Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Sign Removal Order Issued by the Department of Transportation to ADMAR Real Estate Co., LLC/Scully Real Estate Co. II (Oasis #19705)	Case No. TR-09-0001
In the Matter of the Sign Removal Order Issued by the Department of Transportation to ADMAR Real Estate Co., LLC/Scully Real Estate Co. II (Oasis #19706)	Case No. TR-09-0002

FINAL DECISION

With respect to Case No. TR-09-0001, the Department of Transportation (Department) issued a Sign Removal Order dated December 19, 2008, to ADMAR Real Estate Co., LLC/Scully Real Estate Co. II (Admar). The order informed the company that a permit the Department had issued for a sign Admar owned or controlled was revoked and the sign must be removed within sixty days. The subject sign is located along Highway 90/94 approximately 580 feet east of CTH "C" in Juneau County. On January 7, 2009, the Division of Hearings and Appeals (DHA) received a letter from Jeffrey T. Scully requesting a hearing to review the Department of Transportation's removal order.

With respect to Case No. TR-09-0002, the Department issued a Sign Removal Order dated December 19, 2008, to Admar. The order informed the company that a permit the Department had issued for another sign Admar owned or controlled was revoked and the sign must be removed within sixty days. The second sign is also located along Highway 90/94 approximately 1270 feet east of CTH "C" at reference point 55G+.11. On January 7, 2009, the DHA received a letter from Jeffrey T. Scully requesting a hearing to review the Department of Transportation's removal order.

Pursuant to due notice, the DHA conducted a combined hearing in these matters on June 11, 2009, in Madison, Wisconsin. Mark J. Kaiser, Administrative Law Judge, presided. The parties filed post-hearing briefs. The parties filed simultaneous initial briefs. The petitioner's brief was received on August 21, 2009, and the Department's brief was received on August 25, 2009. The parties filed simultaneous reply briefs on September 16, 2009.

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

ADMAR Real Estate Co., LLC/Scully Real Estate Co. II, by

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The Administrative Law Judge issued a Proposed Decision on December 22, 2009. On January 11, 2010, the petitioner filed comments objecting to the Proposed Decision. The petitioner objected to several of the Findings of Fact in the Proposed Decision. The petitioner contended that the Findings of Fact should be amended to include additional facts. In response to the petitioner's objections two of the Findings of Fact have been amended. The reference to County Trunk Highway "C" in paragraph two has been amended to clarify that the road has been relocated and paragraph three has been amended to indicate that the basis of the finding that the annexation was recorded in 2009 is the testimony of Carolyn Hoeth. Other additions to the Findings of Fact requested by the petitioner are supported by the evidence in the record; however, the additional facts are immaterial to the issues in this matter and have not been incorporated into the Final Decision.

The critical issue in this matter is a legal issue. The issue is whether the land on which the subject signs are located constitutes a "business area" for purposes of Wis. Stat. § 84.30. In his objections, the petitioner renews his argument that the business areas along interstate highways should include "unzoned commercial or industrial areas" as that phrase is defined at Wis. Stat. § 84.30(2)(k). The petitioner's amendments to the proposed Findings of Fact are material if "business area" is interpreted in this manner. However, the arguments the petitioner raises in support of its contention that for purposes of Wis. Stat. § 84.30, "business area" should also include "unzoned commercial or industrial areas" as that phrase is defined at Wis. Stat. § 84.30(2)(k) along interstate highways is unpersuasive. As explained in the Proposed Decision, the conclusion that adjacent areas along interstate highway can be classified as a business area only if the area is a commercial or industrial zones and within the boundaries of an incorporated municipality, as those boundaries existed on September 1, 1959 or is an area where the land-use

as of September 1, 1959, was clearly established by state law as industrial or commercial is consistent with the statutory language.

The petitioner also objects to the determination in the Proposed Decision that estoppel is not available against the Department when it is regulating outdoor advertising signs. However, the petitioner cites no authority for its contention that estoppel can be considered against the Department in this case. Having reviewed the submissions of the parties and the record in this matter, other than the two amendments to the Findings of Fact discussed above the Proposed Decision is adopted as the Final Decision in this matter.

Findings of Fact

The Administrator finds:

1. Scully Real Estate II, LLC, owns real property in the Village of Camp Douglas, Juneau County, Wisconsin. The property is located between United States Highway 12 (USH 12) and Interstate Highway 90/94 (I-90/94). Jeff Scully is the owner of Scully Real Estate II, LLC. Jeff Scully also owns Admar Real Estate Company, LLC, and Scully Oil Company. For purposes of this decision these companies will be referred to collectively as Scully, unless it is necessary to distinguish the companies.

2. The property owned by Scully Real Estate II, LLC, was originally part of a ninety acre parcel owned by Julien and Gladys Olsen. Sometime prior to 1959, the Olsens began operating an A&W Root Beer stand on the property on a seasonal basis. At that time the property was in the Town of Orange, outside the corporate boundaries of the Village of Camp Douglas. The A&W Root Beer stand was located along USH 12 near the intersection of a local road, County Trunk Highway "C," that has since been relocated.

3. In 1962, the Olsens sold the land and the A&W Root Beer stand to Ronald Lauden. Mr. Lauden continued to operate the A&W Root Beer business. In 1965, Mr. Lauden opened a gas station on the property and in 1969 constructed a motel on the property. Also in 1969, Mr. Lauden petitioned to have the property annexed by the Village of Camp Douglas. The Village of Camp Douglas did annex the property in 1969, although the annexation was not recorded until 2009 (testimony of Carolyn Hoeth, tr. 22).

4. In the early 1960s, a portion of the Olsen property was purchased for the construction of I-90/94. The construction of I-90/94, bisected the property. As part of the construction of I-90/94, the stretch of County Trunk Highway "C" (CTH "C") that formed the northern boundary of the Olsen property was relocated and the former CTH "C" was vacated. Starting in 1981, the remaining property on the south side of I-90/94, was subdivided into four parcels. Exhibit P11 is a diagram of the property as it has been subdivided and a chain of title for the property is set forth in exhibit P32. On exhibit P11, the parcels owned by Scully are identified by the letters "C," "D," "E," and "F." The A&W Root Beer stand is on parcel "B." Parcel "B" is currently owned by Carl Chase who uses the property to store towed vehicles. The former A&W Root Beer building is rented for storage.

5. In September of 2007, Scully applied to the Department of Transportation for permits to erect two off-premise outdoor advertising signs (exh P15).[1] Both signs were to be erected on property he owned along the south side of I-90/94. One sign was to be constructed 580 feet east of CTH "C" (western sign) and the other 1270 feet east of CTH "C" (eastern sign). Along with the permit applications, Mr. Scully submitted a document titled "Documentation of Zoning." In the Documentation of Zoning, the clerk for the Village of Camp Douglas verified that the site for the proposed signs was zoned B-1, Highway Commercial District and that it had been within the village limits prior to 1959 (exh. P15).

6. On October 10, 2007, the Department issued two off-premise sign permits to Scully. In the cover letter accompanying the permits, the Department's sign permit coordinator indicated that "[i]f th[e] permit application included misrepresentation or . . . the sign does not comply with regulations, this permit may be revoked." (exh. P17) The western sign was assigned OASIS no. 19705 and the eastern sign was assigned OASIS no. 19706.

7. Pylons for the two signs were erected sometime in the fall of 2008 (Jeff Scully testified that he waited a year to a year and a half after he received the permits before he began the construction of the signs). Before the construction of the signs could be completed, the Department received a complaint from an employee of the Collins Sign Company informing the Department that the land on which the signs were located was not within the limits of the Village of Camp Douglas on September 1, 1959. After further investigation, the Department determined that the land on which the signs are located was not in fact within the limits of the Village of Camp Douglas on September 1, 1959.

8. On December 19, 2008, the Department issued separate sign removal orders for each of the signs. The removal orders revoked the permits and directed Mr. Scully to remove the signs within sixty days of the removal orders (exhs. P23 and P25). The stated reason for the revocation of the permits was that the Department discovered that the sites on which the subject signs are located was not within the boundaries of the Village of Camp Douglas or commercially zoned on September 1, 1959.

9. In 1959, the only commercial activity in the vicinity of the sites on which the two signs are located was the A&W Root Beer stand. The remainder of the property was pasture land (testimony of Rolf Kurandt). The land was unzoned until 1977. The distance from the former A&W Root Beer stand to the western sign is approximately 263 feet and from the root beer stand to the eastern sign is approximately 778 feet (exh. P20).

[1] The actual date the applications were filed is not clear. The application in the record is dated July 25, 2007, the Documentation of Verification is dated August 8, 2007, and the checks covering the permit fees are dated September 19, 2007 (exh. P16).

Applicable Statutes

Wis. Stat. § 84.30(3)(e) provides:

> No sign visible from the main-traveled way of any interstate or federal-aid highway may be erected or maintained, except the following:
>
> . . .
>
> (e) Signs to be erected in business areas subsequent to March 18, 1972 which when erected will comply with sub. (4).

Wis. Stat. § 84.30(2)(b) sets forth the following definition:

> (b) "Business area" means any part of an adjacent area which is zoned for business, industrial or commercial activities under the authority of the laws of this state; or not zoned, but which constitutes an unzoned commercial or industrial area as defined in par. (k). In adjacent areas along the interstate system business areas shall be limited to commercial or industrial zones within the boundaries of incorporated municipalities, as those boundaries existed on September 1, 1959, and all other areas where the land-use as of September 1, 1959, was clearly established by state law as industrial or commercial.

Discussion

The subject signs cannot be maintained without state sign permits. The petitioner presented considerable evidence regarding the history of the land on which the subject signs are located. However, eligibility for state sign permits depends on whether the site on which each sign is located is a “business area.” The phrase “business area” is defined at Wis. Stat. § 84.30(2)(b). For areas adjacent to interstate highways, business areas are limited to two distinct categories of land. One category is “commercial or industrial zones within the boundaries of incorporated municipalities, as those boundaries existed on September 1, 1959.” The other category is “all other areas where the land-use as of September 1, 1959, was clearly established by state law as industrial or commercial.”

Despite the verification in the Documentation of Zoning prepared by the clerk of the Village of Camp Douglas, it is now undisputed that the site on which the signs are located was not within the corporate boundaries of the Village of Camp Douglas on September 1, 1959. At the hearing, the petitioner attempted to establish that the sites on which the subject signs are located was clearly established by state law as industrial or commercial as of September 1, 1959. On September 1, 1959, the use of this land was agricultural except for the existence of the seasonal A&W Root Beer stand. One of the signs, OASIS No. 19705, is located approximately

263 feet from the former A&W Root Beer stand and the other sign, OASIS No. 19706, is located approximately 778 feet from the former A&W Root Beer stand.

The phrase "clearly established by state law" is not defined in Wis. Stat. § 84.30 or in any applicable administrative regulations. Neither of the parties has cited any cases interpreting this part of the statute. The Department asserts that the phrase "clearly established by state law means that the area involved must have been zoned commercial or industrial as of September 1, 1959. The petitioner argues that the definition of "unzoned commercial or industrial areas" found at Wis. Stat. § 84.30(2)(k) should also be applicable in this case. Wis. Stat. § 84.30(2)(k) provides:

> "Unzoned commercial or industrial areas" mean those areas which are not zoned by state or local law, regulation or ordinance, and on which there is located one or more permanent structures devoted to a commercial or industrial activity or on which a commercial or industrial activity is actually conducted whether or not a permanent structure is located thereon, and the area along the highway extending outward 800 feet from and beyond the edge of such activity. Each side of the highway will be considered separately in applying this definition. All measurements shall be from the outer edges of the regularly used buildings, parking lots, storage or processing and landscaped areas of the commercial or industrial activities, not from the property lines of the activities, and shall be along or parallel to the edge or pavement of the highway.

Applying the petitioner's interpretation of the definition of "business area" would mean that the only difference between the treatment of adjacent areas along interstate highway and those along primary highways would be the date on which the commercial activity would have had to have been in existence.[2] This interpretation would render the phrase "clearly established by state law" superfluous. "A statute should be construed so that no word or clause shall be rendered surplusage and every word if possible should be given effect." (citation omitted) *Donaldson v. State*, 93 Wis. 2d 306, at 315, 286 N.W.2d 817 (1980).

The definition of "business area" at Wis. Stat. § 84.30(2)(b), makes clear that areas adjacent to interstate highways are a special case and are to be regulated more strictly than other adjacent areas. Applying the accepted rules of statutory construction, the Department's interpretation of the phrase "clearly established by state law" means that adjacent areas along interstate highways must have been zoned commercial or industrial as of September 1, 1959, to be considered "business areas" for purposes of Wis. Stat. § 84.30 is reasonable. It is also noteworthy that the Department discovered that the subject permits were issued in error after receiving a complaint from an outdoor advertising company. This fact indicates that the Department's interpretation of "business area" was understood and accepted in the outdoor advertising industry.

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[2] Pursuant to Wis. Stat. § 84.30(2)(i), primary highways are "any highway, other than an interstate highway, at any time officially designated as a part of the federal-aid primary system by the department and approved by the appropriate authority of the federal government."

The other argument raised by petitioner is that he has spent a considerable amount of money in reliance of the issuance of the permits by the Department. In this case, it is not the petitioner relying on the Department, but the Department and the petitioner relying on verification from the clerk of the Village of Camp Douglas. However, even assuming *ab arguendo* that the petitioner had reasonably relied on permits issued in error by the Department, that reliance is not a defense to the revocation of the permits or the sign removal orders. The regulation of outdoor advertising is considered a police power. *J & N Corp. v. Green Bay*, 28 Wis.2d 583, at 585, 137 N.W.2d 434 (1965). The doctrine of estoppel cannot be used against the state when it is exercising a police power. *Department of Revenue v. Moebius Printing Co.*, 89 Wis.2d 610, at 639, 279 N.W.2d 213 (1979).

Conclusions of Law

The Administrator concludes:

1. The sites on which the subject signs have been constructed do not constitute a "business area" within the definition of business area at Wis. Stat. § 84.30(2)(b), because the area on which the two signs have been constructed was neither within the boundaries of the Village of Camp Douglas or in an area where the land use was clearly established by state law as industrial or commercial on September 1, 1959. Pursuant to Wis. Stat. § 84.30(3)(e), the site is not eligible for permits for off-premise outdoor advertising signs.

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.

Orders

The Administrator orders:

1. The Department of Transportation's revocation of the permit for the sign identified as OASIS No. 19705 and the removal order for that sign is AFFIRMED.

2. The Department of Transportation's revocation of the permit for the sign identified as OASIS No. 19706 and the removal order for that sign is AFFIRMED.

Dated at Madison, Wisconsin on January 28, 2010.

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

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.