the official having jurisdiction over a street or highway,” to place signs “for the purpose of regulating, warning or guiding traffic.” Tennessee Code Annotated, § 54-1-105 provides that among the duties of the transportation commissioner are the duties to “(b)(4) Establish standards for the construction and maintenance of highways in the counties....” and “(c)... to determine the character and have the general supervision of the construction, repair and maintenance of all roads improved under this chapter....” Tennessee Code Annotated, § 54-5-102(a) also provides that:

[T]he commissioner is given the power to proceed to designate main traveled roads, with a view to connecting all county seats, and also to designate other main traveled roads that are deemed of sufficient importance to be included in the general highway plan of the state, and receive for their construction and improvement financial aid under this chapter and chapters 1 and 2 of this title.

Probably most significantly, Tennessee Code Annotated, § 54-5-109, provides that:

The department [TDOT] has full power, in conformity with the rules and regulations made or to be made by any officer or agency of the federal government authorized to make rules under any act of congress granting funds for the construction of roads, or rules made or to be made by the department, to make all plans and specifications for the building of such particular road or bridge to be constructed under its direction, and to supervise and superintend the construction of the road or bridge.

Those statutes, read together, appear to give TDOT jurisdiction over state highway construction, including the authority to establish traffic safety regulations in construction zones, which involves the obvious necessity to establish temporary traffic signs, signals and other devices to promote traffic safety in those zones.

The question of “jurisdiction” over construction zones arises again in PART 6 of MUTCD, entitled TEMPORARY TRAFFIC CONTROL, CHAPTER 6A. GENERAL, which contains two standards:

1. The needs and control of all road users through a TAC [temporary traffic control] zone shall be an essential part of highway construction, utility work, maintenance operations and the management of traffic incidents.

2. *TAC plans and devices shall be the responsibility of the authority of a public body or official having jurisdiction for guiding road users. There shall be adequate statutory authority for the implementation and enforcement of needed road user regulations, parking controls, speed zoning, and the management of traffic incidents. Such statutes shall provide flexibility in the application of TAC to meet the needs of changing conditions in the TAC zone.*

The second standard in Chapter 6A again raises the question of who has the authority to place traffic control devices in temporary construction zones. That question is complicated by the fact that construction companies have a legal duty to operate and maintain safe construction sites. In fact, as I understand it, most, if not all, highway construction contracts between TDOT and construction contractors impose obligations on the construction contractor to use traffic control devices and procedures that produce a safe construction site and that comply with MUTCD. In addition, traffic enforcement personnel working in such zones are often hired by the contractor to perform traffic enforcement duties. As seen above, the MUTCD Standard contained in Section 1A.08 provides that where the “public agency or official having jurisdiction over a street or highway, others such as contractors and public utility companies shall be able to install temporary traffic control devices in temporary traffic control zones.”

TDOT has adopted the *TDOT WORK ZONE SAFETY AND MOBILITY MANUAL* (Nov. 29, 2007), which governs its highway construction projects. It cites as its authority as follows:

1.4 Statement of Authority

Legal authority for this Work Zone Safety and Mobility Manual and its procedures is derived from adherence to §630/1006 in 23CFR630 Subpart J which states “Each State shall implement a policy for the systematic consideration and management of work zone impacts on all Federal-aid highway projects.” TDOT will implement the processes and procedures within this manual for all federal-aid projects. The same requirements should be extended to all other projects for which the Department has authority.

It does not appear to me that statute provides authority for state and local traffic law enforcement with respect to traffic signs and signals and other devices in construction zones, but that Manual appears consistent with the authority and obligation granted to granted TDOT under Tennessee Code Annotated, § 54-5-109.

Part 4 of TDOT’s *WORK ZONE SAFETY AND MOBILITY MANUAL* contains the rules for temporary traffic control, including sign age of construction sites. It provides for a Transportation Management Plan (TOP), which is based on the extent to which the construction project will impact traffic and contains strategies for managing TAMPS, the first of which is Temporary

Traffic Control (TAC) Strategies. [Section 4.2], and Transportation Operations (TO) Strategies [Section 4.2] Section 4.2A contains the Temporary Traffic Control (TAC) Strategies. They include a variety of ways to regulate traffic in construction zones, including the one at issue in your question. The introductory sentence to Traffic Control and Safety Device Strategies provides that “All strategies in this section identified by the TOP should conform to Part 6 of the MUTCD.” Those strategies include “fixed or portable....“Temporary traffic signals.” Section 4.2B entitled Transportation Operations Strategies, under its heading of Work Safety Management Strategies, provides for “Temporary Traffic Signals,” which may be “an advantageous safety measure (i.e. traffic control for one way bridge conditions.”

Section 4.2 also provides for “Enforcement Strategies,” consisting of:

Dedicated (paid) police enforcement: This measure may be included in a project TOP to allow for the presence of a dedicated police enforcement. Police presence may be called for at all times, during a specific time or specific construction activities. The scope and payment of these services may be handled through a contractual agreement. This police presence may begin with the onset of work or as-needed based on driver behavior.

Cooperative police enforcement: This strategy is meant to achieve the same objectives as the dedicated police enforcement except that there is not a separate or exclusive contract agreement. In this case, police enforcement is secured through a cooperative agreement between the police and the work zone agency.

Automated enforcement: This provides an option to utilize technology as the means to assisting enforcement and communicating driver behavior back to travelers. The types of automated strategies may range from automatic speed radar/displays to traffic signal violations. The TMP should specifically identify what is to be measured or enforced.

Of course, the law enforcement strategies are not themselves authority for law enforcement officers to enforce traffic signs and signals in construction zones; such enforcement must have some statutory basis, which I will consider below.

I do not know how “significant” is the construction project on the bridge in question. TDOT *Circular Letter* 712.04-02 (February 1, 1994), which is an appendix to the *Work Safety and Mobility Manual* says:

Anytime proposed construction requires major disruption to existing traffic patterns the Regional Traffic Engineer is to be consulted. The Regional Traffic Engineer should be provided details on the proposed disruption including, but not limited to

advance warning, possible alternate routes, type of disruption, Contract Plans, etc. The Regional Traffic Engineer should review, modify if needed, and approve the proposed plan prior to implementation....

I assume such approval of the bridge construction project at issue occurred, including the arrangement of the timing of the portable traffic light with the city's traffic lights. But if the project was a less "significant" one, the *Work Safety and Mobility Manual* provides for the frequent inspection of the project by TDOT personnel, and gives them the authority to make or approve safety measures in the construction project. As I understand the TDOT construction contracts, a project engineer is generally required to approve all construction zone signs and signals to changes in such signs and signals. [TDOT's *Standard Specifications for Road and Bridge Construction*].

Some "Rules of the Road" in Tennessee Code Annotated, § 55-8-101 et seq. support the placement of signs in construction zones by TDOT. Its *Work Safety and Mobility Manual* contains a *Circular Letter* in Appendix A that provides for how speed limits in construction zones are reduced. [Number 712.04-01 (May 15, 2002). That *Circular Letter* is expressly supported by Tennessee Code Annotated, §§ 55-8-152 and 55-8-153, which gives TDOT the authority to lower speed limits in certain areas, undoubtedly including construction zones. While it puzzles me why there is not similar legislation authorizing TDOT to place and change signs in construction zones, Tennessee Code Annotated, § 55-8-101(37) defines "Official traffic control devices" as "all signs, signals, markings and devices not inconsistent with this chapter and chapter 10, parts 1-5 of this title placed or erected by authority of a public body *or official* having jurisdiction for the purpose of regulating, warning or guiding traffic." The term "public ...official" appears broad enough to encompass TDOT officials whose jurisdiction is state highways and construction sites on such highways. Tennessee Code Annotated, § 55-8-109(a) also provides that, "The driver of any vehicle....shall obey the instructions of any official traffic control device applicable thereto, placed in accordance with the provisions of this chapter and chapter 10, parts 1-5 of this title, unless otherwise directed by a traffic or police officer...." In addition, as already pointed out above, MUTCD itself has the force of law in Tennessee.

The City has also adopted MUTCD in § 15-110 of its Municipal Code. However, it makes it advisory. As also pointed out above, most of MUTCD *is* advisory, but its standards are mandatory, and under Tennessee Code Annotated, § 54-5-108, MUTCD is mandatory for streets as well as highways. I am not sure of the legal effect of MUTCD's "advisory" status in the city's municipal code as to the question of whether MUTCD violations in highway construction zones inside the city could be enforced as municipal ordinance violations. But presumably, such violations could be prosecuted as state law violations. I will research this issue further.

With respect to the flip-side of the same question, I was surprised to learn that *Supplemental Specifications-Section 700* (12-13-10) of TDOT's *Standard Specifications for Road and Bridge Construction* (March 1, 2006) provides that:

All Uniformed Law Enforcement Officers working on TDOT projects shall have training from a Peace Officer Standards and Training (POST) certified police training academy in the State of Tennessee.

All Uniformed Law Enforcement Officers working within TDOT work zones shall have an additional 4 hours of FHA approved work zone training by December 31, 2010. Record of this training shall be submitted to the Project Engineer.

In addition, TOOT offers a short course for law enforcement officers which is a prerequisite to them working on construction projects. My review of that course suggests that it may apply only to law enforcement officers working for contractors as opposed to their law enforcement agencies. But that may not be true; it may apply to any law enforcement officers working in TDOT construction zones. The course declares that the MUTCD reflects "Minimum standards," that state and local agencies can have more restrictive standards, that it applies to all streets and highways open to the public, and that it "Does not address use of law enforcement officers in WZ [work zones]," and that it, "Does not show location of police vehicles." That appears to be an accurate presentation on those points, although the second standard in Section 6A of MUTCD tangentially addresses traffic law enforcement in highway construction zones by leaving it up to "adequate statutory authority" to determine who has such authority in those zones.