



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Sign Removal Order for a Sign
Owned or Controlled by Chuck Decker

Case No. TR-07-0018

FINAL DECISION

On April 25, 2007, Chuck Decker received a sign removal order from the Department of Transportation informing him that a sign owned by him was illegal and must be removed. The sign is located along United States Highway 41/141, south of County Trunk Highway "D" in Oconto County. By letter dated May 14, 2007, Attorney Thomas S. Hornig, on behalf of Chuck Decker requested a hearing pursuant to Wis. Stat. § 84.30(18) to review the Department of Transportation's removal order. Pursuant to due notice, a hearing was conducted on September 27, 2007, in Green Bay, Wisconsin. Mark J. Kaiser, administrative law judge, presided. The parties filed post-hearing briefs. The last submission was received on October 2, 2007.

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

Chuck and Debra Decker, by

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The Administrative Law Judge (ALJ) issued a proposed decision in this matter on November 8, 2007. The Department of Transportation (Department) filed a letter in support of the Proposed Decision on November 23, 2007. The petitioners filed objections to the Proposed

Decision on November 26, 2007. In their objections, the petitioners objected to the ALJ's interpretation of the application of the doctrine of equitable estoppel to actions by state agencies. In the Proposed Decision, the ALJ concluded that the elements of equitable estoppel exist in this matter, but that the doctrine is not available in this matter. In their objections, the petitioners argue that the doctrine of equitable estoppel should apply in this matter. As support for this contention, the petitioners cite *State of Wisconsin v. City of Green Bay*, 96 Wis. 2d 195, 291 N.W.2d 508(1980).

State v. City of Green Bay involves the appeal of an action commenced against the City of Green Bay to enforce four orders issued by the Department of Natural Resources (DNR) concerning solid waste disposal facilities and seeking forfeitures from the City of Green Bay for failures to comply with those orders. The City of Green Bay asserted the defense of equitable estoppel to the action. The court found that the elements of an estoppel defense were present and was available in the case. However, the City of Green Bay did not challenge the validity of the DNR orders. The only issue was the forfeitures for violations of those orders. The Court held that under the circumstances it would be inequitable to require the City of Green Bay to pay a forfeiture and that the public interest would not be unduly harmed by not requiring the City of Green Bay to pay a forfeiture.

In an earlier opinion, the Court said, “[s]trong reasons of public policy exist why estoppel should not be invoked against the government, or an agency of government, when it is sought to exercise the police power for the protection of the public health, safety, or general welfare.” *Park Bldg. Corp. v. Industrial Comm.*, 9 Wis. 2d 78, 100 N.W. 2d 571 (1968). In its opinion in *State v. City of Green Bay*, the Court expressly distinguished the circumstances in that case from those in *Park*. In *Park*, the appellant was seeking to be exempted from a building code requirement. The court held that the building code requirement was promulgated to protect public safety and that estoppel could not be invoked against the state agency when it was enforcing a safety order. In its opinion in *State v. City of Green Bay*, the Court stated “[i]n the case at bar, unlike in *Park*, the city is not asking that it be excused from complying with laws, regulations and orders adopted for the public safety. The city is asking that it not be required to pay a forfeiture to the state. *State v. City of Green Bay, supra*, 96 Wis. 2d at 210.

In *State v. City of Green Bay*, the result was not that the DNR's orders were set aside, but that the City of Green Bay was not required to pay the statutory forfeiture. In the instant matter, the petitioners are not asserting that they are entitled to keep the subject sign in place, but rather that they are entitled to compensation for its loss. The ALJ similarly concluded that the subject sign has lost its legal, nonconforming status and is subject to removal, but that the petitioner is entitled to file a claim against the Department with the Claims Board. The only apparent difference between the Proposed Decision and the position of the petitioners is that the Proposed Decision indicates that the petitioners can seek compensation for their lost signs through the Claims Board, while the petitioners argue that they are entitled to seek compensation under the provisions of Wis. Stat. § 84.30. The petitioners do not explain the significance of this difference.

As described in the Proposed Decision, the actions by some Department employees in this matter caused the Deckers' sign to lose its legal, nonconforming status. The Deckers

unquestionably relied on statements and actions by these employees to their detriment. However, the remedy in this matter is not to allow an unlawful sign to be maintained, but to compensate the Deckers for their loss. Other than minor editorial modifications, the Proposed Decision is adopted as the final decision in this matter.

FINDINGS OF FACT

The Administrator finds:

1. Chuck and Debra Decker (the Deckers) currently own an outdoor advertising sign located along the east side of United States Highway 41/141 (USH 41/141). The sign is ten feet by 28 feet in size and is located approximately 1250 feet south of the centerline of County Trunk Highway "D" (CTH "D") in section 2, Town of Abrams, Oconto County (testimony of Thomas Tilleman). The sign is located on a parcel identified as "parcel 152." For purposes of this decision the sign will be referred to as the "parcel 152 sign." The sign has advertised the Deckers' fireworks business, Uncle Sams Fireworks. The sign currently advertises Chrysler World, a Chrysler motor vehicle dealership.

2. The Deckers purchased the parcel 152 sign from Joy Fuller in 1995. The sign had been maintained by Ms. Fuller and her deceased husband and advertised Joyful Acres Campground, a business operated by the Fullers. At the time the Deckers purchased the sign it also included advertising matter for the Sandalwood Country Club. The Fullers' sign was apparently originally permitted as a directional sign. However, the parcel 152 sign is now classified in the Wisconsin Department of Transportation (Department) sign inventory as a legal, nonconforming sign (exh. "G").¹ The sign is identified as OASIS # 3551 in the Department's sign inventory.

3. The parcel 152 sign is located on land owned on Mike Rowell. The land on which the sign is located is zoned agricultural. Mr. Decker has 43 years remaining on a lease for the land on which the sign is located. The sign is visible from the main-traveled way of USH 41/141. USH 41/141 is part of the federal-aid primary highway system.

4. Beginning in the 1990s, the Department widened and rebuilt USH 41/141, including the stretch through Oconto County. On June 25, 1997, the stretch of USH 41/141 along which the subject signs were located was designated a freeway (exh. "C"). Prior to the improvement of USH 41/141, the intersection of USH 41/141 and CTH "D" was an at grade intersection. The intersection of USH 41/141 and CTH "D" is now a separated grade intersection. The 152 parcel sign is located adjacent to an exit ramp from the northbound lanes

¹ At the hearing, the Department presented an exhibit indicating that the sign at the site was originally permitted as a directional sign. Mr. Decker testified that he purchased that sign and replaced the existing sign face with one containing an off-premise advertising message. It is not clear at what point the sign became classified as a legal, nonconforming sign; however, it is undisputed that the Department considered the sign to be a legal, nonconforming sign. The Department also assessed the Deckers annual fees for the sign as an off property sign (exh.16). Although there is no apparent basis for the sign to be classified as a legal, nonconforming sign, it will be treated as one for purposes of this decision.

of USH 41/141. The sign is located 675 feet north of the beginning of the taper for the exit ramp (testimony of Thomas Tilleman).

5. The Deckers also owned a sign located along the east side of USH 41/141 approximately 2338 feet north of Allen Road (exh. 24). This sign was located on a parcel identified as “parcel 81-1” and for purposes of this decision will be referred to as the “parcel 81-1 sign.” The Deckers owned the real estate upon which the parcel 81-1 sign was located.

6. In 1999, the Department purchased the real estate upon which the parcel 81-1 sign was located from the Deckers for the highway improvement project. According to the testimony of Cindy Magray, the Department’s real estate agent for the Northeast Region (formerly District 3), the Department’s policy at the time the Deckers’ property was purchased was to negotiate compensation for outdoor advertising signs separately from the purchase of the real estate. Mel Martin, the Department’s sign permit coordinator in this region at the time, was responsible for negotiating compensation for the parcel 81-1 sign with the Deckers.

7. Before the compensation for the parcel 81-1 sign could be negotiated, a construction crew working on the USH 41/141 improvement project destroyed the sign. Mel Martin suggested that in lieu of monetary compensation for the destroyed sign, the Department could assist the Deckers with replacing the lost sign at another location. No alternative site for a replacement sign was located. Ultimately Mr. Martin and the Deckers agreed to have the Department pay for the rebuilding and enlarging the Deckers’ parcel 152 sign as compensation for the loss of the parcel 81-1 sign.

8. At the time the Deckers purchased the parcel 152 sign from Ms. Fuller, the sign face was eight feet by eight feet in size. Mr. Decker removed the existing sign face and replaced it with a new face 120 square feet in size. Mel Martin hired Jones Sign Company to rebuild the Deckers’ sign on parcel 152. After the sign was rebuilt, the sign face was enlarged to its current size of 280 square feet. The rebuilding of the parcel 152 sign was done in 2000. The Department paid Jones Sign Company \$8,864.00 to rebuild and enlarge the parcel 152 sign (exh. F).

9. The Department also paid the Deckers \$1500.00 to cover the relocation of the parcel 81-1 sign. The Deckers testified that they were told the \$1500.00 payment was a “finders fee” for locating a new site for the sign. This testimony was confirmed by Mel Martin. The documentation associated with the payment identifies the payment as reimbursement for the relocation expenses for the sign (exh. D).

10. On September 12, 2001, the Oconto County zoning enforcement administrator issued a sign removal notice to Mr. Decker and Mike Rowell for the rebuilt sign on parcel 152 (exh. I). The sign removal notice alleged that the sign was unlawful because it was erected without a permit and was on land that is in an Agricultural District. On October 10, and November 3, 2001 Mel Martin, on behalf of the Deckers, sent letters to the Oconto County zoning administrator explaining that the Department had paid for the rebuilding of the parcel 152 sign and that the rebuilding was within the allowable limits for maintenance on a legal, nonconforming sign (exh. J). In the letters, Mr. Martin stated that the sign was the result of a

legal rebuild, and that the total cost of the rebuild was \$816.00, which is less than 50% of the sign's replacement cost.

11. Mel Martin retired from the Department in 2002. He was replaced by Ed Jaskolski. On November 29, 2002, Mr. Jaskolski, issued a removal notice for the parcel 152 sign. After a meeting on December 16, 2002, between the Deckers and various Department personnel including Mel Martin (then retired), it was decided that Ed Jaskolski would help the Deckers find a new location for the sign, and the sign removal order was rescinded (exh. 15). No new site for the sign was located and the sign was allowed to be maintained on parcel 152.

12. In 2004, the Department issued another sign removal order for the parcel 152 sign (exh. 7). This removal order was also rescinded.

13. On April 24, 2007, the Department issued another sign removal order for the parcel 152 sign (exh. "R"). The grounds for the removal listed in the order are as follows:

- WisDOT paid you \$1500 to remove a nonconforming sign at approximately the above location on March 28, 2000.
- That sign was removed in 2000.
- That sign could not be enlarged, replaced or relocated under section 201.10 W.A.C. and section 84.30(5), Stats.
- Jones Sign Company erected a larger sign for you at a different location but nearby visible from a federal-aid freeway in violation of section 84.30(5), Stats. WisDOT made a payment of \$8864 on March 28, 2000 to Jones Sign Company.
- The sign was erected without a required permit. Under s. Trans 201.09, Wis. Admin. Code, a permit is required to erect a new sign visible from a primary highway. The sign now existing at this location is a new illegal sign. No permit has been issued for that sign.
- This sign is located within 500 feet of the taper in violation of section 84.30(4)(c)2., Stats.
- This sign is located within 500 feet of another sign in violation of section 84.30(4)(c)2., Stats.
- In the alternative, the sign was enlarged and the face material was changed in October of 2006 in violation of section 201.10 W.A.C. and section 84.30(5), Stats.
- The sign was erected in violation of local zoning laws.

14. The parcel 152 sign lost its legal, nonconforming status because it was rebuilt and enlarged. The sign can no longer be maintained without a permit. The sign is not eligible for a permit at its present location because it is located within the taper of the intersection and the land on which it is located is zoned agricultural.

Discussion

Although not completely supported by the documentary evidence, the credible testimony at the hearing is essentially undisputed. What happened is relatively clear. Why it happened is not. It is undisputed that the Deckers owned a legal, nonconforming sign located at parcel 89-1 along the east side of USH 41/141. The Department needed the land on which the sign was located for a highway improvement project. The Department negotiated with the Deckers for the purchase of their land. Although there are documents that suggest that the negotiated price also included the sign, the testimony of Mr. Decker and the Department witnesses who were involved in the negotiations indicates that the Department intended to negotiate compensation for the sign separately. Before compensation could be negotiated, the sign was destroyed.

Rather than negotiating monetary compensation for the destroyed sign, Mel Martin offered to have the Department pay for the rebuilding and enlargement of another sign owned by Mr. Decker, the parcel 152 sign. Mr. Martin also arranged for the payment of \$1500.00 to Mr. Decker to cover the "relocation expense" of the destroyed sign. Mr. Martin testified that the parcel 152 sign was not rebuilt, but only repositioned so that it would not encroach on the highway right of way. This is not true. The existing sign was removed and an entirely new and larger sign was constructed at the site. The fact that the rebuilding of the sign was arranged and paid for by the Department does not alter the fact the rebuilding of the sign caused it to lose its legal, nonconforming status. It only demonstrates that the rebuilding was done with the knowledge and acquiescence of the Department.

Mr. Decker does not argue that the parcel 152 sign was rebuilt and enlarged in violation of Wis. Admin. Code § 201.10(2)(e). Rather, he argues that the Department should be estopped from seeking the removal of the sign based on its involvement in the rebuilding and enlargement of the sign. The elements of an estoppel defense are:

- 1) Action or nonaction which induces
- 2) Reliance by another
- 3) To his detriment.

State v. City of Green Bay, 96 Wis. 2d, 195, at 205, 291 N.W.2d 508.

The elements of estoppel are all present in this case with respect to the parcel 152 sign. However, the principle is well established that estoppel is not available against governmental bodies when the governmental action involves a police power. In its opinion in *Department of Revenue v. Moebius Printing Co.*, 89 Wis.2d 610, 279 N.W.2d 213 (1979), the Wisconsin Supreme Court commented:

We have not allowed estoppel to be invoked against the government when the application of the doctrine interferes with the police power for the protection of the public health, safety or general welfare. *State v. Chippewa Cable Co.*, 21 Wis.2d 598, 608, 609, 124 N.W.2d 616 (1963); *Park Bldg. Corp. v. Ind. Comm.*, 9 Wis.2d 78, 87, 88, 100 N.W.2d 571 (1960); *Town of Richmond v. Murdock*, 70

Wis.2d 642, 653, 654, 235 N.W.2d 497 (1975); *McKenna v. State Highway Comm.*, 28 Wis.2d 179, 186, 135 N.W.2d 827 (1965); *Milwaukee v. Milwaukee Amusement, Inc.*, 22 Wis.2d 240, 252-53, 125 N.W.2d 625 (1964).

89 Wis.2d 610, 639

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).

In his post-hearing brief, Mr. Decker argues that the phrase “for the protection of the public health, safety or general welfare” in the above quote from the opinion in *Department of Revenue v. Moebius Printing Co.*, is meant to limit the situations in which estoppel can not be used against the government. Mr. Decker appears to be suggesting that only when the government is using police power for the protection of the public health, safety or general welfare is a party not allowed to invoke the doctrine of estoppel against a governmental body. However, this phrase is simply part of the definition of “police power.” “The police power of the state is the inherent power of government to promote the general welfare. It covers all matters having a reasonable relation to the protection of the public health, safety or welfare. (citations omitted)” *State v. Interstate Blood Bank, Inc.*, 65 Wis. 2d 482, at 490, 222 N.W.2d 912 (1974).

The Deckers lost the use of the parcel 89-1 sign when the property on which the sign was located was purchased by the Department for a highway improvement project. The Deckers were entitled to compensation for the loss of that sign. However, rather than compensate them monetarily, the Department agreed to compensate them by paying for the relocation and rebuilding of the sign. When no one was able to find another site for which a sign permit could be issued, the Department then agreed to pay for the enlargement of another legal, nonconforming sign owned by the Decker. It is unlawful to enlarge a legal, nonconforming sign. Accordingly, through the Department’s actions, the parcel 152 sign lost its legal, nonconforming status and now has been the subject of a series of Department sign removal orders. (At the hearing, the Department suggested that the sign should not have been classified as a legal, nonconforming sign. This allegation was not one of the grounds for removal of the sign cited in any of the removal orders issued to the Deckers and; therefore, is beyond the scope of this hearing. However, it is mentioned to demonstrate the confusing history of the subject sign.)

The Deckers do not dispute that the parcel 152 sign was rebuilt and enlarged. The real issue is what remedy is available in this matter. Arguably, because of the Department’s involvement in the rebuilding and enlarging of the sign, one remedy would be to allow the sign to remain. However, this remedy would require the doctrine of estoppel to be invoked against the Department. As discussed above, estoppel can not be invoked against the Department in this matter. Through the actions of a Department employee, the Deckers’ sign lost its legal, nonconforming status. The sign can now only be maintained if a sign permit is issued for it. The site on which the sign is located is not eligible for a sign permit. Accordingly, the Department’s removal order must be affirmed. The Deckers should be entitled to compensation for the loss of the sign. The Division of Hearings and Appeals does not have the authority to order the

Department to pay compensation. The proper forum for the Deckers to seek compensation for the loss of the sign is the State of Wisconsin Claims Board.

CONCLUSIONS OF LAW

The Administrator concludes:

1. The parcel 152 sign owned by Chuck and Debra Decker was classified by the Wisconsin Department of Transportation as a legal, nonconforming sign. Pursuant to Wis. Admin. Code § Trans. 201.10(2)(e), a legal, nonconforming sign may continue to exist as long as it remains “substantially the same as it was on the effective date of the state law.” Because the sign was rebuilt and enlarged the Deckers’ sign lost its legal, nonconforming status.

2. The Deckers’ sign was rebuilt and enlarged at the expense and with the acquiescence of the Wisconsin Department of Transportation. The Deckers relied on the advice of an employee of the Wisconsin Department of Transportation in agreeing to have the sign rebuilt as compensation for the loss of another sign he owned. The elements of an estoppel defense are present with respect to the unlawful rebuilding and enlargement of the parcel 152 sign. However, the regulation of outdoor advertising is considered the exercise of police power and estoppel is not available as a defense to a government action when it is exercising a police power.

3. 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 order.

ORDER

The Administrator orders:

The sign removal order issued to Chuck Decker by the Department of Transportation and dated April 24, 2007, is affirmed.

Dated at Madison, Wisconsin on January 11, 2008.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
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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.