



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

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In the Matter of the Denial of an Application for a  
Vegetation Alteration Permit to Clear Channel  
Outdoor, Inc., issued by the Department of  
Transportation

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Case No.: TR-10-0041

FINAL DECISION

On March 31, 2010, Clear Channel Outdoor, Inc., (CCO) applied to the Department of Transportation (Department) for a Vegetation Alteration Permit to remove or trim 22 trees obstructing the view of an outdoor advertising sign and to provide a 350 feet viewing zone for the sign. On June 11, 2010, the Department issued a Vegetation Alteration Permit Application Decision to CCO denying the application. By letter dated July 6, 2010, Attorney Michael A.I. Whitcomb, on behalf of CCO, requested a hearing pursuant to review the Department's denial. This request for a hearing was assigned docket number TR-10-0029 by the Division of Hearings and Appeals.

On September 10, 2010, the Department issued a revised Vegetation Alteration Permit Application Decision to CCO. In the revised decision, the Department approved the removal of nine of the 22 trees that are subject to CCO's application. CCO then filed a request for a hearing to review the revised decision. This request for a hearing was assigned docket number TR-10-0041. Docket number TR-10-0041 includes the issues in docket number TR-10-0029. Accordingly, docket number TR-10-0029 was dismissed. Pursuant to due notice, the Division of Hearings and Appeals held a hearing in docket number TR-10-0041 on May 3, 2011, in Madison, Wisconsin. Mark J. Kaiser, Administrative Law Judge, presided. The parties filed post-hearing briefs. The last submission was received on July 26, 2011.

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

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Wisconsin Department of Transportation, by

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The Administrative Law Judge issued a Proposed Decision in this matter on November 28, 2011. The Department filed objections to the Proposed Decision on December 13, 2011. CCO filed comments on the Proposed Decision on December 14, 2011. Neither party objected to the proposed Findings of Fact. The Department objected to the ALJ's interpretation of Wis. Stats. § 84.305(3)(e) and Clear Channel's comments consisted of a few recommended editorial changes to the Discussion section of the Proposed Decision.

In its objections, the Department urges that the two sentences in Wis. Stats. § 84.305(3)(e) are not contradictory, but rather should be treated as the first sentence states a general rule and the second sentence as an exception to the rule. This is a more reasonable interpretation of Wis. Stats. § 84.305(3)(e). However, rather than the speculative exceptions that the Department suggests the exception should be the express statement in the statute. Namely, the Department is not precluded from permitting the alteration of preexisting vegetation that did not obstruct the sign at the time the sign was erected.

The Department also requests that the Proposed Decision be amended to explain how specimen trees should be treated in the viewing windows that do not include references to specimen trees. It is not appropriate for the Division to interpret statutory provisions that are not at issue in this matter. The Proposed Decision is amended by editing the language that treats the two sentences of Wis. Stats. § 84.305(3)(e) as contradictory and replacing that discussion with one that describes the first sentence as a general prohibition and the second sentence as an exception to that prohibition. In all other respects, the Proposed Decision is adopted as the final decision in this matter.

### Findings of Fact

The Administrator finds:

1. Clear Channel Outdoor Inc., (CCO) is the owner of an outdoor advertising sign located adjacent to interstate highway 94 (I-94) in the City of Milwaukee. The sign is located on the south side of I-94, and the west face is visible to eastbound traffic (exh. R2). The Department of Transportation (Department) issued a sign permit authorizing the construction and maintenance of the sign in 1978 (exh. R14). The sign is identified in the Department's sign database as OASIS 17092 (exh. R2).

2. At the outset of the hearing, the parties stipulated that the sign was erected on November 20, 1979. The base of the sign structure is significantly below the highway grade. At the site of the sign, the highway grade is twelve feet above the ground. The highway right-of-way then slopes sharply downhill away from the highway to the sign. The sign sits on top of a

60-70' monopole (Merriman testimony, tr. p. 44). The bottom of the sign face is 56 feet in height above ground level (HAGL) (Falvey testimony, tr. p. 177). The sign face is slightly above the grade of the roadway.

3. Portions of the sign face are now obscured by both natural and planted vegetation (exh. CCO 15). By application, satisfying the requirements of Wis. Stats. §§ 84.305(3)(a) and (b) and dated March 31, 2010, CCO applied to the Department for a permit to Remove and Trim Vegetation on the I-94 right-of-way. The application alleges that vegetation obstructs the view of CCO's sign and it is necessary to alter the vegetation in order to provide a 350 foot viewing zone for the sign (exh. R2). Attached to the application is a "Site Plan" identifying 22 trees that CCO wants approval to trim or remove. The 22 trees are located to the west of the sign within a distance of slightly more than 200' from the sign. The trees that CCO is seeking to trim or remove are all located entirely on the state-owned right-of-way of I-94.

4. On the Site Plan the trees are numbered one through 22. The species of the trees are identified and listed as follows:

- a) trees one, two, three, five, six, seven, eight, nine, ten, thirteen, and fourteen are black locust trees;
- b) tree fourteen is a mulberry tree; and,
- c) trees eleven, twelve, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, 21, and 22 are green ash trees.<sup>1</sup>

5. The Department's landscape architect, Jim Merriman, reviewed CCO's application for a permit. He also reviewed Department records, including photologs, construction records, aerial photos and planting plans. Merriman found one planting plan for the site. The planting plan showed the Department planted 25 Green Ash trees near the site of the subject sign in 1975 as part of a larger vegetation planting effort along I-94 (Merriman testimony tr. p. 25; exh. R8). Using stationing to indicate scale, the planting plan shows that the green ash trees were planted in the area 250 feet immediately west of the sign (exhs. R8 and R9).

6. The planting plan reviewed by Merriman is an "as-built" plan that shows the completion of the work and notes where work deviated from plan. The as-built plan contains notes where the number, species or locations of plantings deviated from the plans, but contains no notes concerning the 25 green ash trees. The green ash trees were most likely 5'-6' tall and about 2 years old when planted (Good testimony, tr. pp 163-4).

7. Merriman made several visits to the site of the sign. In June of 2010, Merriman visited the site of the sign with representatives of Clear Channel, Jerry Falvey and arborist Greg Good. Merriman used the planting plan to identify planted trees on the site, and concluded that the ground locations matched the planting plans. During the site visit, Merriman and Good agreed as to the species and trunk diameters of the trees identified on CCO's Site Plan. This information was recorded by Falvey (exh. R16).

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<sup>1</sup> Trees 21 and 22 were originally identified by CCO as honey locust trees, but were subsequently determined to be green ash trees.

8. Based on his field observations, measurements, and the planting plan, Merriman concluded that ten of the trees on CCO's Site Plan, trees numbered eleven, twelve, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, 21, and 22, are planted trees. Additionally, the trunks of trees four, eleven, twelve, thirteen, and fourteen measured at three feet above ground level were fifteen inches, 14.5 inches, fifteen inches, 13.5 inches, and fourteen inches respectively at the time they were measured during June 2010 site visit (exh. R3). For purposes of Wis. Stats. § 84.305, these five trees are "specimen trees." Based on these determinations, Merriman concluded that thirteen of the trees on CCO's Site Plan should not be trimmed, removed, or relocated. The thirteen trees are the ten planted trees and three specimen trees (two of the specimen trees are also planted trees).

9. The other nine trees that CCO is seeking to trim or remove are younger than the sign. However, Merriman initially concluded that trimming or removing these trees would not improve the visibility of the sign (Merriman testimony, tr. p. 43). Merriman gave his recommendations concerning the trees and the permit application to the Department's outdoor advertising sign coordinator, Debora Brucaya, who issued the decision dated June 11, 2010 (exh. CCO 1). The Department initially denied the application for vegetation alteration permit entirely.

10. CCO responded to the denial by requesting a hearing to review the denial and also requested permission to trim or remove as many trees as the Department would allow. The Department issued a revised decision on September 10, 2010 (exh. CCO 19). The revised decision permitted CCO to remove the nine trees that are younger than the sign. The Department decided that even though an entire 350' viewing window could not be opened up, the nine trees that were neither specimen trees nor were in existence before the sign could be altered. Trimming or removing those nine trees opened a viewing window 150' long (Falvey testimony, tr. p. 185). Clear Channel accepted that permit and cut the trees. CCO then appealed the Department's revised decision denying permission to trim or remove the remaining thirteen trees identified on the Site Plan.

11. Wis. Stats. § 84.305 requires the Department to review a viewing zone for outdoor advertising signs. The viewing zone starts at the subject sign and extends one thousand feet prior to the sign viewed from the closest lane traveling towards the sign. Within the viewing zone, depending on various factors, the statute requires the Department to establish, if possible, a viewing window within which the entire face of the sign is not obstructed (Merriman, tr. p. 18). In the instant case the applicable viewing window is 350 feet.

12. There is no evidence in the record that establishes specifically which trees are obstructing the view of the sign in the viewing window and the extent to which the respective trees constitute an obstruction. However, the Department did acknowledge that the specimen trees and the planted trees that it has denied CCO permission to alter do provide an obstruction. The Department initially denied CCO's request to trim other vegetation because trimming that vegetation would not provide relief to CCO.

## Discussion

The title of Wis. Stats. § 84.305 is “Vegetation obstructing the view of outdoor advertising signs.” The purpose of the statute is to provide relief to sign owners in terms of keeping their signs visible to motorists, while protecting vegetation existing in the highway right-of-way. The expressed legislative intent of the statute is to maximize the visibility of outdoor advertising signs. Wis. Stats. § 84.305(3)(f) provides, in relevant part:

The department shall make every effort to issue permits under this section that authorize the permittee to fully remedy the condition giving rise to the need for the permit as described under sub. (2)(a)1. to 4. . . .

Wis. Stats. § 84.305(2)(a)1. to 4 describes various viewing windows for which sign owners may seek relief. CCO is seeking a 350 foot viewing window for its sign. The applicable provision for a 350 foot viewing window is Wis. Stats. § 84.305(2)(a)2, which provides:

Notwithstanding ss. 66.1037 and 86.03, upon application, the department may issue permits to sign owners for the trimming, removal, or relocation of vegetation that is located in the right-of-way of a highway under the jurisdiction of the department for maintenance purposes and that obstructs a sign if any of the following applies:

2. The sign is more than 800 feet from another sign and, because of an obstruction to sight by planted vegetation in the highway right-of-way, there is no portion of the viewing zone along which, for a distance of 350 continuous feet, the entire face of the sign is viewable.

The parties agree that the subject sign was erected on November 20, 1979. There is also no dispute that the thirteen additional trees CCO wishes to trim, remove, or relocate were either in existence prior to the erection of the sign or are specimen trees. The dispute between the parties is whether the Department is prohibited from issuing a permit allowing the trimming, removal, or relocation of vegetation that preexisted the sign or is a specimen tree. With respect to vegetation that preexisted the sign, the question that needs to be decided is a legal issue. The legal issue that needs to be decided is the interpretation and application of Wis. Stats. § 84.305(3)(e). Wis. Stats. § 84.305(3)(e) provides:

A permit issued under this section may not authorize the permittee to trim, remove, or relocate vegetation in existence prior to the erection of the sign obstructed by the vegetation. Nothing in this paragraph prohibits the department from issuing a permit authorizing the trimming, removal, or relocation of vegetation that, at the time the sign was erected, did not obstruct the view of the sign.

The parties interpret the first sentence of this statute differently. The parties dispute whether the phrase “obstructed by the vegetation” in this sentence refers to the time the sign was

erected or the current time. The Department interprets this phrase to mean that any vegetation in existence at the time the sign was erected can not be trimmed, removed, or relocated regardless of whether the vegetation would have obstructed the view of the sign at the time it was erected. The Department presented evidence that ten of the trees at issue were planted prior to the erection of the sign.<sup>2</sup>

CCO argues that the first sentence of Wis. Stats. § 84.305(3)(e) should be interpreted to mean that only vegetation that would have obstructed the sign at the time it was erected cannot be trimmed, removed, or relocated. CCO's interpretation is consistent with the overall purpose of Wis. Stats. § 84.305, which is to improve the visibility of outdoor advertising signs. However, the most logical interpretation of the first sentence of Wis. Stats. § 84.305 is that the phrase "obstructed by the vegetation" modifies the word "sign." Meaning that vegetation sought to be trimmed, removed, or relocated only had to be in existence at the time the sign was erected, not that it obstructed the view of the sign at the time the sign was erected. This interpretation is reinforced by the fact that the second sentence of the statute refers to the vegetation that did not obstruct the view of the sign at the time the sign was erected. The second sentence of Wis. Stats. § 84.305(3)(e) would be superfluous if the first sentence is interpreted as referring to vegetation that preexisted the sign but did not obstruct the view of the sign.

Wis. Stats. § 84.305(3)(e) is ambiguous. The ambiguity is caused by the apparent contradiction between the first and second sentences. The first sentence appears to establish an absolute prohibition to permitting the trimming, removal, or relocation of any vegetation that preexisted a sign. The second sentence provides that the Department may issue a permit for the trimming, removal, or relocation of vegetation that preexisted a sign, if the vegetation did not obstruct the visibility of the sign at the time the sign was erected. The most reasonable manner to interpret Wis. Stats. § 84.305(3)(e) to avoid a contradiction is to read the first sentence of the statute as a general prohibition and the second sentence as an exception to that prohibition. Despite the presence of the phrase "may not authorize" in the first sentence, the Department does have authority to permit the trimming, removal, or relocation of vegetation that preexisted the erection of a sign under some circumstances.

In its objections to the Proposed Decision, the Department agreed with this interpretation of Wis. Stats. § 84.305(3)(e). The only disagreement between the Department's position and the Proposed Decision is what exceptions to the blanket prohibition should be considered. The Department suggests several possible exceptions such as removing dead, preexisting trees, preexisting trees that need clearing for utility lines, preexisting diseased trees, and preexisting trees that are invasive species. A more reasonable interpretation is that the exception is the one expressly stated in the statute. Namely, that the vegetation an applicant is seeking to alter is vegetation that did not obstruct the sign at the time the sign at the time it was erected.

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<sup>2</sup> In its post-hearing brief, the Department did not take such a black and white position. However, the evidence it presented at the hearing was primarily limited to the ages of the trees that CCO is seeking to trim, remove, or relocate.

The other category of vegetation that the Department refused to allow CCO to alter are the five specimen trees.<sup>3</sup> Nothing in Wis. Stats. § 84.305 prohibits the Department from allowing the trimming or removal of specimen trees. The only reference to specimen trees is found in Wis. Stats. § 84.305(2)(b) which provides:

In measuring the distance in continuous feet along the viewing zone under par. (a)3. and 4., the department shall not include in its measurement any part of the viewing zone where any portion of the face of a sign is not viewable because of an obstruction to sight by a specimen tree in the highway right-of-way.

There is no reference to specimen trees with respect to the 350 foot viewing zone applicable in this matter. The Department interprets Wis. Stats. § 84.305(2)(b) as prohibiting the alteration of specimen trees in the viewing zones described in Wis. Stats. §§ 84.305(2)(a)(3) and (4). The Department then asserts that it is “nonsensical to *prohibit* the cutting of specimen trees within a 500-foot viewing zone but to *require* them to be cut in a 350-foot viewing zone.” (emphasis in original)

The Department’s argument is not persuasive for at least two reasons. Firstly, it is a mischaracterization to say that Wis. Stats. § 84.305(2)(b) prohibits the cutting of specimen trees in the longer viewing zones. Wis. Stats. § 84.305(2)(b) only states that “the department shall not include in its measurement any part of the viewing zone where any portion of the face of a sign is not viewable because of an obstruction to sight by a specimen tree.” This is not a prohibition to the alteration of specimen trees in these viewing zones. Secondly, even if one interprets the language in Wis. Stats. § 84.305(2)(b) as a prohibition to the alteration of specimen trees in the longer viewing zones, it is not nonsensical to treat the shorter viewing zones differently. In a longer viewing zone an interruption of the visibility of the sign resulting from the existence of a specimen tree has less of an impact than the interruption of the visibility of the sign in a shorter viewing zone.

The Department has the authority to permit the vegetation removal requested by CCO. The issue to be decided then becomes whether the Department’s refusal to do so in this case was reasonable. The situation in the instant case is somewhat unique in that the right of way is far below the grade of the highway. The bottom of the subject sign is 56 feet HAGL. Merriman and Good agreed that the planted green ash trees were probably five to six feet tall when planted. Thus the vegetation shown on the Department’s planting guide would not have even approached the bottom of the sign for a considerable time, let alone obstructed the view of the sign, at the time the sign was erected. It is understandable that no one would have considered the existing vegetation a potential problem at the time the sign was erected.

A decision as to whether the Department’s denial was reasonable depends on two factual determinations. These determinations are:

- 1) whether trimming, removal, or relocation of any or the thirteen trees at issue would provide the relief sought by CCO; and,

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<sup>3</sup> Two of the specimen trees are also planted trees that preexisted the sign.

2) whether the subject trees can be trimmed or relocated without damaging the trees.

There is no conclusive evidence in the record on these factual issues. Neither party presented any evidence on these issues because they believed, for different reasons, that such evidence was unnecessary.

The Department did not present evidence on these issues because it interprets Wis. Stats. § 84.305(3)(c) as prohibiting it from issuing vegetation cutting permits for any vegetation that preexisted the sign. Accordingly, it mainly presented evidence to establish the age of the vegetation. CCO interprets the statute as entitling sign owners to remove, trim, or relocate any vegetation that obstructs the visibility of a sign within the appropriate viewing window unless the vegetation obstructed the visibility of the sign at the time the sign was erected. The statute requires more balancing than either party acknowledges. In this case, the trees CCO is seeking to alter are more than 35 years old. It may be unreasonable to remove trees that have been established for that length of time. It is also not feasible to relocate trees of that age. However, the bottom of the sign is 56 feet HAGL. It seems likely that the trees could be trimmed to a height of 56 feet without harming them. This would provide the relief sought by CCO while still maintaining vegetation that preexisted the sign.

The use of the word “may” in Wis. Stats. § 84.305(2)(a) implies the Department is to exercise discretion in issuing Vegetation Alteration Permit. However, considering that the legislative intent of Wis. Stats. § 84.305 is to improve visibility of outdoor advertising signs, the discretion should, whenever possible, be exercised in terms of deciding whether obstructing vegetation should be trimmed, removed, or relocated. This conclusion is reinforced by the fact that Wis. Stats. § 84.305(5) provides for compensation for planted vegetation that must be removed or relocated. The compensation requirement suggests that if it is necessary to destroy vegetation in order to open up the statutory viewing window, the Department is not to deny the application, but rather condition it on the payment of compensation.

The only reason that the Department provided for the portion of CCO’s application that it denied is that those trees preexisted the sign or are specimen trees. The issue is whether the denial is reasonable. The only rationale that the Department has provided to support its denial is the general statement that trees on the highway right-of-way provide various public benefits. It is undeniable that trees provide numerous benefits, but the trees that CCO is seeking to alter may not be harmed by trimming or could be replaced if it was necessary to remove them. The Department needs to provide substantive reasons as to why these specific trees should not be altered to justify its decision. CCO has the burden to show the Department’s decision is not reasonable, but before it has to do so the Department must set forth reasons specific to the vegetation at issue. The Department has not done so and; therefore, its decision can not be affirmed.

### Conclusions of Law

The Administrator concludes:

1. For purposes of Wis. Stats. § 84.305, trees identified as numbers four, eleven, twelve, thirteen, and fourteen are “specimen trees” as defined at Wis. Stats. § 84.305(1)(f).
2. The subject sign was erected on or about November 20, 1979. The Department established that trees eleven, twelve, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, 21, and 22 were planted pursuant to a planting plan sometime in 1975. Pursuant to Wis. Stats. § 84.305(1)(d), these trees are “planted trees” and were in existence prior to the erection of the sign.
3. Because of the existence of the trees identified in Site Plan attached to the application for a Vegetation Alternation Permit, there is not a 350 foot window within the viewing zone in which the entire face of the sign is not obstructed. Pursuant to Wis. Stats. § 84.305(2)(a)2, the Department may authorize the trimming, removal, or relocation of any vegetation necessary to provide a 350 foot viewing window for the sign. Pursuant to Wis. Stats. § 84.305(1)(h), vegetation includes planted and specimen trees.
4. Pursuant to Wis. Stat. §§ 84.305(8) and 227.43(1)(bg), the Division of Hearings and Appeals has the authority to issue the following order.

### Order

The Administrator orders:

The revised Vegetation Alternation Permit Application Decision issued by the Department of Transportation is reversed with respect to trees four, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, 21, and 22. The Department shall amend the permit to allow Clear Channel Outdoor to trim, remove, or relocate these trees as necessary to provide a 350 foot viewing window for the sign that is the subject of this matter. If it is necessary to remove or relocate any tree in order to provide the statutory viewing window, the permit should be conditioned on the payment of compensation.

Dated at Madison, Wisconsin on February 10, 2012.

STATE OF WISCONSIN  
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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.