

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

In the Matter of the Sign Removal Order and
Revocation of Sign Permit Issued by the Department
of Transportation to Heritage Milwaukee, LLC for a
sign located along I-94 in Milwaukee County,
Wisconsin

Case No: DOT-23-0009


FINAL DECISION

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

Heritage Milwaukee, LLC (Heritage), by


von Briesen & Roper, S.C.
10 East Doty St., Ste. 900
Madison, WI 53703

Wisconsin Department of Transportation (Department), by


Department of Transportation
P.O. Box 7910
Madison, WI 53707-7910

PRELIMINARY RECITALS

On March 19, 2024, the Division of Hearings and Appeals (DHA), by Administrative Law Judge Kristin Fredrick, issued a Proposed Decision in favor of the Department of Transportation (Department), which affirmed the Department's April 11, 2023 order requiring Heritage Milwaukee, LLC (Heritage) to remove an existing sign structure due the expiration of its permit (#021007). Pursuant to the process described in Wis. Stat. § 227.46(2m), Heritage timely filed objections to the Proposed Decision.

Heritage specifically objected to proposed Findings of Fact paragraphs #2, 9-11, 13 and 14, and suggested seven additional findings of fact. Heritage requested a different interpretation of the facts and weighing of the evidence, leading to a conclusion that the Department acted disingenuously and erroneously when it ordered Heritage to remove the sign structure after the permit expired. However, the ALJ's credibility determinations are reliable evidence in the record that supports the sign removal order and are not disturbed here.

As described in the Proposed Decision, a preponderance of the credible evidence supported the sign removal order by establishing the following, in summary. On April 4, 2022, the Department issued Heritage sign permit #021007, which had a one-year period of validity before expiration. With the permit in hand, Heritage began the sign project but then decided a different location would be better. To that end, in December 2022, Heritage stopped construction on its sign structure and canceled a scheduled delivery of face panels that would have allowed the structure to become a completed sign. Further, in January 2023, it submitted an application to city authorities (not the Department) seeking approval to move the sign project to a different location.

Unrelatedly, on March 10, 2023, the Department advised Heritage that its sign project would need to be moved because it was located within a highway construction project. The Department further advised Heritage that it would need to file a new permit application for a different sign location to be approved. Despite additional urging from the Department for a new permit application, Heritage did not file one before sign permit #021007 expired. Accordingly, on April 11, 2023, the Department ordered Heritage to remove the sign structure due to failure to erect a sign within the one-year period allowed by sign permit #021007. It was Heritage's appeal from the sign removal order that formed the basis for the instant proceedings.

Heritage primarily offered two arguments to support its position that it should be allowed to keep the sign project as though it had complied with sign permit #021007. First, it asserts that the Department acted in bad faith because it allowed Heritage to stop construction, and the Department knew construction stopped, but the Department did not warn Heritage that it would issue a sign removal order upon expiration of the permit. In short, Heritage asserts, the Department sat on its hands and let Heritage allow the permit to expire even though the Department knew Heritage was relying in good faith on the Department's knowledge that the issue was merely one of location rather than validity of a permit. Therefore, Heritage argues, the Department should be collaterally estopped from using the sign removal order to enforce the permit expiration.

Setting aside that this agency lacks authority to order an equitable remedy, the record did not support bad faith on the Department's part. To the contrary, a preponderance of the credible evidence showed that Heritage stopped construction prior, and unrelated to the Department advising it that the location would have to be moved. The Department thereafter tried to assist Heritage in applying for a new permit before the expiration of the existing one. There is no evidence that the Department misled Heritage or took any action that would reasonably lead it to believe it was somehow excused from complying with the one-year permit or having to complete a new application.

Heritage's second argument is that it effectively complied with sign permit #021007 by simple virtue of the Department's sign removal order. In other words, even though the project was incomplete and lacking advertising panels, the Department must have recognized the project as a sign before being able to order it removed, in which case it complied with the sign permit in the first place and could not have violated the expiration date. This argument is tautological and unsupported by the law or record, and ultimately not compelling.

Accordingly, the Administrator hereby adopts the Proposed Decision as DHA's Final Decision, as follows:

PROCEDURAL HISTORY

By letter dated April 11, 2023, the Department ordered the removal of a billboard due to expiration of a sign permit (Permit #021007) belonging Heritage. The sign was located along I-94 in Milwaukee County at Greves Street (Lat: 43.03338441674242; Long: -87.94731196880282). On April 28, 2023, Heritage, by [REDACTED] filed a Notice of Appeal and Appeal of Sign Removal Order and Revocation of Sign Permit pursuant to Wis. Stat. § 84.30(11) and (18). Heritage filed an Amended Notice of Appeal on May 3, 2023.

The matter was assigned to administrative law judge (ALJ), Kristin P. Fredrick, of the Division of Hearings and Appeals. On May 23, 2023, a prehearing conference was conducted and on November 14, 2023 a final pretrial hearing was held, at which time the hearing date was confirmed and scheduled, along with deadlines for the parties to submit and exchange witness lists and exhibits. The hearing was held in Madison, WI on January 23, 2024. Following the hearing, counsel for Heritage requested an opportunity to submit a written brief regarding the issue of how a sign is defined under Wis. Stat. § 84.30, which was granted but limited to a two-page submission. The Department submitted a letter brief on February 13, 2024. No letter brief was received on behalf of Heritage. The hearing record includes the audio recording of the January 23, 2024 hearing; Heritage's Exhibits 1-3, 5 and 6; Department's Exhibits 100, 101 and 103; and the Department's post-hearing letter brief.

FINDINGS OF FACT

1. On April 4, 2022, the Department issued Permit 021007 granting an Outdoor Sign Installation Permit to Heritage to erect an outdoor advertising sign ("the sign") along Highway 57/I-94 near the address of 2612 W. Greves Street, in the City of Milwaukee, Milwaukee County, Wisconsin. (Hearing testimony of [REDACTED] [REDACTED] Exs. 1 and 100)
2. In December 2022, Heritage stopped construction on the sign structure under Permit 021007 based upon unhappiness with the sign positioning and location. Further, Heritage cancelled shipment of the digital advertising display panels/screens for the sign while they investigated an alternative location. (Hearing testimony of [REDACTED] [REDACTED] Ex. 101)
3. Heritage was aware that they had one year to complete the sign erection. ([REDACTED] testimony; Ex. 101)
4. In January 2023, Heritage submitted an application to the City of Milwaukee seeking approval to move the sign to a new location on the same property. ([REDACTED] testimony; hearing testimony of [REDACTED])

5. In early 2023, the Department's Outdoor Advertising Program Division learned that the existing Heritage sign structure was located in the path of a planned highway improvement project. (██████ testimony; hearing testimony of ██████ Exs. 2 and 100)
6. On March 10, 2023, the Department attempted to reach out to Heritage to advise that any sign allowed under Permit 021007 would need to be relocated due to the highway project. (██████ testimony; Ex. 6)
7. On March 15, 2023, the Department spoke to and emailed the co-founder and managing partner of Heritage, ██████ ██████ with regard to relocating the Heritage sign. ██████ ██████ thought it was serendipitous that both Heritage and the Department wanted the sign moved. (██████ testimony; ██████ testimony; Exs. 6 and 101, p. 58)
8. The Department's March 15, 2023 email correspondence to ██████ ██████ informed Heritage that they would be required to submit a new permit application for the new sign location to be approved. Specifically, the email stated "Once we receive the application, and supporting documents; the materials will be reviewed and a site visit completed prior to consideration for approval. We understand that you have already submitted application materials to Milwaukee, as a reminder we are completely separate from them in our application processes." (Exs. 6 and 101, p. 58)
9. Immediately following receipt of the Department's email, ██████ ██████ advised the Heritage consultant, ██████ to "Please send ASAP." (Id.)
10. When no permit application had been submitted by Heritage by March 21, 2023, the Department reached out to Heritage again and requested that Heritage let the Department know "if we can expedite/assist with the application process in any way, or if you are having any technical difficulties with the database." (██████ testimony; Exs. 6 and 101, p. 63)
11. ██████ ██████ forwarded the Department's March 21, 2023 correspondence to the Heritage consultant requesting that ██████ ██████ update ██████ ██████ at the Department. (Ex. 101, p. 63)
12. Heritage did not submit a new permit application to the Department to relocate the sign prior to the expiration of Permit No. 021007. (██████ testimony; ██████ testimony; ██████ testimony)
13. Heritage's Permit No. 021007 expired on April 4, 2023. (██████ testimony; Ex. 1)

14. Heritage neither requested an extension of time from the Department to complete the erection of its sign under Permit No. 021007 nor did Heritage complete a new application for a relocated sign prior to the one-year expiration of the permit. (██████ testimony; ██████ testimony)
15. The Department does not have a practice of issuing warning letters to sign permit owners of a permit's impending expiration. (██████ testimony; ██████ testimony)
16. On April 11, 2023, the Department issued a letter to Heritage ordering the removal of the existing sign structure due to the failure to erect the sign within one year as required under the permit terms and Wis. Admin. Code § 201.07(2). (██████ testimony; Ex. 5)

APPLICABLE LAW

The U.S. Department of Transportation, Federal Highway Administration (FHA) mandates that states enact and enforce laws to control the erection and maintenance of outdoor advertising signs along federal highways pursuant to 23 USC 131 and the federal regulations under 23 CFR Part 750. Consistent with 23 USC 131, the Wisconsin legislature enacted Wis. Stat. § 84.30 (the sign control law), which governs the Department's authority to regulate outdoor advertising signs adjacent to federal and interstate highways.¹ See *Vivid, Inc. v. Fiedler*, 219 Wis. 2d 764, ¶ 14, 580 N.W.2d 655 (1998).

A "sign" is defined as "any outdoor advertising sign, display, device, notice, figure, painting, drawing, message, placard, poster, billboard, or other thing, which is designed, intended, or used to advertise or inform, any part of the advertising or informative contents of which is visible from any place on the main-traveled way of any portion of an interstate highway or primary highway." Wis. Stat. § 84.30(2)(j).

As part of the Department's authority to "promulgate rules deemed necessary to implement and enforce" the sign control law, the Department enacted Wis. Admin. Code Ch. Trans 201. Signs cannot be erected along interstate highways without the Department's approval and issuance of a permit and license. Wis. Stat. §§ 84.30(3), (10) and (10m); Wis. Admin. Code §§ Trans 201.03 and 201.035. The specific provision of Chapter Trans 201 particularly germane to the present matter is Wis. Admin. Code § Trans 201.07(2), which states: "[a] new sign permit shall automatically expire one year after issuance if the sign permitted has not been erected and the permit holder has not received an extension from the department." Further, if a sign owner wants to physically relocate a sign, they must submit a new permit application and request that the prior permit be cancelled. Wis. Admin. Code § Trans 201.08.

¹ The sign at issue in this matter is located along I-94, which is an interstate federal highway within the definition found at Wis. Stat. § 84.30(2)(f).

DISCUSSION

The issue in this case is whether the Department correctly issued an order requiring Heritage to remove an existing sign structure due to noncompliance with the sign permit and expiration of the permit pursuant to Wis. Admin. Code § Trans 201.07(2) because Heritage failed to complete their sign installation within one year of issuance of the permit. The relevant underlying facts are largely undisputed.

The Department issued Heritage Permit 021007 on April 4, 2022. (Ex. 1) The terms of the permit state that it will expire “one year after its issuance if the sign is not erected by that time.” (Id.) See also, Wis. Admin. Code § Trans 201.07(2). Heritage began construction of the sign authorized under Permit 021007 in the fall of 2022; however, it stopped construction of the sign in December 2022 and cancelled shipment of the digital advertising display panel/screen that had not yet been installed on the sign to investigate a potential better location for the sign. (██████ testimony; ██████ testimony; Ex. 101)

Around the same time that Heritage began the process to obtain a new permit from the City of Milwaukee for a different sign location, the Department’s Outdoor Advertising Division learned that the existing sign structure permitted under Permit 021007 was in the path of a proposed Department highway project and thus, the sign would need to be relocated. (██████ testimony; ██████ testimony; ██████ testimony; ██████ testimony) The Department reached out to Heritage in March 2023 on at least two separate occasions and advised them that the sign would need to be relocated and further advised Heritage on the need to obtain a new permit for any relocated site. (██████ testimony; Exs. 6 and 101) However, Heritage failed to submit a new permit application to the Department before April 4, 2023, which was the one-year deadline to erect a sign under the terms of the Permit 021007. (██████ testimony)

The Department concluded that Permit 021007 expired as of April 4, 2023, and that the Heritage sign structure was incomplete given that it did not have any advertising display face installed yet; just the pole and framing where the actual advertisement could eventually be placed. (██████ testimony) Therefore, on April 11, 2023, the Department issued an order requiring Heritage to remove any existing sign structure under Wis. Admin. Code § 201.07(2)(b). (██████ hearing testimony; Ex. 5)

At the hearing in this matter, four witnesses testified, including two Department employees, the co-founder and managing partner of Heritage, ██████ ██████ and Heritage’s contracted consultant, ██████ who was hired to provide operations management services for Heritage, including overseeing the permit and construction activities to erect the sign. (██████ testimony; ██████ testimony; ██████ testimony; ██████ testimony; Ex. 101)

Heritage representatives testified that the Department told Heritage to cease further construction on the sign in March 2023. However, the evidence established at the hearing that Heritage had already ceased construction prior to the time that the Department had even become aware that the existing sign structure was in the path of a highway project. (██████ testimony; ██████ testimony; Ex. 101) Heritage had decided that they did not like the current location for

the sign and sought to investigate alternative locations early in December 2022 prior to learning that the Department also required that it be relocated. (Id.) Moreover, on December 7, 2022, Heritage cancelled shipment of the digital advertising display panels/screens for the sign, so that Heritage could investigate the possibility of relocating the sign to a new location. (Id.) In January 2023, Heritage even filed a new permit application with the City of Milwaukee hoping to move the sign to a different location. (██████ testimony)

Heritage was aware of the one-year deadline to complete the sign. (██████ testimony) After Heritage cancelled delivery of the digital advertising display panels in December 2022, the vendor reminded them on February 23, 2023, that the build deadline was April 4. (Ex. 101) By the plain language in the permit, Heritage was already aware of the one-year deadline to complete the installation and erection of the sign. (Ex. 1). The Department also communicated to Heritage about the need to act on filing a new permit application in March 2023. (██████ testimony; Ex. 6)

Heritage put forward two arguments that are equally unsupported and unpersuasive. First, Heritage suggested that the sign was “erected” within one year even absent the advertising face because the definition of sign under Wis. Stat. § 84.30(j) does not include language that a sign requires an advertising face to be considered erected or complete. Heritage presented no legal authority to support this argument. The Department asserted that Heritage only erected a structure consisting of a pole and braces, but that no sign was erected that displayed advertising or information visible from a highway. The Department cited two prior circuit court decisions to support the position that poles and braces alone do not constitute a sign. *Collins-Lacrosse Sign Corp. v. Wisconsin Department of Transportation*, Dane Co. Circuit Court Case No. 153-290 (7/21/1977) and *Acme Outdoor Displays v. WisDOT Division of Highways*, Dane County Circuit Court Case No. 154-424 (9/2/1977).

It is well-established that statutory language must be given its “common, ordinary, and accepted meaning”, that a statute’s plain meaning can be ascertained “from the context in which the words are used,” and that any interpretation should “avoid absurd or unreasonable results...” *Brunton v Nuvelt Credit Corp.*, 2010 WI 50, ¶ 16, 325 Wis. 2d 135, 785 N.W.2d 302, citing *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶¶ 45-46, 271 Wis. 2d 633, 681 N.W.2d 110. Further, any statutory interpretation should be construed to fulfill the purpose of the statute rather than undermine it. *Id.* at ¶ 17, citing *County of Dane v. LIRC*, 2009 WI 9, ¶ 34, 315 Wis. 2d 293, 759 N.W.2d 571. The statutory definition of “sign” under Wis. Stat. § 84.30(2)(j) explicitly describes the sign’s advertising purpose, “which is designed, intended, or used to advertise or inform, any part of the advertising or informative contents of which is visible from any place on the main-traveled way of any portion of an interstate highway or primary highway.” Wis. Stat. § 84.30(2)(j). The advertising panels are thus an integral part of what is considered a sign under the statute. The pole and braces alone, without any advertising panels, are not designed to advertise or inform. Thus, the structure that remained after Heritage ceased construction in December 2022 could not be considered an erected sign absent the digital advertising display panels that Heritage had cancelled shipment of on December 7, 2022. It is a reasonable, common-sense conclusion that a sign is not fully erected until the advertising panels are installed on the pole and braces. This conclusion is further

supported by the fact that Heritage's own witnesses testified that construction on the sign was not completed.

Second, Heritage suggests that the Department acted in bad faith by instructing Heritage to cease construction of the sign but then issuing the removal order once the permit expired. This assertion is without merit or factual basis in the record. Heritage witnesses testified that the decision to cease construction efforts on the sign and to cancel the delivery and installation of the digital advertising panels occurred in December 2022 to investigate a better location for the sign. Heritage's decision to stop construction on the sign occurred prior to the Department's discovery and determination that the sign would need to be relocated due to being within a highway project. Additionally, Heritage takes issue with the fact that the Department did not advise Heritage that the Department considered the sign incomplete without advertising panels and that the Department did not explicitly tell Heritage that the failure to submit a new application before the expiration of Permit No. 021007 would result in the issuance of an order for removal. None of Heritage's arguments are persuasive. Heritage was made aware of the need to either complete the sign erection or request an extension within one year of the permit issuance. Further, Heritage was aware of the need to file a new application to relocate the sign; however, Heritage failed to act. It was Heritage's own inaction that led to both the failure to complete the erection of the sign and then the failure to timely submit a new application to relocate the sign.

It is Heritage's burden to establish that the Department's order to Heritage to remove its sign structure was improper. Heritage neither submitted a post-hearing brief nor cited any law that supports a finding that a sign under Wis. Stat. § 84.30 can consist of merely a pole and brace structure without any advertising. The Department's removal order was based upon Heritage's failure to comply with the terms of the permit by failing to erect the sign within one year of the April 4, 2022 issuance of Permit No. 021007 consistent with Wis. Admin. Code § 201.07(2)(b). Further, the preponderance of the evidence at hearing established that Heritage neither requested an extension nor submitted a new permit application to the Department as necessary to relocate the sign. Accordingly, Heritage has not met its burden of proof and therefore, the Department's decision to order the removal of the existing sign structure must be upheld.

CONCLUSIONS OF LAW

1. The Department has authority over sign permits pursuant to Wis. Stat. § 84.30.
2. The Department correctly concluded that Heritage's sign permit No. 021007 expired without a sign having been fully erected within one year of the issuance of the permit pursuant to Wis. Admin. Code § 201.07(2)(b), thereby justifying the Department's order to remove the sign.
3. The Division of Hearings and Appeals has authority to issue the following orders pursuant to Wis. Stat. §§ 84.30(18) and 227.43(1)(bg).

ORDER

For the reasons stated above, the Department's April 11, 2023 order requiring Heritage to remove an existing sign structure due to expiration of Permit 021007, is AFFIRMED.

Dated at Madison, Wisconsin on May 29, 2024.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
4822 Madison Yards Way, Fifth Floor
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: /s/
Brian Hayes
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 served and 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
4822 Madison Yards Way, Fifth Floor
Madison, Wisconsin 53705

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.