

## STAFF REPORT

### Department of Metropolitan Development Division of Planning Current Planning Section

**Case Number:** 2022-UV2-012  
**Address:** 9333 Haver Way (approximate address)  
**Location:** Washington Township, Council District #2  
**Zoning:** C-5  
**Petitioner:** Reagan Outdoor Advertising, by Michelle Noppenberger  
**Request:** Variance of use and development standards of the Consolidated Zoning and Subdivision Ordinance to provide for 60-foot tall, 14-foot by 48-foot digital off-premise advertising sign (maximum 40-foot height permitted, digital off-premise sign not permitted), within 907 feet of another off-premise advertising sign (1,000 feet of radial separation required) and to allow for digital messages to display for minimum of eight seconds (minimum of ten second display permitted), and to be located along an interstate entrance roadway (advertising signs not permitted within 500 feet of an entrance roadway).

#### **ADDENDUM FOR DECEMBER 13, 2022**

Due to the lack of a quorum, this petition was continued for cause from the September 13, 2022 hearing to the December 13, 2022 hearing at the request of the petitioner. Staff **continues to recommend denial** of this request.

In summary, the Petitioner is requesting multiple development standard variances and to allow a billboard with digital display. To remind the Board, in 2019 the City-County Council considered and explicitly rejected amendments to the Sign Ordinance that would allow the type of digital display sought by the Petitioner. It is Staff's opinion that if the Petitioner wants billboards with digital display anywhere in Marion County, they need to once again ask the City-County Council to amend the Sign Ordinance. Instead, the Petitioner has come to this Board and ask them to make a policy decision contrary to the City-Council's 2019 decision. The role of the BZA is to uphold the Zoning Ordinance or require the Petitioner to prove that each statutory finding of fact has been met in order to grant the variance. After a thorough review, Staff believes the Petitioner has failed to meet each and every required finding of fact and therefore recommends denial of this Petition.

#### **ADDENDUM FOR SEPTEMBER 13, 2022**

This petition was continued for cause from the August 9, 2022 hearing to the September 13, 2022 hearing at the request of the petitioner. Staff **continues to recommend denial** of this request.

#### **August 9, 2022**

This petition was automatically continued from the May 17, 2022 hearing to the June 14, 2022 hearing at the request of a registered neighborhood organization.

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## **STAFF REPORT 2022-UV2-012 (Continued)**

This petition was automatically continued from the June 14, 2022 hearing to the July 12, 2022 hearing at the request of the petitioner.

This petition was continued for cause from the July 12, 2022 hearing to the August 9, 2022 hearing at the request of the petitioner.

## **RECOMMENDATIONS**

Staff **recommends denial** of this request.

## **SUMMARY OF ISSUES**

The following issues were considered in formulating the recommendation:

### **LAND USE**

#### **EXISTING ZONING AND LAND USE**

C-5	Metro	Car dealership
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#### **SURROUNDING ZONING AND LAND USE**

North	C-5	Commercial (Car dealership)
South	C-5	Commercial (Car repair/maintenance)
East	C-5	Commercial (Car dealership)
West	C-5	Commercial

COMPREHENSIVE PLAN	The Comprehensive Plan recommends community commercial development.
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- ◇ The subject site is developed with an auto sales business and a 40-foot tall static and trivision billboard. It is surrounded by other similar uses such as car dealerships and car repair and maintenance.

### **VARIANCE OF DEVELOPMENT STANDARDS**

- ◇ The grant of the petition would allow for a 60-foot tall digital off-premises sign to be located within 907 feet of another off-premise advertising sign and along an interstate entrance roadway with digital messages that change more frequently than the Ordinance's minimum duration requirement would allow.
- ◇ In April 2022, The Supreme Court of the United States held that local Zoning Ordinances can draw a distinction between off-premise and on-premises signs that is based on the location of the sign in question while still remaining content neutral and observant of the sign owner's First Amendment rights. (CITY OF AUSTIN, TEXAS v. REAGAN NATIONAL ADVERTISING OF AUSTIN, LLC, ET AL.(2022)

(Continued)

## **STAFF REPORT 2022-UV2-012 (Continued)**

◇ Section 36-7-4-918.5(a) of the Indiana Code provides:

(a) A board of zoning appeals shall approve or deny variances from the development standards (such as height, bulk, or area) of the zoning ordinance. The board may impose reasonable conditions as a part of the board's approval. A variance may be approved under this section only upon a determination in writing that:

(1) the approval will not be injurious to the public health, safety, morals, and general welfare of the community;

(2) the use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner; and

(3) the strict application of the terms of the zoning ordinance will result in practical difficulties in the use of the property. However, the zoning ordinance may establish a stricter standard than the "practical difficulties" standard prescribed by this subdivision.

◇ This statute does not give the Board discretion to act on an application to vary development standards for grounds other than satisfaction of § 36-7-4-918.5(a) (1), (2) and (3). "Because a petitioner for a variance must establish the existence of **all** of the prerequisites, the failure of proof on any one will be sufficient to defeat the request." *Sam's E., Inc. v. United Energy Corp.*, 927 N.E.2d 960, 964 (Ind. Ct. App. 2010) (emphasis added).

### **Practical difficulties**

◇ Regarding the third of these statutory preconditions for departures from development standards, the petitioner's proposed findings of fact state that "there are no objective standards by which to determine whether the strict application of the terms of this title will result in practical difficulties in the use of the property." That assertion is incorrect. Indiana's appellate courts have defined the concept of "practical difficulties in the use of property," making it unnecessary for the City or the State to have done so. In the most recent published decision on this topic, the Indiana Court of Appeals defined it in a way that focuses primarily on three considerations:

We have articulated several factors for a reviewing court to consider in determining whether compliance with a zoning ordinance will result in practical difficulties:

**(1) whether "significant economic injury" will result if the ordinance is enforced;**

**(2) whether the injury is self-created; and**

**(3) whether there are feasible alternatives.**

◇ *Caddyshack Looper, LLC v. Long Beach Advisory Bd. of Zoning Appeals*, 22 N.E.3d 694, 704 (Ind. Ct. App. 2014) (emphasis added). The Indiana Court of Appeals continues to apply these criteria for practical difficulties

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## **STAFF REPORT 2022-UV2-012 (Continued)**

- ◇ Because Indiana law gives the Board the benefit of a specific definition of the key terms of the third requirement (practical difficulties), making that requirement (as defined by Indiana law) relatively more precise than the first and second requirements, and because a failure to establish even one of the statutory requirements deprives the Board of authority to grant a departure from development standards, Staff recommends that the Board start (and perhaps end) its consideration of the variance petition by analyzing whether the application satisfies the “practical difficulties” statutory requirement.
- ◇ First, regarding whether some or all of the three *Caddyshack* factors are satisfied by this application, the Board should consider that in 2019, the City amended the Ordinance to make otherwise-compliant off-premises signs permitted uses in many locations along freeways and expressways or inside places zoned Industrial, C-4, C-5, and C-7, so long as they are located along the I-465 beltway and meet the sign regulations for off-premise signs. But petitioner’s pending petition involves a sign that exceeds the height limitation, separation requirements, duration time, and display type.
- ◇ It is also relevant that even after a 2016 federal court order upheld the constitutionality of the City’s ban on digital off-premises signs, the City relaxed that ban in 2019. Specifically, the City replaced it with a combination of (1) conditions on the location and operation of digital off-premises signs; and (2) conditions on the operation of all digital displays. See Sections 744-911 & 744-907(C)(4). The petitioner’s pending request seeks to take advantage of the City’s replacement of its former ban, but proposes a sign that—because of its height, location, and shorter duration between images—would not satisfy the conditions imposed by the 2019 amendment that replaced the ban.

### ***Self-created injury***

- ◇ One of the three *Caddyshack* factors is “whether the injury is self-created.” In several different respects, the structure’s violations of applicable standards are the result of choices made by the petitioner.
- ◇ As Staff understands the petitioner’s business model, it is not tied to its ownership of a particular location, as would be the case for a petitioner that holds fee title to a parcel and would therefore be in a more difficult position to sell the parcel to acquire a site in a differently zoned area of the City. Instead, petitioner’s business model involves acquiring existing billboard sites that it identifies and then negotiating leaseholds with the fee owners of such sites. In these circumstances, even if the petitioner has already entered into leases for locations the existing billboards could still be utilized without the need for additional variances to convert them to digital billboards.
- ◇ Second, the property currently is and can continue to be developed with C-5 uses by right as zoned without the need for variances. This is a further reason why building an unpermitted structure on that site would be a self-created injury.

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## **STAFF REPORT 2022-UV2-012 (Continued)**

- ◇ Third, the petitioner has requested variances to allow for an increase in permitted sign height from 40 feet to 60 feet in height, deficient separation from another off-premise sign and interstate entrance roadway, and to allow for digital messages to display for minimum of eight seconds where a minimum of ten-second display is permitted. The increase in height, the deficient separation, and the reduction to the time of digital display is a drastic departure from what is permitted by the Ordinance for digital signs. Seeking to build an excessively tall sign with more frequent changes in displays, in violation of the applicable standards, creates the need to seek additional variances from standards. Because the petitioner could also choose to maintain the existing sign, the needs for height, separation, and duration variances are self-created injuries.
- ◇ The submitted findings note that “due to the increase in height, of the Keystone Avenue bridge deck, the need arises to increase the height of the sign from 40’ overall height to 60’ overall height, so the sign can be viewed from southbound traffic”. The more visible a sign is, the greater its value might be. But many structures would be more valuable if they could be constructed in disregard of height limitations. That, however, does not make compliance with the height limits a practical difficulty under the *Caddyshack* factors.

### ***The existence of feasible alternatives***

- ◇ The third *Caddyshack* factor is “whether there are feasible alternatives.” The burden of satisfying the requirements for obtaining a variance lies with the petitioner. “It is the burden of the petitioner for a variance to establish the existence of each of the statutory prerequisites.” *Maxey v. Bd. of Zoning Appeals*, 480 N.E.2d 589, 592 (Ind. Ct. App. 1985). The petitioner has not demonstrated that there are no alternative, feasible location for the subject sign.
- ◇ The existing C-5 zoning allows for a 40-foot tall billboard on site with a standard vinyl changeable face. Because the sign could meet the standards of the Ordinance with regard to height and face, there are feasible alternatives to the proposed structure. That further prevents the petitioner from satisfying the “practical difficulties” test as defined in *Caddyshack*.
- ◇ The submitted findings note that “the industry standard for digital displays is eight (8) seconds”, which is why the request would be to reduce the duration time from 10 seconds to eight seconds. The alternative of meeting the 10 second standard of the Ordinance could be accomplished without difficulty.

### ***Whether significant economic injury will result***

- ◇ There may be financial advantages to the petitioner in their choosing of a site in the City where its proposed use is prohibited and then obtaining, through a variance, what is effectively a license to do something lawfully that remains forbidden to the petitioner’s competitors. But the inability to obtain that kind of competitive advantage through a variance is not a “significant economic injury” to the petitioner.

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## **STAFF REPORT 2022-UV2-012 (Continued)**

### **Injurious to safety**

- ◇ Although Section 36.7-4-918.5(a)(1) (“the approval will not be injurious to the public health, safety, morals, and general welfare to the community”) includes some imprecise phrases, it cannot be satisfied where the petitioner is unable to show that approval would not be injurious to safety. There are reasons to believe that the variance, if granted, would be injurious to public safety. The proposed digital outdoor advertising sign would be located along a heavily trafficked area. In order to prevent unnecessary distractions and promote public safety, the Sign Regulations prohibit signs of the kind proposed. In Staff’s opinion, at this location the proposed sign would unnecessarily distract motorists, traveling at a high speed, from other traveling vehicles in traffic, thereby negatively affecting public safety. This is particularly important at the subject site because the sign is located at the beginning of an entrance ramp, when maneuvering between lanes and ramps increases.
- ◇ This portion of Keystone Avenue has a large amount of Interstate traffic. It is visually difficult to take in any signage at this location, while continuing to maneuver safely in the travel lanes. Making matters worse, it would be located adjacent to an entrance roadway of Interstate 465, which for safety reasons is not permitted. If a large digital sign is added, it could severely distract attention away from legally installed directional signage and other commercial signage making them less effective to those established businesses.
- ◇ The Sign Regulations “facilitate an easy and agreeable communication between people...and serve an important function.” The purpose of the Sign Regulations is to “eliminate potential hazards to motorists, and pedestrians; to encourage signs which, by their good design, are integrated with and harmonious to the buildings and site which they occupy; and which eliminate excessive and confusing sign displays.” Proliferation of signs causes those signs that are permitted and legal to become less effective and reduces their value. Additionally, the Sign Regulations preserve and improve the appearance of the City as a place in which to live and work.
- ◇ At the existing 40-foot height, there are no buildings or landscaping that would obscure the proposed EVMS to warrant a height increase. This height change, however, would clearly impact the motorists traveling along I-465 who would not have otherwise been drawn to the existing billboard because of its proposed changing and/or scrolling display, brightness and aesthetic impact.
- ◇ There is no reason that the existing sign could not be used, along with alternative communication methods.
- ◇ In Staff’s opinion, the requested sign height increase coupled with the digital display would result in signage that would not reflect the character of the area and would be detrimental to the motorists.

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## **STAFF REPORT 2022-UV2-012 (Continued)**

### **GENERAL INFORMATION**

THOROUGHFARE PLAN	Keystone Avenue is classified in the Official Thoroughfare Plan for Marion County, Indiana as a primary arterial, with a 248-foot existing right-of-way and a 124-foot proposed right-of-way.
SITE PLAN	File-dated April 8, 2022.
PLAN OF OPERATION	File-dated April 8, 2022.
FINDINGS OF FACT	File-dated April 8, 2022.
REVISED FINDINGS OF FACT	File-dated June 13, 2022.

### **ZONING HISTORY – SITE**

#### EXISTING VIOLATIONS

None.

#### PREVIOUS CASES

**2005-ZON-185; 9402 Haver Way** (subject site), Rezoning of 3.55 acres, being in the C-6 District, to the C-5 classification to provide for automotive related uses, **approved**.

**2001-ZON-168; 9333 Haver Way** (subject site), Rezoning 1.6 acres from the C-3, C-6 and C-S to C-5 to provide for general commercial uses, **approved**.

**2000-AP1-006; 9402 Haver Way** (subject site), Modification of conditions, related to petition 99-V2-132, terminating condition #4 which required the removal of an existing advertising sign, and to modify condition #2 to reduce the maximum height of the on-premises signs to 87 feet (maximum 102-foot tall signs previously permitted), **granted**.

**99-V2-132; 9402 Haver Way** (subject site), Variance of development standards of the Sign Regulations to provide for an 80-foot tall, 316-square foot illuminated pole sign (maximum 40 feet in height permitted), **granted**.

**93-HOV-53; 9333 Haver Way** (subject site), Variance of development standards of the Sign Regulations of Marion County to provide for the placement of an illuminated awning (non-illuminated permitted), **granted**.

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## **STAFF REPORT 2022-UV2-012 (Continued)**

### **ZONING HISTORY – VICINITY**

**2020-DV1-009; 9510 Aronson Drive** (northeast of site), Variance of development standards of the Consolidated Zoning and Subdivision Ordinance to provide for the construction of a 40-foot tall, 148-square foot pole sign with a zero-foot front setback and a pylon sign along Aronson Drive (maximum 20-foot tall, 135-square square foot pole sign permitted, five-foot front setback required, pylon signs not permitted along private streets), **granted**.

**2020-DV2-006; 3232 Harper Road** (east of site), Variance of development standards of the Consolidated Zoning and Subdivision Ordinance to provide for a 61-foot tall, 210-square foot freestanding pylon sign (maximum 25-foot tall pylon sign and 200 square feet permitted for frontage less than 500 feet), **withdrawn**.

**99-V2-132; 9402 Haver Way** (west of site), Variance of development standards of the Sign Regulations to provide for an 80-foot tall, 316 square foot illuminated pole sign (maximum 40 feet in height permitted), **granted**.

**95-V1-121; 9445 Threel Road** (east of site), Variance of use and development standards of the Sign Regulations to provide for the placement of an additional pole sign located within an integrated center (not permitted), measuring 5.58 by 28 feet and being 30 feet in height, **granted**.

**94-UV1-7; 9444 -9512 Haver Way** (northwest of site), Variance of use of the Commercial Zoning Ordinance to provide for an existing veterinary clinic to relocate from one building to another within an existing retail service/shopping center (not permitted), **granted**.

**94-V3-16; 2110 West 42<sup>nd</sup> Street** (northeast of site), Variance of development standards of the Dwelling Districts Zoning Ordinance to legally establish a fence 74 inches in height within the required front yard, and within the right-of-way and clear sight area of 42<sup>nd</sup> Street and within the clear sight area of West 42<sup>nd</sup> Street and Knollton Road, **granted**.

**89-V3-76; 9455 Haver Way** (north of site), Variance of development standards of the Sign Regulations to provide for an illuminated awning, **granted**.

**87-V1-40; 9431 Threel Road** (east of site), Variance of development standards of the Sign Regulations to provide for the erection of a 14 by 48-foot advertising pole sign on a site that does not have public street frontage, **denied**.

**85-UV1-2; 9431 Threel Road** (east of site), Variance of use of the Commercial Zoning Ordinance to provide for new and used vehicle sales with indoor and outdoor display and wall signs, **granted**.

**85-UV2-95; 9431 Haver Way** (north of site), Variance of use of the Commercial Zoning Ordinance to provide for the construction and use of a drive-through car wash, **granted**.

**84-UV1-20; 9431 Threel Road** (east of site), Variance of use of the Commercial Zoning District Ordinance to provide for the construction of a 60 by 20-foot building to be used as an automobile sales facility with offices and outdoor display of automobiles and with wall signs, **denied**.

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**STAFF REPORT 2022-UV2-012 (Continued)**

**83-HOV-62; 9445 Threel Road** (northeast of site), Variance of development standards of the Sign Regulations to allow the erection of a roof sign on a building in an integrated center, **granted.**

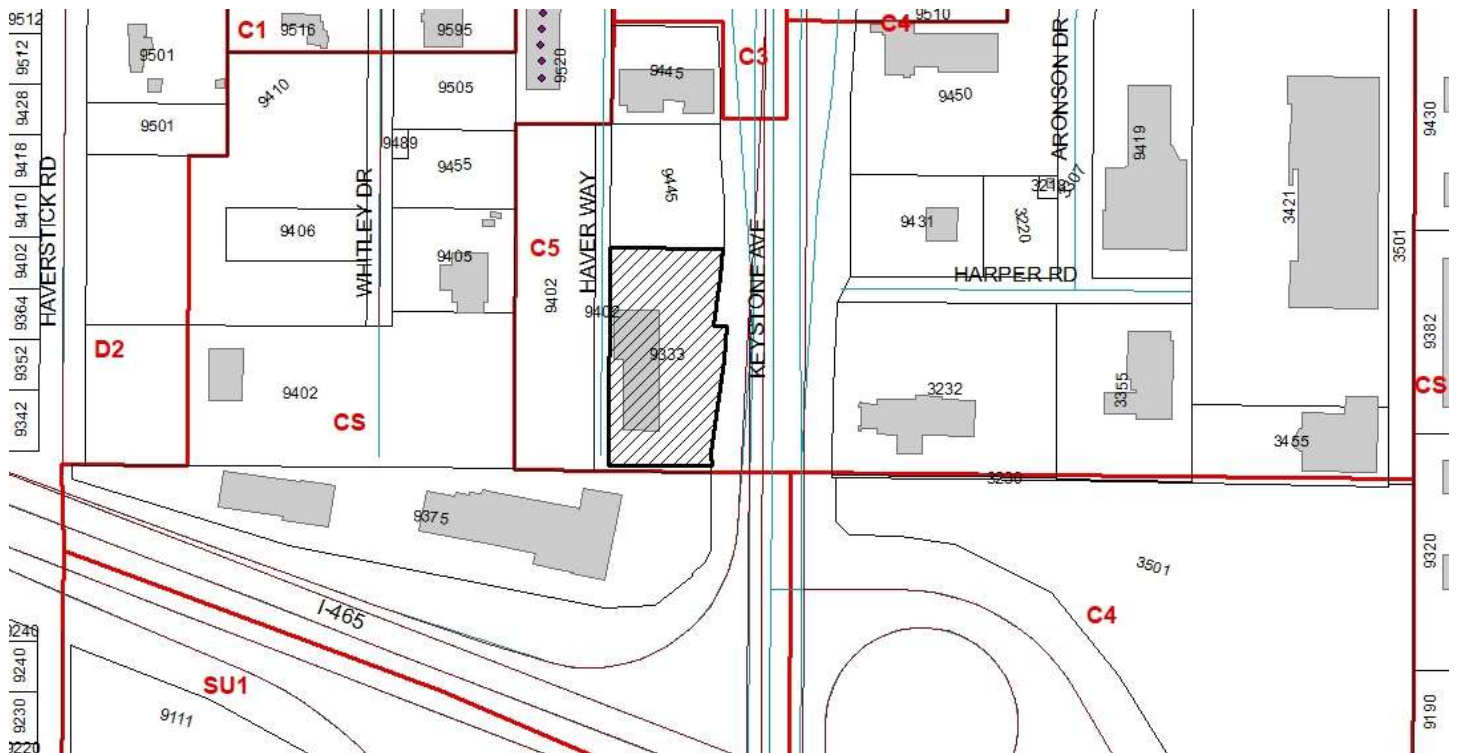
**79-A2-1; 3201 East 96<sup>th</sup> Street** (east of site), Appeal of denial of sign permit application, **denied.**

**78-V1-129; 3235 Harper Road;** (east of site), Variance to permit remodeling and maintenance of existing sign, to include an electronic message center, **denied.**

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## 2022-UV2-012; Location Map



## 2022-UV2-012; Aerial Map



## 2022-UV2-012; Site Plan



## **2022-UV2-012; Plan of Operation**

### **PLAN OF OPERATION**

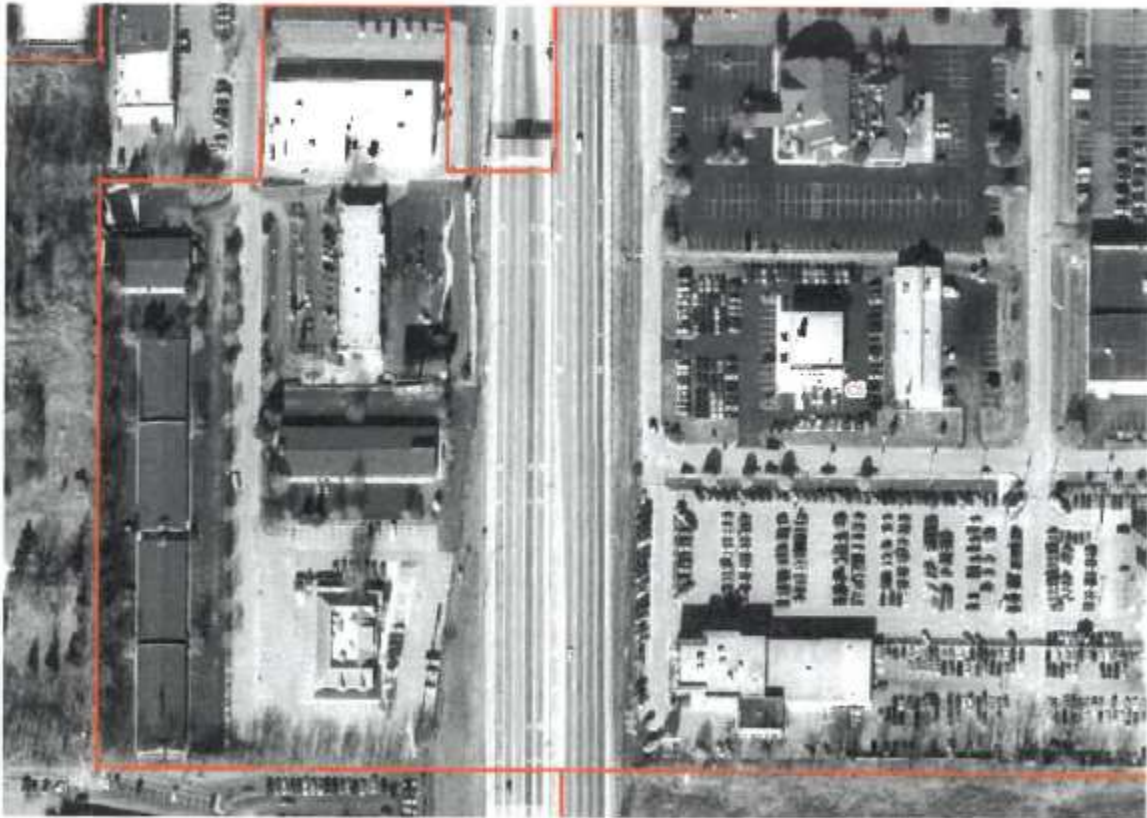
Reagan Outdoor Advertising is requesting a variance to convert an existing off-premises' static outdoor advertising sign to digital. Upon approval, of the currently requested variance, the plan of operation is as follows:

- Convert one 14'x48' static face and one 14'x48' trivision face of the existing off-premises' s advertising sign to digital.
- Upon conversion the digital signs will display static digital messages with hold times no less than 8 seconds and transitioning in less than a second which contain light sensing technology which will dim the sign in relation to surrounding ambient light, be protected with programmatic safeguards and cyber security protocols to prevent unauthorized messages, and go to "full black" in the event of a catastrophic failure.
- The digital messages will consist of off-premise message content as well as non-commercial message content.
- Each face will be oriented toward Keystone Avenue.
- The sign will be part of the national AMBER ALERT network to be utilized for messages regarding abducted children to provide information to the motoring public when seconds count to find and save an abducted child.



## 2022-UV2-012; 1995 Aerial Map

1995 Aerial Map from GIS Maps:



**2022-UV2-012; Photographs**



Photo of the existing billboard looking north.



Photo of the existing billboard looking south.





Photo of the Subject P property: 9333 Haver Way



Photo of the interstate entrance ramp and Keystone Avenue looking north.



Photo of the interstate entrance ramp and Keystone Avenue looking south.



Photo of the existing billboard sign.