Before The
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Sign Removal Order issued to The Lamar Company, LLC, d/b/a Lamar Advertising of Janesville (OASIS No. 14598)	Case No. DOT-16-0012
In the Matter of the Sign Removal Order Issued by the Department of Transportation to The Lamar Company, LLC, d/b/a Lamar Advertising of Janesville, for a Sign Located Along I-39, in Rock County (OASIS No. 14410)	Case No. DOT-16-0015

FINAL DECISION

On May 27, 2016, the Wisconsin Department of Transportation (Department) issued a sign removal order (SRO) to the Lamar Company, LLC, (Lamar) for an outdoor advertising sign located along I-39 in Dane County. On June 23, 2016, Lamar requested a hearing before the Division of Hearing and Appeals (DHA) to review the SRO. This matter was assigned docket number DOT-16-0012 by the DHA. On June 22, 2016, the Department issued a sign removal order to Lamar for an outdoor advertising sign located along I-39 in Rock County. On July 11, 2016, Lamar requested a hearing to review the SRO before the DHA. This matter was assigned docket number DOT-16-0015 by the DHA. The two matters have been combined for hearing purposes. On August 16, 2016, the Department issued an amended SRO for the sign that is the subject of docket number DOT-16-0012. The amended SRO added as another ground for the SRO that the subject sign has displayed messages that are in violation of restrictions in the federal Bonus Act.

Lamar filed a Motion to Dismiss these SROs along with SROs for other outdoor advertising. In its motion, Lamar alleged that the Department did not have the authority to issue the SROs and the DHA did not have jurisdiction to hear and decide the appeals of these SROs. Lamar's motion was denied and the matters were placed on a track for hearing. Proceedings in these matters were subsequently suspended along with the review of other SROs issued to Lamar while a final decision issued by DHA in another matter reviewing an SRO was appealed to the Wisconsin Supreme Court. The Wisconsin Supreme Court issued its opinion in *Lamar Central Outdoor, LLC, v. Division of Hearings and Appeals*, 389 Wis.2d 486, 936 N.W. 2d 573, on December 19, 2019. The opinion in *Lamar Central* did not resolve the issues in the instant matters and a combined

hearing in the instant matters was scheduled for July 23, 2020. On June 1, 2020, the parties filed a stipulation in which the Department withdrew the alleged violation of the Bonus Act for the sign that is the subject of docket number DOT-16-0012 and abandoned any similar allegation for the sign that is the subject of docket number DOT-16-0015. Accordingly, the only issue remaining in both matters is whether the respective signs lost their nonconforming status because of the addition of electrical lighting to the sign structures.

On June 3, 2020, Lamar filed a Motion to Dismiss the respective SROs. In response to the motion, the hearing scheduled for July 23, 2020, was cancelled. On July 2, 2020, the Department filed its response in opposition to the motion and on July 13, 2020, Lamar filed a reply brief in support of its motion.

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

The Lamar Company, LLC, by

Attorney Kraig A. Byron and
Attorney Thomas S. Hornig
von Briesen & Roper, S.C.
10 East Doty Street, Suite 900
Madison, WI 53703

Wisconsin Department of Transportation, by

Attorney Vincent Bauer
Department of Transportation-Office of General Counsel
P.O. Box 7910
Madison, WI 53707-7910

The Administrative Law Judge (ALJ) issued a Proposed Decision in this matter on September 15, 2020. The Proposed Decision granted summary judgment in favor of Lamar and reversed the SROs issued by the Department. Lamar and the Department filed comments on the Proposed Decision on September 30, 2020. Lamar did not object to the Proposed Decision. The Department objected to the Proposed Decision and contended that it was denied due process when it was not provided an opportunity to submit materials to oppose a summary judgment. The Department cites *CTI of Northeast Wisconsin, LLC. V. Herrell*, 259 Wis. 2d 756, 656 N.W.2d 794 (Ct. App. 2002) as support for it contention that due process requires notice to the parties if a court converts a motion to dismiss for failure to state a claim upon which relief can be granted to a motion for summary judgment.

In the Proposed Decision, the ALJ cited Wis. Stat. § 802.06(2)(b) as authority for treating Lamar's Motion to Dismiss as a Motion for Summary Judgment. Wis. Stat. § 802.06(2)(b) provides in relevant part:

> If on a motion asserting the defense described in par. (a) 6. to dismiss for failure of the pleading to state a claim upon which relief can be granted, or on a motion asserting the defenses described in par. (a) 8. or 9., matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by s. 802.08.

In *CTI of Northeast Wisconsin*, the court held that a reasonable opportunity to respond required notice by the trial court that it intended to treat the motion to dismiss as a motion for summary judgment. The court stated that under the circumstances of that case "[n]otice is required because without it, parties may not realize their right or obligation to respond." The court continued "[w]hat constitutes a reasonable opportunity to respond, however, will vary from case to case. *See Little v. Streater*, 452 U.S. 1, 5–6, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981) (a meaningful opportunity, as part of constitutional due process, is flexible and calls for such procedural protections as the particular situation demands). Thus, because sometimes parties do respond without prompting from the trial court, they may occasionally be precluded from arguing a lack of notice or opportunity to reply." *CTI of Northeast Wisconsin*, 259 Wis. 2d 756, at 762-63.

Accordingly, Wis. Stat. § 802.06(2)(b) does not require a court to expressly notify the parties that it intends to convert a motion to dismiss to a motion for summary judgment, but to give the parties a reasonable opportunity to present all material made pertinent to a motion for summary judgment. In the instant matter, the Department had two opportunities to state what materials it would provide to oppose summary judgment, its response to Lamar's Motion to Dismiss and its objections to the Proposed Decision. In both submissions, the Department listed the evidence that it would present in support of the allegation in its sign removal orders. This is the evidence that the Department would have presented in opposition to a motion for summary judgment.

In its response opposing Lamar's motion, the Department stated it would provide an expert who will testify that Scotch Lite lettering is not a light source and that reflective sheeting cannot be considered illumination under Wis. Stat. § 84.30. In its objections to the Proposed Decision, the Department objects to a statement that the facts in the instant cases are identical to those in DHA case No. DOT-16-0020 and lists evidence it would present evidence distinguishing the respective signs. None of the evidence cited by the Department in its responses is material to the factual issue before the Division in these cases. The only factual issue is whether Scotch Lite lettering is a form of illumination. In the instant cases, as in DOT-16-0020, the Department classified the signs as illuminated and indicated that the manner of illumination was "Scotch Lite Lettering." As stated in the Proposed Decision, the only evidence that would be material is testimony

that the classification of the subject signs as illuminated was in error. Despite this statement, the Department does not claim in its objections to the Proposed Decision that it has such evidence.

The Department had a reasonable opportunity to present materials that would have opposed a motion for summary judgment. Even if the evidence the Department offered in opposition to Lamar's Motion to Dismiss and in its objections to the Proposed Decision proved exactly what the Department alleges it would, that evidence is not material to the issue that needs to be decided in these matters. Considering the undisputed facts, Lamar is entitled to summary judgment. The Proposed Decision is adopted as the final decision in these matters.

Lamar titled its motion a Motion to Dismiss and sought the "dismissal" of the Department's SROs on the ground that they have failed to state a claim on which relief may be granted. A SRO is not a complaint which initiates litigation and no authority is cited supporting Lamar's implicit contention that an SRO must meet the requirements of a civil complaint. However, Lamar contends that there is no dispute of fact in these matters and that it is entitled to have the SROs reversed based on a determination applied to identical facts in a previous decision issued by DHA. Lamar's motion is more appropriately treated as Motion for Summary Judgment. Pursuant to Wis. Stat. § 802.06(2)(b), a motion to dismiss can be treated and disposed of as motion for summary judgment if appropriate. There are no disputed facts and these matters can be decided on summary judgment.

Issues to be Decided

Whether the allegations set forth in the Department's sign removal orders are true and, if the allegations are true, whether they constitute a basis for the loss of the nonconforming status for the subject signs

Findings of Fact

The Administrator finds:

The following facts are derived from Wisconsin Department of Transportation records and are undisputed.

1. The Lamar Company, LLC, (Lamar) owns and controls an outdoor advertising sign that was erected in the adjacent area along Interstate Highway-39 (I-39), 1635 feet south of the Droning Road underpass in Dane County. The sign is identified as OASIS Number 14598 in the database of the Department of Transportation (Department). I-39 is an interstate highway within the definition at Wis. Stat. § 84.30(2)(f). The sign was in existence prior to March 18, 1972, the effective date of Wis. Stat. § 84.30 (the sign control law) and was allowed to be maintained as a nonconforming sign.

2. In a Department sign inspection report dated March 21, 1974, the sign, at the time it became a nonconforming sign, is described as a wooden structure, with a single sign face twenty feet wide by seven feet high. According to Department records, the sign had "illumination." The illumination is identified as "Scotch Lite."

3. On May 27, 2016, the Department issued a sign removal order for the sign. The sign removal order alleged that the sign lost its nonconforming status because electrical lighting had been added to the sign after 1974.

4. Lamar also owns and controls an outdoor advertising sign that was erected in the adjacent area along I-39, 2650 feet north of the Town Line Road underpass in Rock County. The sign is identified as OASIS Number 14410 in the database of the Department. The sign was in existence prior to March 18, 1972, the effective date of the sign control law and was allowed to be maintained as a nonconforming sign.

5. In a Department sign inspection report dated March 19, 1974, the sign at the time it became a nonconforming sign is described as a wooden structure, with a single sign face. According to Department records, the sign had "illumination." The illumination is identified as "Scotch Lite."

6. On June 22, 2016, the Department issued a sign removal order for the sign. The sign removal order alleged that the sign lost its nonconforming status because lighting had been added to the sign after 1974.

Discussion

It is undisputed that both signs at issue were illuminated by Scotch Lite lettering at the time the sign control law became effective. Scotch Lite is a brand name for a reflective material applied to outdoor advertising signs to make the signs visible in very low light situations when headlights of passing motor vehicles strike the sign. Both signs are nonconforming signs meaning that they could not be lawfully erected at their respective locations after the effective date of the sign control law, but can be maintained pursuant to Wis. Admin Code § Trans 201.10(2). Relevant to the instant matters is Wis. Admin Code § Trans 201.10(2)(e), which provides:

(2) In order to lawfully maintain and continue a nonconforming sign, or a grandfathered sign under s. 84.30 (3)(d), Stats., the following conditions apply:

. . .

(e) The sign must remain substantially the same as it was on the effective date of the state law, and may not be enlarged. Reasonable repair and maintenance of the sign, including a change of advertising message, is not a change which would terminate nonconforming rights. Customary maintenance ceases and a substantial

> change occurs if repairs or maintenance, excluding message changes, on a sign exceeds 50% of the replacement costs of the sign.

It is also undisputed that external electrical lighting was added to both signs after the effective date of the sign control law. The Department alleges that the addition of external electrical lighting to signs that had previously been illuminated by Scotch Lite lettering constitutes a substantial change to a nonconforming sign in violation of Wis. Admin Code § Trans 201.10(2)(e). This is the precise fact situation in a previous decision issued by DHA, In the Matter of the Sign Removal Order Issued by the Department of Transportation to The Lamar Company, LLC for a Sign Located Along I-39 in Rock County (OASIS Number 14617), DHA Case No. DOT-16-0020. The determination in Case No. DOT-16-0020 was that replacing Scotch Lite lettering with electrical lighting as the manner of illuminating an outdoor advertising sign was not a substantial change. The basis of Lamar's motion is that based on the determination in DOT-16-0020, the SROs in the instant matters should be reversed.

In its response to Lamar's motion, the Department contends that the facts in the instant case are distinguishable from those in DOT-16-0020. The Department asserts that the extent of the use of Scotch Lite lettering on the signs differs. The alleged substantial change to the nonconforming signs is that illumination was added to the sign. Accordingly, the question is whether Scotch Lite lettering is illumination, not the amount of lettering. The Department also states that it has an expert witness who will testify that Scotch Lite lettering is not a light source and that reflective sheeting cannot be considered illumination under Wis. Stat. § 84.30. With respect to offer of expert testimony that reflective tape is not a light source, clearly, reflective tape is not a light source. However, the legislative objective underlying the meaning of the word "illumination" as the word is used in the current provision, Wis. Stat. § 84.30(5)(br)f., is broader than a "light source."

At the time the SROs at issue in these matters were issued, the phrase "[t]he sign must remain substantially the same" as used in Wis. Admin Code § Trans 201.10(2)(e) was not defined. Since then, Wis. Stat. § 84.30 has been amended. The amendment includes definitions for the phrases "Substantial change" and "Substantially the same" 2017 Wisconsin Act 320 created Wis. Stat. § 84.30(5)(br). Wis. Stat. §§ 84.30(5)(br)1(f) and (g) provide:

> f. "Substantial change," with respect to a nonconforming sign, includes increasing the number of upright supports; changing the physical location; increasing the square footage or area of the sign face; adding changeable message capability; or adding illumination, either attached or unattached, to a sign that was previously not illuminated. "Substantial change" does not include customary maintenance.
>
> g. "Substantially the same," with respect to a nonconforming sign, means that no substantial change has been made to the sign since it became nonconforming.

The effective date for 2017 Wisconsin Act 320 was April 17, 2018, which is after the sign removal order at issue in this matter was issued. However, there is no indication that

the legislative intent in creating Wis. Stat. § 84.30(5)(br) was to amend Wis. Stat. § 84.30, but rather the intent was clarification and to provide some definition for previously undefined terms and phrases used in Wis. Stat. § 84.30 and Wis. Admin Code chap. Trans 201. The creation of Wis. Stat. §§ 84.30(5)(br)1(f) and (g) is consistent with federal guidance cited in the decision in DOT-16-0020 that the addition of illumination to a previously non-illuminated sign is a substantial change to a nonconforming sign. However, upgrading the method of illuminating an already illuminated sign is not a substantial change

The intent of the regulation of outdoor advertising along interstate and federal aid highways is to protect natural scenic beauty by limiting the obtrusiveness of billboards. Obtrusiveness has at least two dimensions. It can be enlarging the structure, so the sign takes up more of the sight field of motorists. Obtrusiveness can also be increased by extending the time that the sign is visible by adding illumination to a previously non-illuminated sign. This is consistent with the Department's contention in the respective SROs that the addition of lighting "constitutes a substantial change [to the nonconforming signs] because the nonconforming use was extended to a 24-hour period, rather than confined to daylight hours." Thus, the consideration is the number of hours a day that a sign is visible to motorists, not the device that makes the sign visible after darkness.

An expert witness testifying that Scotch Lite lettering is not a "light source" is immaterial to the determination that for purposes of the sign law Scotch Lite lettering is not a form of illumination. The Department also stated that the expert would provide testimony that reflective sheeting cannot be considered illumination under Wis. Stat. §. 84.30. Whether reflective sheeting can be considered illumination under Wis. Stat. § 84.30 is a legal issue that DHA can decide without expert testimony. The only conceivable testimony that might be helpful to the Department's case in the instant matters would be a witness that could testify that of signs using Scotch Lite lettering were not uniformly classified as "illuminated" in the Department's database and that that classification in the instant cases and was in error. The Department has not alleged it has such a witness.

Adding illumination to a nonconforming sign that was not previously illuminated constitutes a substantial change to the sign. The legal issue in this matter thus boils down to whether the use of Scotch Lite lettering on an outdoor advertising sign is a form of illumination. Scotch Lite lettering is a reflective material that makes the lettering on an outdoor advertising sign visible during hours of darkness when the face of the sign is hit by motor vehicle headlights. "Illuminate" is defined as "to give light to, light up." (Webster's New World Dictionary). The use of a reflective material caused the signs to "light up" when struck by headlights. At times the signs are hit by headlights, they are illuminated. The determination that the use of Scotch Lite lettering is a form of illumination is consistent with the Department's view at the time the sign control law became effective. On the Department's inventory sheet for the subject signs "Yes" is checked by the question of illumination and the words "Scotch Lite" is written on the inventory sheet as the manner of illumination.

The DHA is not bound to follow holdings in previous decisions on the same issue, but it should strive for consistency in its decisions. The DHA considered the exact fact situation as in the instant cases in DOT-16-0020. The determination in DOT-16-0020 was that Scotch Lite lettering was a form of illumination for outdoor advertising signs and that the addition of electrical lighting is an upgrading of the method of illumination, not the addition of illumination. The Department chose not to appeal the decision in DOT-16-0020. There is no reason to deviate from the determination in DOT-16-0020 in deciding the instant matters. Lamar is entitled to summary judgment in its favor in these matters.

Conclusions of Law

The Administrator concludes:

1. The Department has issued SROs to Lamar alleging that the addition of electrical lighting to the subject signs constitutes a substantial change to the signs causing the signs to lose their nonconforming status. It is undisputed that the signs were previously illuminated by the use of Scotch Lite lettering. The modification of the method of illuminating a nonconforming sign is not a "substantial change" for purposes of Wis. Admin. Code § Trans 201.10(2)(e). Accordingly, the SROs do not allege a legal basis to support the Department orders to remove the subject 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. For the reasons stated above, the sign removal order dated on May 27, 2016, issued by the Wisconsin Department of Transportation to Lamar Company, LLC, for a sign located along I-39 in Dane County and identified as OASIS Number 14598 is REVERSED.

2. For the reasons stated above, the sign removal order dated June 22, 2016, issued by the Wisconsin Department of Transportation to Lamar Company, LLC, for a sign located along I-39 in Rock County and identified as OASIS Number 14410 is REVERSED.

Dated at Madison, Wisconsin on October 15, 2020.

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: _____
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.