



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of a Removal Order Issued to

Case No. TR-07-0026

Barbara Patterson Gumz and Roderick Gumz

FINAL DECISION

On May 15, 2007, the Department of Transportation (Department) issued a sign removal order to Barbara Patterson Gumz and Roderick Gumz (the Gumz) for a sign located along State Trunk Highway 16 in Columbia County. By letter dated June 12, 2007, Attorney Vytas P. Salna, on behalf of the Gumz, requested a hearing to review the Department's removal order. In response to the request, the Division of Hearings and Appeals conducted prehearing conferences on June 28 and September 10, 2007. Prior to the September 10, 2007 prehearing conference the Department filed a Motion to Dismiss seeking an order dismissing the Gumz' request for a hearing. Accordingly, no evidentiary hearing was scheduled and a briefing schedule for the motion was established. On October 4, 2007, the Gumz filed a brief opposing the Department's motion along with a supporting affidavit. On October 22, 2007, the Department filed a reply brief. On October 24, 2007, the Gumz filed a letter objecting to statements in the Department's reply brief.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Barbara Patterson Gumz and Roderick Gumz, by

Attorney Vytas P. Salna
417 West Wisconsin Street
Portage, WI 53901

Wisconsin Department of Transportation, by

Attorney John Sobotik
Office of General Counsel
P.O. Box 7910
Madison, WI 53707-7910

The Administrative Law Judge (ALJ) issued a proposed decision in this matter on December 21, 2007. The Department filed a letter in support of the Proposed Decision on January 10, 2008. Also on January 10, 2008, the petitioners filed objections to the Proposed Decision. The petitioners argue that the ALJ misconstrued the meaning of the word "continue"

in the phrase “continue to be lawfully maintained” as it is used in Wis. Admin. Code § Trans 201.10(2)(d). The ALJ interpreted “continue” in the commonly understood sense as remaining in existence without interruption. The petitioners argue that the word “continue” should be interpreted consistent with the definition of the word “discontinued” in Wis. Admin. Code § Trans 201.10(2)(f).

Wis. Admin. Code § Trans 201.10(2)(f), sets forth three specific circumstances under which a legal, nonconforming sign would lose that status, when the sign is destroyed, abandoned, or discontinued. Specifically, Wis. Admin. Code § Trans 201.10(2)(f) provides that a legal, nonconforming sign is considered “discontinued” “if for a period of 12 months or longer it is composed of obsolete advertising matter or is without advertising matter or is in need of substantial repair.” Based on this definition, the petitioners argue that since they allegedly reconstructed their legal, nonconforming sign with materials from the original sign approximately eleven months after it was knocked over by a tornado, the sign should be considered to have been continuously maintained for purposes of Wis. Admin. Code § Trans 201.10(2)(d).

A legal, nonconforming sign is considered to have been discontinued even if the sign structure exists but if it remains with obsolete or no advertising matter or in need of substantial repair for a period of twelve months. No basis exists to consider a legal, nonconforming sign to have been continuously maintained in compliance with Wis. Admin. Code § Trans 201.10(2)(f) as long as it is not “discontinued” for purposes of Wis. Admin. Code § Trans 201.10(2)(f). The petitioners do raise a valid point that the word “continue” in Wis. Admin. Code § Trans 201.10(2)(d) is somewhat ambiguous. Surely, a legal, nonconforming sign that is knocked over by a storm and repaired reasonably promptly should be considered to have been continuously maintained. However, in the instant matter, the petitioners completely removed the legal, nonconforming sign and replaced it with a new sign structure.

The Department issued an order requiring the petitioners to remove the new sign. After going through the process of challenging the Department’s sign removal order at an administrative hearing, the petitioners apparently tore down the new sign and erected another sign allegedly composed of material from the original sign. A sign that has been replaced for substantial period of time can not reasonably be considered to have been continuously maintained. Having reviewed the submissions of the parties and the record in this matter, I hereby adopt the Proposed Ruling of the ALJ as the Final Decision in this matter.

The Gumz are the owners of an outdoor advertising sign that was classified as a legal, nonconforming sign. That sign was damaged by a tornado on June 6, 2006. The Gumz replaced the damaged sign with a new sign. The Department issued a sign removal order alleging that the Gumz’ sign had lost its legal, nonconforming status because it had been replaced with a new sign. The Gumz requested a hearing to review the Department’s sign removal order. After a hearing, the Division of Hearings and Appeals issued an order affirming the Department’s sign removal order. The Gumz subsequently took down the replacement sign and erected another sign at the site allegedly using a substantial amount of material from the destroyed sign structure.

The basis of the Department's Motion to Dismiss is that the question of whether the Gumz' sign can be maintained as a legal, nonconforming sign has already been litigated and that the Division of Hearings and Appeals is barred from conducting a hearing on the Gumz' new request for a hearing by claim preclusion. The grounds for removal in the Department's order in the instant matter is that the sign has been erected without a permit. The Gumz' defense to the removal order is that they replaced the new sign structure that had been the subject of the previous hearing with a sign structure allegedly comprised mostly of the materials from the sign that had been damaged by the tornado. The issue in the previous matter was whether the legal, nonconforming sign had lost its legal, nonconforming status because it had been replaced with a new sign structure. The issue in this matter is whether the sign can regain legal, nonconforming status if the material from the original sign is used. Since the issues are distinguishable, claim preclusion is not applicable.

Alternatively, the Department argues that the Gumz' sign lost its legal nonconforming status because it has not been continually maintained. This argument is more appropriately considered in a motion for summary judgment and will be considered as such. The procedure for summary judgment for civil actions in circuit court is governed by Wis. Stat. § 802.08. For purposes of this ruling the procedure applicable for civil actions will be followed. The purpose of summary judgment is to obviate the need for a trial where there is no genuine issue to any material fact. *Heck & Paetow Claim Service, Inc. v. Heck*, 93 Wis. 2d 349, 286 N.W.2d 831 (1980). Summary judgment is not available if any disputed facts exist or if reasonable inferences leading to conflicting results may be drawn on the basis of uncontested facts. *Tomlin v. State Farm Mut. Auto Liability Ins. Co.*, 95 Wis. 2d 215, 290 N.W.2d 285 (1980).

For purposes of considering a motion for summary judgment, it will be assumed that the current sign structure consists predominantly of material from the original legal, nonconforming sign. The issue is whether the Gumz' sign can regain its legal, nonconforming status if material from the original sign is reused. The facts necessary to rule on this issue are undisputed. To be maintained as a legal, nonconforming sign, the sign must remain continually in existence. The Gumz' legal, nonconforming sign was not in existence for a period of approximately eleven months. This determination is based on the fact the sign was destroyed by a tornado on June 6, 2006, and reerected on May 10, 2007 (affidavit of Roderick Gumz). In the interim, the Gumz erected a new sign on the site. Accordingly, the Gumz' legal, nonconforming sign was not continually in existence.

Even assuming that the current sign is comprised predominantly of material from the original legal, nonconforming sign, that sign was completely removed and replaced with a new sign. The Gumz have now replaced that sign with another new sign, albeit one comprised of material from the original sign. The Gumz did not repair a legal, nonconforming sign. They completely removed it and subsequently rebuilt it. As such the sign was not continually in existence and has, therefore, lost its legal, nonconforming status.¹

¹ As a separate basis for finding that the Gumz' sign has lost its legal, nonconforming status, in its reply brief the Department argues that the Gumz have "impliedly" admitted that their sign has been relocated. Pursuant to Wis. Admin. Code § TRANS 201.10(2)(c), a legal, nonconforming sign can not be relocated. Although the Department may interpret statements made by the Gumz as an admission that the sign has been relocated, the fact that the sign has been relocated is not expressly undisputed. Accordingly, no determination will be made that the Gumz' sign has lost its legal, nonconforming status based on a finding that it has been relocated. However, since the Gumz' sign has

Conclusions of Law

The Administrator concludes:

1. Pursuant to Wis. Admin. Code § Trans 201.10(2)(d), for a legal, nonconforming sign to be maintained it must have been lawful on the effective date of the state law and must continue to be lawfully maintained. As discussed above, the Gumz' sign was not in existence for a period of approximately eleven months and therefore, has not been maintained in compliance with the requirements of Wis. Admin. Code § Trans 201.10(2)(d). Pursuant to Wis. Admin. Code § Trans 201.10(2), a nonconforming sign which has not been maintained in compliance with the requirements of Wis. Admin. Code § Trans 201.10(2)(d) may not be lawfully maintained and continue as a legal, nonconforming sign. A sign which loses its legal nonconforming status is subject to removal.

2. Pursuant to Wis. Stat. §§ 84.30(18) and 227.43(1)(bg), the Division of Hearings and Appeals has the authority to issue the following orders.

Order

The Administrator orders:

The sign removal order issued by the Department on May 15, 2007, with respect to the sign owned by Barbara and Roderick Gumz is affirmed.

Dated at Madison, Wisconsin on January 17, 2008.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
David H. Schwarz
Administrator

clearly lost its legal, nonconforming status because it has not been continuously maintained, it is not necessary to conduct an evidentiary hearing make a determination on this issue.

NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. The Division of Hearings and Appeals shall be served with a copy of the petition either personally or by certified mail. The address for service is:

DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400

Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. § 227.52 and 227.53 to insure strict compliance with all its requirements.