STATE OF WISCONSIN
SUPREME COURT

LAMAR CENTRAL OUTDOOR, LLC
d/b/a Lamar Advertising of Central Wisconsin
-and-
TLC PROPERTIES, INC.,

Petitioners-Appellants-Petitioners,

v.

STATE OF WISCONSIN
DIVISION OF HEARING & APPEALS,

Appeal No.
2017AP001823

Respondent-Respondent,

-and-

STATE OF WISCONSIN
DEPARTMENT OF TRANSPORTATION,

Other Party.

ON APPEAL FROM A JUDGMENT OF THE
CIRCUIT COURT, PORTAGE COUNTY, HONORABLE JON M.
COUNSELL, PRESIDING, CASE NO. 16 CV 0196

BRIEF OF PETITIONERS-APPELLANTS-PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE ISSUES

I. Whether DHA erroneously interpreted a provision of law.

A. Whether DHA erred in finding that Wis. Stat. § 84.30 and Wisconsin Administrative Code Trans. § 201.10 prohibit the enlargment of nonconforming, off-premise signs erected after March 18, 1972.

Resolved by the Trial Court: The trial court found that DHA's interpretation of the law was correct.

Resolved by the Court of Appeals: The court of appeals found that DHA's interpretation of the law was correct.

B. Whether DHA misinterpreted and misapplied common law authorities relating to nonconforming uses.

Resolved by the Trial Court: The trial court found that DHA's interpretation of the law was correct.

Resolved by the Court of Appeals: The court of appeals found that DHA's interpretation of the law was correct.

II. Whether DHA erred as a matter of law by finding that the right to cure provision in Wis. Stat. § 84.30(11) does not apply to Lamar's sign.

Resolved by the Trial Court: The trial court found that DHA's determination was correct.

Resolved by the Court of Appeals: The court of appeals found that DHA's determination was correct.

A. Whether 2017 Act 320 extended the Wis. Stat. § 84.30(11) right to cure to all nonconforming signs.

Resolved by the Trial Court: The Act was promulgated after entry of the trial court decision.

Resolved by the Court of Appeals: The court of appeals found that Act 320 does not apply to Lamar's sign on the basis of its determination that the sign was no longer considered "nonconforming" on the effective date of the Act.

III. Whether DHA erred as a matter of law by failing to require WisDOT to resolve statutory ambiguities by engaging in rulemaking.

A. Whether WisDOT's change of policy relating to the addition of extensions to nonconforming signs without promulgating a formal rule pursuant to Wis. Stat. § 227.10(1) constituted unlawful rulemaking.

Resolved by the Trial Court: The parties briefed the issue, but the trial court did not address it.

Resolved by the Court of Appeals: The court of appeals found that it was not necessary for WisDOT to promulgate its revised interpretation of Wis. Stat. § 84.30 as a rule.

B. Whether Wis. Stat. § 227.10(1) required WisDOT to promulgate as a rule its revised interpretation of Wis. Stat. § 84.30.

Resolved by the Trial Court: The parties briefed the issue, but the trial court did not address it.

Resolved by the Court of Appeals: The parties briefed the issue, but the court of appeals did not directly address it.

STATEMENT OF THE CASE
Nature of the Case

Before the Court is the review of a Chapter 227 Final Decision issued by the State of Wisconsin, Division of Hearings and Appeals ("DHA") affirming a Sign Removal Order ("SRO") issued by Other Party, State of Wisconsin, Department of Transportation ("WisDOT"). The Petitioners-Appellants-Petitioners are Lamar Central Outdoor, LLC, d/b/a Lamar Advertising of Central Wisconsin, and TLC Properties, Inc., jointly referred to hereafter as "Lamar."

DHA affirmed the SRO on the basis of its finding that the addition of temporary extensions[1] to the subject sign between 2007 and 2009 constituted an unlawful enlargement of the sign under Wis. Stat. § 84.30 and Trans. 201.10(2)(e), Wis. Admin. Code. The trial court and State of Wisconsin Court of Appeals, District IV ("court of appeals") affirmed DHA's decision. This Court granted review to address Lamar's concerns focusing on statutory interpretation and the need for administrative rulemaking.

[1] "Extensions" are portions of sign faces that extend beyond the straight line edges of those faces.

Summary of Lamar's Argument

Lamar's first argument is that there is no legal prohibition on enlarging its sign, a nonconforming, off-premise sign erected after March 18, 1972. WisDOT's SRO relied on Wis. Stat. § 84.30(5)(bm). DHA determined that this statute (the only statute prohibiting the enlargement of signs) applies only to on-premise signs and is not applicable to Lamar's sign. Because the parties agreed with this determination, the court of appeals did not address it. The other legal authority relied upon by WisDOT is Trans. 201.10(2)(e). Analysis of that rule yields the conclusion that it applies only to nonconforming signs lawfully in existence on March 18, 1972 and has no application to those erected thereafter. Lamar's sign was erected in 1991.

Because of the questionable applicability of the statutory and administrative code provisions relied upon by DHA, it is appropriate to refer to the treatment of nonconforming uses under the common law. The alleged revisions to the subject sign are not of the nature that would warrant the termination of Lamar's nonconforming property rights under controlling authorities. The termination of Lamar's property rights would be contrary to both the letter and the spirit of long-standing common law precedent relating to the elimination of nonconforming uses.

Lamar's second argument is that the owner of a nonconforming sign erected in an adjacent area after March 18, 1972 has a statutory right to cure a violation that would otherwise cause the sign to lose its nonconforming status. DHA erroneously found that the right to cure included in Wis. Stat. § 84.30(11) does not apply to nonconforming signs. The plain language of the statute dictates otherwise.

Further, Wis. Stat. § 84.30(br)(4) was signed into law on April 16, 2017. Subsection 2 of the Act (2017 Act 320) provides that it "first applies to nonconforming signs in existence on the effective date of this subsection." Lamar's sign remained in existence on April 17, 2017. The statute provides in relevant part that "[i]n determining whether a change to a sign constitutes a violation of sub. (3) or (4), the department may not consider any changes to that sign that no longer exist." It is undisputed that the alleged changes to Lamar's sign did not exist when the SRO was issued. The court of appeals found that while Lamar's sign still existed, it was no longer "nonconforming" as of the effective date of the Act. Lamar disputes this finding.

Rulemaking is addressed in Lamar's final argument. The record establishes that WisDOT previously afforded a right to cure to the owners of nonconforming signs. The court of appeals rejected Lamar's argument that

WisDOT's determination to no longer afford such a right to cure required formal rulemaking. WisDOT engaged in unlawful rulemaking when it changed its policy regarding the addition of temporary extensions to nonconforming signs without engaging in formal rulemaking under Wis. Stat. § 227.10. Ambiguities in Wis. Stat. § 84.30 and the Department's policy changes in response to those ambiguities required WisDOT to engage in formal rulemaking.

DHA acknowledged the existence of the rulemaking issues (R.8-19; P-App. 394), but failed to address them in its Decision. Despite the fact that both parties addressed the issue, the trial court also disregarded rulemaking. The court of appeals found that it was not necessary for WisDOT to promulgate its revised interpretation of Wis. Stat. § 84.30 as a rule. [COA Decision, ¶77, P-App. 452].

Statement of Facts

1. Orde Advertising (Lamar's predecessor in interest) applied to WisDOT for a permit to construct the subject sign in 1991. [R.8-463–467; P-App. 354-358].

2. The sign is located adjacent to and within view of Interstate Highway I-39 in Portage County, Wisconsin. [R.8-457; P-App. 348].

3. WisDOT issued a permit for OASIS 7740 in 1991, authorizing two sign faces totaling 1344 square feet in area. [R.8-463–467; P-App. 354-358].

4. At the time WisDOT issued a permit for the sign, the highway along which the sign was constructed was designated U.S. Highway 51. [R.8-457, 463-467; P-App. 348, 354-358].

5. The area in which the sign stands was made a part of the City of Stevens Point in 1968. [R.8-459, 468-474; P-App. 350, 359-365].

6. The area in which the sign stands was not described as being part of the City as of September 1, 1959. [R.8-470, 475-483; P-App. 361, 366-374].

7. The lands where the sign stands were also unzoned as of September 1, 1959, and no state law designated the area as commercial or industrial as of September 1, 1959. [R.8-459; P-App. 350].

8. WisDOT records show that Lamar Central Outdoor, LLC has owned the subject sign at all times relevant to this action. [R.8-457; P-App. 348].

9. U.S. Highway 51 was designated an interstate highway on January 11, 1996. [R.8-458; P-App. 349]. On that date, OASIS 7740 became a "nonconforming sign."

10. Lamar filed an application to remove vegetation in the vicinity of its sign on June 12, 2012. [R.8-485–496; P-App. 376-387].

11. WisDOT issued an Amended Decision denying Lamar's application on or about October 10, 2012. [R.8-497; P-App. 388)]. The stated basis for WisDOT's denial of Lamar's application was that the sign was unlawfully enlarged. [Id.].

12. WisDOT alleges that Lamar's sign was enlarged through the use of extensions. The Department informally defined "sign extensions" by stating that "most signs are a regular geometric shape. An extension is something that's added on to the side, maybe sticks out from the sign." [R.108-37; P-App. 37].

13. WisDOT's then Statewide Sign Permit Coordinator acknowledged that "there is nothing in Trans. 201 or in Section 84.30 of the Wisconsin Statutes that specifically addresses extensions or bump-outs." [R.108-70; P-App. 70].

14. WisDOT's stated basis of illegality is that "from at least May 21, 2008 to September 9, 2008, OASIS 7740 was enlarged beyond its originally permitted nonconforming size of 1344 square feet." [R.8-451; P-App. 342].

15. On September 4, 2012, WisDOT issued a SRO to Lamar on the basis that the "sign has been enlarged, in violation of Wisconsin Administrative Code Trans. 201.10(2)(e) and Wisconsin Statute 84.30(5)(bm) (see enclosure). This is an illegal sign." [R.8-498; P-App. 389].

16. WisDOT has no knowledge of the dimensions of the subject sign face on the date the sign became nonconforming (January 11, 1996). [R.108-150 – 153; P-App. 150-153].

17. WisDOT has no knowledge of the appearance of the subject sign face on January 11, 1996. [R.108-150 – 153; P-App. 150-153].

18. WisDOT has no knowledge as to whether the subject sign included one or more extensions on January 11, 1996. [R.108-150–153; P-App. 150-153].

19. David Vieth, Deputy Director of WisDOT Region 1, testified that "an extension can be legal, whether it's a non-conforming sign or another

sign. However, if the sign when it became non-conforming did not have an extension, an extension can't be added." [R.108-30–31; P-App. 030-031].

20. Mr. Vieth further testified that he did not know whether the subject sign had an extension at the time it became non-conforming. [R.108-30; P-App. 030].

21. No testimony was presented as to the area of any of the extensions presented by WisDOT for the consideration of the Division.

22. Prior to 1999, the most serious consequence of adding an extension to a nonconforming sign was that the owner of such a sign would be given a sixty-day warning to remove the extension. If the owner did so, the sign could continue to lawfully exist. [R.108-194–195; P-App. 194-195].

23. WisDOT's SRO states that "[u]nder the authority provided in Wisconsin Statutes, 84.30(11) and Wisconsin Administrative Code, TRANS. 201.09, you are hereby ordered to remove the above-described outdoor advertising sign within 60 days of the date of this notice." [R.8-498; P-App. 389 (Emphasis supplied)].

24. WisDOT's SRO further alleges that "[t]his sign has been enlarged, in violation of Wisconsin Administrative Code Trans. 201.10 (2)(e) and Wisconsin Statute 84.30(5)(bm)." [R.8-498; P-App. 389].

25. Lamar timely appealed WisDOT's SRO. The appeal was assigned Case Numbers TR-12-0034 and TR-12-0035. [R.8-18; P-App. 393].

26. A contested case hearing was conducted following the denial of WisDOT's motion for summary judgment. [See R.108-1–305; P-App. 001-305].

27. On May 24, 2016, DHA entered a Final Decision affirming WisDOT's SRO. [R.8-18–31; P-App. 393-406]. That Final Decision was affirmed by the trial court on review. [R.100-1–10; P-App. 407-416].

28. DHA's Final Decision includes a finding that "Wis. Stat. § 84.30(11) does not apply to nonconforming signs." [R.8-26; P-App. 401].

29. The sign at issue in this appeal is a nonconforming sign erected after March 18, 1972. [R.8-21; P-App. 396].

30. DHA's jurisdiction under Wis. Stat. § 84.30(18) is limited to "[h]earings concerning sign removal notices under [Wis. Stat. § 84.30] sub. (11)."

31. DHA's Final Decision also includes a finding that "Wis. Stat. § 84.30(5)(bm), applies to on-premise signs and is not applicable to the subject sign." [R.8-26; P-App. 401].

ARGUMENT

STANDARD OF REVIEW

Wis. Stat. § 227.57 addresses the Court's scope of review. Subsection (5) provides that "the court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law."

This case hinges upon DHA's interpretation of Wis. Stat. § 84.30 and Trans. 201.10. The material facts are set forth above and are not in dispute. The interpretation of statutes and regulations and their application to the undisputed facts are questions of law. See ***Truttschel v. Martin***, 208 Wis. 2d 361, 364–65, 560 N.W.2d 315, 317 (Wis.App.1997).

Wis. Stat. § 227.57(11)[2] was originally enacted on April 26, 2016 as 2015 Assembly Bill 582. It was published on April 27, 2016. No effective date is prescribed in the Act. Accordingly, Subsection (11) took effect the day after its date of publication, on April 28, 2016. See Wis. Stat. § 991.11. DHA's

[2] Per Wis. Act. 369 (effective 12/15/18), Wis. Stat. § 227.57(11) now reads "Upon review of an agency action or decision, the court shall accord no deference to the agency's interpretation of law."

Final Decision on review was entered May 24, 2016. Subsection (11) therefore applies to the Court's review of DHA's decision. It provides as follows:

> Upon review of an agency action or decision affecting a property owner's use of the property owner's property, the court shall accord no deference to the agency's interpretation of law if the agency action or decision restricts the property owner's free use of the property owner's property.

Because DHA's Decision restricts Lamar's free use of its property by causing Lamar to lose its property rights in the asset altogether, the Decision is to be accorded no deference. It is for this Court to determine what it views as the most reasonable interpretation of Wis. Stat. § 84.30 and Trans. 201.10.

I. THERE EXISTS NO LEGAL PROHIBITION ON ENLARGING LAMAR'S SIGN.

WisDOT's SRO cites to Wis. Stat. § 84.30(5)(bm) and Trans. 201.10 (2)(e) as the legal bases for its determination of illegality. [R.8-498, P-App. 389]. DHA found that Wis. Stat. § 84.30(5)(bm) applies only to on-premise signs and does not apply to Lamar's sign. [R.8-26, P-App. 401]. Because the parties agreed with this determination, the court of appeals did not address it. [COA Decision, p. 10, FN7, P-App. 428]. Trans. 201.10(2)(e) does not provide WisDOT with legal authority to order the removal of nonconforming signs lawfully erected after March 18, 1972.

A. WIS. STAT. § 84.30(5)(BM) APPLIES ONLY TO ON-PREMISE SIGNS.

Prior to Act 320, Wis. Stat. § 84.30(5)(bm) was the only statute addressing enlargement of a nonconforming sign. It remains the only reference in Wis. Stat. § 84.30 or otherwise to signs being subject "to removal without compensation."

DHA properly concluded in its Final Decision that "Wis. Stat. § 84.30 (5)(bm), applies to on-premise signs and is not applicable to the subject sign." [R.8-26, P-App. 401]. The statute cited by WisDOT in its SRO provides no authority for the removal of Lamar's sign.

In its Decision, the court of appeals noted that "the parties do not dispute that § 84.30 (5)(bm) applies only to on-premise signs, and the sign at issue is an off-premise sign. Therefore, our discussion does not address § 84.30 (5)(bm)." [COA Decision, p. 10, FN7, P-App. 428]. Because the court of appeals did not address the issue, Lamar will briefly explain why DHA's determination that Wis. Stat. § 84.30(5)(bm) applies only to on-premise signs is correct. The statute provides as follows:

> Signs lawfully erected, **but which do not conform to the requirements of sub. (3)(c)**, are declared nonconforming but are not subject to removal, except as otherwise provided in this paragraph. To allow such signs to exist, to perform customary maintenance thereon or to change the advertising message thereof, does not constitute a violation of sub. (3), but to enlarge, replace or relocate such signs, or to erect additional signs, shall

> constitute a violation subjecting the sign to removal without compensation, unless upon completion of such work all signs upon the property conform to the requirements of sub. (3). (Emphasis supplied).

Wis. Stat. § 84.30(3)(c) refers exclusively to "[s]igns advertising activities conducted on the property on which they are located." Such signs are known as "on-premise signs." It is legally impossible for a lawfully erected (i.e. "permitted") off-premise sign to conform to the requirements of Wis. Stat. § 84.30(3)(c), which concerns only "on-premise signs."

If Wis. Stat. § 84.30(5)(bm) were read as being applicable to off-premise signs, then every legally permitted, off-premise sign would automatically be "declared nonconforming" as soon as it was erected. If Wis. Stat. § 84.30(5)(bm) is read as being applicable to off-premise signs, the existence of legally permitted, off-premise signs would be legally impossible. These facts support DHA's determination that Wis. Stat. § 84.30(5)(bm) applies exclusively to "on-premise signs."

Given that Wis. Stat. § 84.30(5)(bm) applies exclusively to on-premise signs, Trans. 201.10 is the only remaining legal authority that could possibly support the removal of Lamar's sign.

B. TRANS. 201.10 DOES NOT APPLY TO SIGNS LAWFULLY ERECTED AFTER MARCH 18, 1972.

Trans. 201.10(2) provides in relevant part:

> (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:
>
> (a) The sign must have been actually in existence at the time the applicable state law became effective,…
>
> (d) The sign must have been lawful on the effective date of the state law and must continue to be lawfully maintained.
>
> (e) The sign must remain substantially the same as it was on the effective date of the state law, and may not be enlarged…

Trans. 201.10(1)-(2) provide that in order to lawfully maintain a nonconforming sign, a sign must meet all of the conditions of subsection (2). Three of those conditions (a, d & e) require that the sign be in existence on ***the effective day of the state law***. Wisconsin's version of the HBA was first adopted as Wis. Stat. § 84.30 by the enactment of Chapter 197 of the Laws of 1971, published March 17, 1972. [See R.96-57–61].

Wis. Stat. § 991.11 (formerly Wis. Stat. § 990.05) provides that legislative acts take effect the day after publication. That is why Wis. Stat. § 84.30 contains multiple references to March 18, 1972. That is the day after publication of Chapter 197, Laws of 1971.

This analysis is confirmed by a quick reading of Chapter 197, Laws of 1971. In all subsections in which the current Wis. Stat. § 84.30 includes the date "March 18, 1972," the original promulgation included the following language: "the effective date of this section (1971)." Hence, when Trans. 201.10 makes references to "the effective date of the state law," it means "March 18, 1972." The provisions of Trans. 201.10 must therefore be regarded as "on March 18, 1972" being in place of "on the effective date of the state law."

A sign lawfully erected after March 18, 1972 cannot *have been actually in existence [on March 18, 1972].* Similarly, a sign lawfully erected after March 18, 1972 could not *have been lawful [on March 18, 1972].* Finally, a sign lawfully erected after March 18, 1972 could not *remain substantially the same as it was [on March 18, 1972].* The plain language of Trans. 201.10 makes it applicable only to signs lawfully in existence on March 18, 1972.

The court of appeals "reject[ed] Lamar's approach because the structure of ch. TRANS 201, understood within the context provided by § 84.30 and federal regulations codified at 23 C.F.R. Part 750, supports construing the phrase "the effective date of the state law" as used in §TRANS

201.10(2)(e) to refer to the date in January 1996 on which a state law rendered the sign nonconforming, and not to March 18, 1972 as Lamar contends." [COA Decision, p. 16, P-App. 434].

The court found that "[c]ontext is important to meaning," as is "the structure of the [administrative rule] in which the operative language appears." ***Id.*** We conclude that the "intrinsic context in which [the administrative rule's] language is used," ***Id.***, ¶ 49, supports the DHA's interpretation. [Id.].

The court of appeals utilized rules of statutory construction which are to be applied only when a provision is ambiguous. The word "ambiguous" does not appear in the court of appeals' decision. That is because the plain language of the rule is clear. It is inappropriate to apply rules of statutory construction to an unambiguous rule.

The court of appeals cited to the seminal decision of the Wisconsin Supreme Court in ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110. The Court devoted a substantial portion of its decision to discussing "plain meaning" principles.

> Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language. Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances, but is not the primary focus

> of inquiry. It is the enacted law, not the unenacted intent, that is binding on the public. Therefore, the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.
>
> Thus, we have repeatedly held that statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *Seider,* 236 Wis.2d at 232, 612 N.W.2d 659; *see also Setagord,* 211 Wis.2d at 406, 565 N.W.2d 506; *Williams,* 198 Wis.2d at 525, 544 N.W.2d 406; *Martin,* 162 Wis.2d at 893–94, 470 N.W.2d 900. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.
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> ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶¶ 44-45, 271 Wis. 2d 633, 662–63, 681 N.W.2d 110, 123–24.

The Court emphasized that "our cases generally adhere to a methodology that relies primarily on intrinsic sources of statutory meaning and confines resort to extrinsic sources of legislative intent to cases in which the statutory language is ambiguous." ***Kalal***, 2004 WI 58, ¶43.

The court of appeals made no finding of ambiguity. Its analysis of the rule should have begun and ended with a discussion of its plain meaning.

Further, the court of appeals misapplied another principle identified in its Decision. The court found that "DHA's interpretation construes the rule so as to make it "an effectual piece of legislation in harmony with common sense and sound reason." ***DaimlerChrysler,*** 299 Wis. 2d 1, ¶ 10 (quoting ***Busch,*** 217 Wis. 2d at 441)." [COA Decision, p. 16, P-App. 434]. The legal principle cited by the court reads in full as follows:

> Administrative rules promulgated pursuant to a power delegated by the legislature "should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason." *Law Enforcement Standards Bd. v. Village of Lyndon Station,* 101 Wis.2d 472, 489, 305 N.W.2d 89 (1981).
>
> ***State v. Busch***, 217 Wis. 2d 429, 441, 576 N.W.2d 904, 908 (1998) (Emphasis supplied).

DHA and the court of appeals construed the rule itself. They did not construe the rule with the underlying statute. The distinction is important. The rule must be construed with Wis. Stat. § 84.30 to make an effectual piece of legislation. As previously noted, Wis. Stat. § 84.30 does not include any limitations on the enlargement of nonconforming, off-premise signs. Likewise, the statute does not provide for the uncompensated removal of such signs. Construing the rule together with the statute to make it "an effectual piece of legislation in harmony with common sense and sound reason" weighs against an interpretation of the rule providing for the uncompensated removal of Lamar's sign. Any interpretation providing for the uncompensated removal of Lamar's sign is out of harmony with Wis. Stat. § 84.30.

Further, DHA's construction of the rule is out of harmony with the rule itself. The complete language of Trans 201.10(2)(a) reads:

> The sign must have been actually in existence at the time the applicable state law became effective, except where a permit for the construction of a sign was granted by the state prior to the effective date of the state law

> and the sign owner acted in good faith and expended sums in reliance thereon. This exception shall not apply in instances where large numbers of permits were applied for and issued to a single sign owner, obviously in anticipation of the passage of a state control law.

The rule provides that the sign must be in existence on the effective date of the state law, or the owner must have received a permit and invested money in the sign on the effective date of the state law. The final sentence exposes the weakness in DHA's interpretation. It eliminates the permit exception "in instances where large numbers of permits were applied for and issued to a single sign owner, obviously in anticipation of the passage of a state control law." The last phrase of subsection (2)(a) makes it clear that "the effective date of the state law" refers to the passage of the sign control law by the legislature, not some future event such as the conversion of a state highway to an Interstate. Thus, DHA's interpretation of the rule is not only out of harmony with Wis. Stat. § 84.30 – it is out of harmony with the rule itself.

Removal of Lamar's sign only with the payment of compensation is also supported by the first promulgation of administrative rules interpreting Wis. Stat. § 84.30. Chapter Hy 19, Wis. Admin. Code, was created effective October 1, 1972, by "Register, September, 1972, No. 201." Hy 19.06(1) includes limitations on nonconforming signs existing on March 18, 1972.

However, it does not impose limits on signs erected after March 18, 1972. The only limits on such signs are included in subsection (2). Aside from physical construction limitations, the only requirement is that such signs be "substantially supported, well-maintained, and sightly in appearance." [Hy 19.06(2), Wis. Admin. Code (1972)]. This rule is consistent with Wis. Stat. § 84.30 as it existed in 1972, and as it existed as of the date WisDOT issued its SRO. The rule, like the statute to this day, does not restrict changes on post-1972 signs. It provides only for the compensated removal of such signs.

This may explain why the court of appeals further attempted to support its rejection of Lamar's position by citing to the compensated removal provisions of Wis. Stat. § 84.30,

> [T]he statutory scheme and administrative rules strongly suggest that *all* nonconforming signs, including the sign at issue in this case, are intended to be removed. *See* Wis. STAT. § 84.30(5)(a) ("Signs outside of business areas which are lawfully in existence on March 18, 1972 but which do not conform to the requirements herein are declared nonconforming and *shall be removed* by the end of the 5th year from said date.") (emphasis added), (5)(b) ("A sign lawfully erected after March 18, 1972 and which subsequently does not conform to this section *shall be removed* by the end of the 5th year after it becomes nonconforming.") (emphasis added).

[COA Decision, p. 21, P-App. 439].

The court of appeals is correct. The legislature intended that all nonconforming signs be removed within five years of becoming nonconforming – with compensation. Both of the above provisions address

compensated removal of nonconforming signs. They fail to even mention or refer to any intent of the legislature to provide for the uncompensated removal of nonconforming signs.

Further review of Wis. Stat. § 84.30 and Hy 19, Wis. Admin Code, as initially promulgated, is instructive. The language of Wis. Stat. § 84.30(11) was substantially the same in 1972 as it exists today. Hy 19.09 provided as follows:

> Any sign erected after March 18, 1972, and not permitted by the commission, or permitted signs which subsequently become nonconforming with respect to section 84.30, Wis. Stats., or these rules, shall be removed in accordance with section 84.30(11), Wis. Stats."

Hy 19.09 refutes the DHA/court of appeals' construction of Wis. Stat. § 84.30(11). The administrative code acknowledged that subsection (11) applies to "[a]ny sign erected after March 18, 1972 ... which subsequently become[s] nonconforming with respect to section 84.30." From the very beginning, WisDOT afforded the subsection (11) right to cure to signs lawfully erected after March 18, 1972, which subsequently failed to comply with the statute. The right to cure was recognized in the administrative code. Any change of position required the Department to promulgate a new rule purporting to remove this recognized right.

Again, the court of appeals concluded that "the structure of ch. TRANS 201, understood within the context provided by § 84.30 and federal regulations codified at 23 C.P.R. Part 750, supports construing the phrase 'the effective date of the state law' as used in §TRANS 201.10 (2)(e) to refer to the date in January 1996 on which a state law rendered the sign nonconforming, and not to March 18, 1972 as Lamar contends." [COA Decision, ¶39, P-App. 434].

There is no legal support for this conclusion. The above analysis of the legislative history of Wisconsin's HBA conclusively establishes that the "effective date of this section" is March 18, 1972. As established above, when Trans. 201.10 makes references to "the effective date of the state law," it plainly means "March 18, 1972."

The court of appeals did not interpret the statute or administrative code. It re-wrote them. Such rewriting could result in a different "effective date of this section" for every post-1972 sign. Such a construction is unworkable and inconsistent with the plain language of the statute.

There is a logical basis for the preferential treatment of post-1972 signs. Signs permitted after passage of the Act were not intended to be phased out. The owners of such signs paid valuable consideration for a

property interest they had reason to believe could be maintained indefinitely. Most often, as here, a permitted sign becomes nonconforming as the direct result of governmental action.

Lamar's sign was legally permitted along State Highway 51. That state highway was later designated as I-39. [R.8-458, P-App. 349]. Solely by virtue of this change in designation the sign became nonconforming. The legislature and the Department made a fair and reasonable determination to not impose the same standards on this sign (by example) as on those declared nonconforming on March 18, 1972 and originally earmarked for removal no later than March 18, 1977.

The Court should presume that the legislature said what it meant and meant what it said. The plain meaning of Wis. Stat. § 84.30 must be given effect. It may only be given effect by not permitting the uncompensated removal of Lamar's sign.

C. A TEMPORARY NONCONFORMITY DOES NOT RENDER ILLEGAL A NONCONFORMING SIGN ERECTED AFTER MARCH 18, 1972.

Lamar's sign was first permitted as an off-premise sign in 1991. [R.8-458, P-App. 349]. It subsequently became nonconforming in 1996. [R.8-457–461, P-App. 348–352].

Wis. Stat. § 84.30(11) applies to Lamar's sign. It provides:

> any sign erected in an adjacent area after March 18, 1972, in violation of this section or the rules promulgated under this section, may be removed by the department upon 60 days' prior notice by registered mail to the owner thereof and to the owner of the land on which said sign is located, unless such sign is brought into conformance within said 60 days.

(Emphasis supplied).

DHA determined that Wis. Stat. § 84.30(11) does not apply to any nonconforming signs, including Lamar's. [R.8-26, P-App. 401]. This determination is incorrect.

Signs that were lawfully in existence when the state law took effect on March 18, 1972 were categorized as "nonconforming." It was the original intent that all such signs would be removed within five years. [See Wis. Stat. § 84.30(5(a)]. Wis. Stat. § 84.30(11) does not regulate such signs. It applies only to "sign[s] erected in an adjacent area after March 18, 1972." The erection and maintenance of post-1972 signs is expressly permitted by law.

As discussed above, Hy 19.06(1) is the predecessor rule to Trans 201.10. It imposed no limits on changes to signs erected after March 18, 1972. Like the statute to this day, it did not restrict changes on post-1972 signs. And like the statue, it provided only for the compensated removal of such signs. Any change to this rule would require support in Wis. Stat. § 84.30. There is no such support. Further, any change in the rule would

need to plainly state that changes to signs erected after March 18, 1972 were now limited, and that changes exceeding those limitations would result in the uncompensated removal of the sign. Trans 201.10 does not do so … and for good reason. Wis. Stat. § 84.30 does not provide for uncompensated removal of off-premise signs erected after March 18, 1972.

DHA and the reviewing courts failed to recognize that the signs to which subsection (11) applies were not those Lady Bird Johnson sought to eliminate when she championed the Highway Beautification Act. There exists a sound basis for the decision of the legislature to treat more favorably those signs lawfully erected after enactment of the Act. It is not the province of DHA or the courts to question the judgment of the legislature.

D. DHA'S INTERPRETATION OF WIS. STAT. § 84.30(11) IS CONTRARY TO THE PLAIN MEANING OF THE STATUTE.

The first rule of statutory interpretation is what is referred to as the "plain meaning rule." In ***VanCleve v. City of Marinette***, 258 Wis.2d 80, 655 N.W.2d 113 (Wis. 2003), the Supreme Court described the rule as follows:

> In interpreting a statute, we first look to the language of the statute itself to attempt to interpret it based on "the plain meaning of its terms." *State v. Williquette*, 129 Wis.2d 239, 248, 385 N.W.2d 145 (1986). Furthermore, it is a well established rule that if the language of a statute is clear and unambiguous, the court must not look beyond the statutory language to ascertain the statute's meaning. Only when statutory language is

> ambiguous may we examine other construction aids such as legislative history, context, and subject matter.
>
> ***VanCleve v. City of Marinette***, 258 Wis.2d 80, 90-91, 655 N.W.2d 113, 118 (Wis. 2003).

Here, the plain meaning of Subsection (11) supports the conclusion that the right to cure applies to signs that were lawfully erected and were compliant, when erected, but subsequently became noncompliant. As the statute is written, the phrase "in violation of this section or the rules promulgated under this section" refers to "sign," not "erected." This interpretation is supported by subsequent clauses (*e.g.*, "may be removed" and "unless such sign is brought into conformance") and by the commas setting off "in violation." In addition, the other subsections within Wis. Stat. § 84.30 support the interpretation that "in violation" within Subsection (11) refers to the sign, not its erection, as determined below.

DHA (and both reviewing courts) concluded that Wis. Stat. § 84.30(11) does not apply in this case because that subsection applies only to signs that were "erected" unlawfully, and the Lamar sign was "erected" lawfully. [R.8-26, P-App. 401]. This interpretation is incorrect. The right to cure provision in Subsection (11) applies to signs like the subject sign that were lawfully erected and compliant when erected, but subsequently became

non-compliant. This interpretation of Subsection (11) is supported by the plain meaning of its terms and other subsections of Wis. Stat. § 84.30. See e.g., ***Wisconsin Citizens Concerned for Cranes & Doves v. DNR***, 2004 WI 40, ¶ 6, 270 Wis. 2d 318, 677 N.W.2d 612.

The court of appeals found that "nonconforming sign[s], by definition, cannot be brought 'into conformance.' A sign that is 'erected . . . in violation,' on the other hand, can be brought 'into conformance.' Accordingly, we conclude that the right to cure provided for in § 84.30(11) applies only to signs 'erected ... in violation' of § 84.30 or its related administrative rules." [COA Decision, ¶62, P-App. 445-446].

Trans. 201.035(7) refutes this ruling of the court of appeals. It provides in relevant part:

> The permit for a sign shall expire upon the due date for payment unless the annual fee for the sign has been paid. Signs with expired permits are subject to removal 60 days from the due date specified in the notice. The department shall notify a sign owner that a sign is subject to removal under this section in accordance with s. 84.30(11), Stats.

A sign erected pursuant to a state-issued permit is a sign that was legally erected. A sign with an expired permit becomes illegal, but the "sign may be brought into conformance" by paying the required fee within 60 days. Thus, the determination that Wis. Stat. § 84.30(11) applies only to signs erected illegally is expressly contradicted by Trans. 201.035(7).

Further, 2017 Wisconsin Act 320 ("Act") refutes the court of appeals' conclusion that an illegal sign may not be brought into conformance with the HBA. The Act, signed into law 04-16-2017, provides for just that. Wis. Stat. § 84.30(5)(br)(4) provides that if an "alleged violation [unlawful change to a nonconforming sign] is remedied within 60 days of receipt of the notice under this subdivision, the activity does not constitute a violation of sub. (3) or (4)."

Section 2 of the Act provides that it "first applies to nonconforming signs in existence on the effective date of this subsection." Lamar's sign was nonconforming and in existence on that date. As a result, the Act's amendments apply to Lamar's sign.

Wis. Stat. § 84.30(br)(4) provides in relevant part that "[i]n determining whether a change to a sign constitutes a violation of sub. (3) or (4), the department may not consider any changes to that sign that no longer exist." DHA made a finding in its Decision that the changes to the sign that constituted the alleged illegality were not in existence at the time WisDOT inspected the sign or issued the SRO. [R.8-21–22, P-App. 396–397].

Wis. Stat. § 84.30(br)(4) further provides:

> If the department determines that a change to a sign constitutes a violation of sub. (3) or (4), the department shall notify by registered mail the sign

> owner and the owner of the property upon which the sign is located of the alleged violation. If the alleged violation is remedied within 60 days of receipt of the notice under this subdivision, the activity does not constitute a violation of sub. (3) or (4).

The issue of whether Wis. Stat. § 84.30 includes a 60-day "right to cure" was litigated throughout these proceedings. Wis. Stat. § 84.30(br)(4) expressly provides that alleged violations remedied within 60 days' notice are not violations. The violations alleged here were remedied years before the SRO was issued. By promulgating Wis. Stat. § 84.30(br)(4), the legislature extended the right to cure in Wis. Stat. § 84.30(11) to all nonconforming signs, even those in existence on March 18, 1972.

The court of appeals found that the provisions of Act 320 do not apply to Lamar's sign because when the Act was signed into law, the sign was illegal, not nonconforming. [COA Decision, ¶54, P-App. 443]. The legality of Lamar's sign remains at issue. Until such time as this litigation is concluded, Lamar's sign remains classified as "nonconforming." The amendments plainly provide that "[i]n determining whether a change to a sign constitutes a violation of sub. (3) or (4), the department may not consider any changes to that sign that no longer exist." Not only do the alleged changes to Lamar's sign not currently exist – they did not exist when the

SRO was issued. Since there was no alleged illegality in existence when the SRO was issued, there exists no violation of sub. (3) or (4).

Equally important, regardless of whether the provisions of Act 320 apply to Lamar's sign, their enactment by the legislature refutes a central tenet of the holding of DHA and the reviewing courts – that once a nonconforming sign becomes unlawful it may not be brought back into conformance with Wis. Stat. § 84.30. This finding was fundamental to the rejection of Lamar's interpretation of Wis. Stat. § 84.30(11). Act 320 renders this finding untenable.

II. THE RULINGS OF THE COURT OF APPEALS ARE IN CONFLICT WITH EXISTING LAW.

Reversal is also necessary because the court of appeals' decision conflicts with the requirements of Wis. Stat. § 227.10 and this Court's decisions.

A. WISDOT FAILED TO ENGAGE IN REQUIRED RULEMAKING.

WisDOT's treatment of sign extensions and the availability of a right to cure alleged unlawful changes has been inconsistent over the years. That inconsistency is a direct result of divergent interpretations of the applicable statutes and rules. Any perceived ambiguity should have been resolved by

WisDOT engaging in rulemaking. In the absence of a clear rule of law, the *ad hoc* interpretations of WisDOT decision-makers constitute unlawful rulemaking. Such interpretations have created an uncertain legal landscape and have rendered tenuous the property rights of sign owners.

1. WISDOT'S TREATMENT OF SIGN EXTENSIONS ON NONCONFORMING SIGNS HAS BEEN INCONSISTENT.

Lamar called Robert Hardie as a witness. Mr. Hardie was a long-time WisDOT employee, holding the position of, among others, [Sign] Permit Program Supervisor. [R.108-188, P-App. 188]. The responsibilities of the Permit Program Supervisor included the statewide regulation and oversight of all outdoor advertising signs. [R.108-189, P-App. 189]. Mr. Hardie testified that during his tenure "[i]f a sign was either permitted at a certain size or legal-nonconforming at a certain size, if an extension went up, it would be considered illegal, and have to be removed or taken back to where it was before." [R.108-194, P-App. 194]. Mr. Hardie further testified that the owner of such a sign would be given a sixty-day warning to remove the extension. If the owner did so, the sign could continue to lawfully exist. [R.108-194–195, P-App. 194–195]. Such a policy is consistent with Lamar's interpretation of Wis. Stat. § 84.30(11).

Mr. Hardie was succeeded by Deborah Brucaya. She was WisDOT's statewide Sign Permit Coordinator at the time the subject SRO was issued. Ms. Brucaya testified that if an extension is added to a nonconforming sign, the sign loses its nonconforming status forever and becomes illegal. It makes no difference if the extension is removed prior to a WisDOT enforcement action. [R.108-66, P-App. 066].

Mr. Hardie testified that "DOT had no published written policy on the use of extensions one way or the other on off-premises nonconforming signs during [his] tenure." [R.108-193, P-App. 193]. Likewise, WisDOT currently has no policies or guidance to assist the department with the interpretation of the applicable statutes and rules. [R.108-34, P-App. 034].

For many years sign extensions were permitted as standard industry practice. [R.108-193,228,229,207–211,216,218; P-App. 193,228,229,207–211,216,218]. WisDOT was unable to refute this contention. [R.108-290, P-App. 290; R.108-69, P-App. 069]. Adding an extension prior to 1999 resulted only in an order from WisDOT requiring its removal within 60 days. [R.108-194–195, P-App. 194–195]. As evidenced by this action, the Department has dramatically shifted its policies and its interpretation and application of the statutes.

2. WISDOT'S CHANGE IN POLICY IN RELATION TO THE TREATMENT OF TEMPORARY EXTENSIONS CONSTITUTES UNLAWFUL RULEMAKING.

WisDOT argued before DHA that it was not necessary for the Department to engage in rulemaking in order to apply what it considers to be the unambiguous meaning of the applicable authorities. [See R.8-165; citing ***Schoolway Transportation Co. v. Division of Motor Vehicles***, 72 Wis. 2d 223, 240 N.W.2d 403 (1976)].

However, WisDOT's statewide Sign Permit Coordinator of 10+ years acknowledged that there is considerable room for interpretation as to the meaning of the sign statutes and rules. [R.108-63, P-App. 063]. This room for interpretation is on full display here given the divergent interpretations of Wis. Stat. § 84.30(11) by Ms. Brucaya and her predecessor, Mr. Hardie.

The facts here are consistent with the second rulemaking issue presented in ***Schoolway***. The Court described the facts as follows:

> The Department has also revised its interpretation...of sec. 341.26 (2)(h), Stats., and will no longer permit Schoolway to register its busses for charter and contract work pursuant to the terms of that section. Since the terms of that section do not specifically exclude busses engaged in charter and contract work, the Department relies on the context of ch. 71 in which the definition of urban mass transportation is contained to reach its conclusion that Schoolway's busses do not qualify. This represents an interpretation of a statute within the meaning of sec. 227.10 (4). The interpretation is being administered as law and the Department relies upon it to deny Schoolway a license under sec. 341.26 (2)(h)...This

> interpretation is in direct contrast to the manner in which the statute was previously administered by the Department.
>
> ***Schoolway Transp. Co., Inc. v. Division of Motor Vehicles, Dept. of Transp.***, 72 Wis. 2d 223, 236-237, 240 N.W.2d 403, 410 (Wis. 1976).

DHA expressly acknowledged the issue of…

> whether the Department was required to engage in rulemaking when it abandoned a previous policy of providing owners of nonconforming signs notice and an opportunity to cure violations that cause the signs to lose their nonconforming status. These issues were all adequately addressed by the Administrative Law Judge in the Proposed Decision.

[R.108-19, P-App. 394].

Despite recognizing the issue, DHA failed to address it in its Decision. DHA did not analyze whether WisDOT's abandonment of its prior policy of providing sign owners with notice and an opportunity to cure required WisDOT to engage in rulemaking.

DHA did comment on the issue.

> One can understand that owners of nonconforming signs may have come to rely on the Department's practice of notifying sign owners of violations; however, there is no written requirement that the Department do so. There is an element of unfairness on the part of the Department to abandon its practice of giving notice of a violation and providing an opportunity to cure a violation without a warning to sign owners, particularly in a situation such as the instant one where the sign had been restored to its original size before the Department issued the sign removal order. However, to set aside the Department's sign removal order based on the Department's past practice requires the exercise of equitable powers which the Division of Hearings and Appeals, as an administrative agency, does not have.

[R.8-27–28, P-App. 402–403 (Emphasis supplied)].

DHA's conclusion that it did not have the power to grant Lamar equitable relief does not explain its failure to address Lamar's legal claim that rulemaking was required. Lamar did not request equitable relief. It requested a ruling that WisDOT was required under Wis. Stat. § 227.10(1) to promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopted to govern its enforcement or administration of that statute. Here, WisDOT was required to promulgate as a rule its policy determination that temporary sign extensions, previously allowed by the Department, would now be considered unlawful enlargements when added to nonconforming signs. Likewise, the Department's prior policy of providing sign owners with 60 days to remove extensions deemed unlawful was changed without rulemaking. WisDOT's changed policies regarding the treatment of the addition of temporary extensions to nonconforming signs, effectuated without the benefit of formal rulemaking, constituted unlawful rulemaking in violation of Wis. Stat. § 227.10(1). See ***Schoolway Transp. Co., Inc. v. Division of Motor Vehicles, Dept. of Transp.***, 72 Wis. 2d 223, 236-237, 240 N.W.2d 403, 410 (Wis. 1976).

The court of appeals disagreed, finding that the Department's actions fell within the *error-correcting exception* of ***Schoolway***.

> [T]he Department's revised application and enforcement of § 84.30(11) fits within the error-correcting exception. *Schoolway,* 72 Wis. 2d at 236. As we have already noted, the plain language of § 84.30(11) means that it applies only to signs "erected ... in violation" of the statutory and rule requirements. Therefore, Lamar never had the statutory right to cure the violation, and Lamar cannot now take advantage of a statutory right it never possessed. Under *Schoolway,* regardless of whether the Department previously provided a right to cure for violations related to extensions, the Department was "duty-bound to cease its prior practice" and "adhere to the terms of [WIS. STAT. § 84.30(11)]." *Id.* at 229. Accordingly, the Department was not required to promulgate a rule.

[COA Decision, ¶77, P-App. 452].

In ***Schoolway***, the Court found that one changed statutory application required rulemaking and another did not. The Court found that rulemaking was not required to reverse the Department's practice of allowing school buses to be registered for transportation services other than transporting students, because such practice was contrary to the express, plain language of the school bus license statute. ***Schoolway***, 72 Wis. 2d 223, 236. Such facts are not present here. The court of appeals' machinations analyzing the syntax of the statute belie its conclusion that its interpretation is based on the "plain meaning" of the statute. [COA Decision, ¶¶57–66, P-App. 444–447].

The court did not find that Wis. Stat. § 84.30(11) was unambiguous. It did not limit itself to ascertaining the plain meaning of the provision. It

was only after applying rules of statutory construction that the court determined that "Section 84.30(11) is reasonably read to provide a right to cure for signs that were erected illegally after the statute took effect on March 18, 1972, but only where the violation is curable and the sign can be altered to conform to the statutory requirements." [COA Decision, ¶66, P-App. 447].

Further, there is nothing in the record suggesting that the Department ever made a determination that it had interpreted the statute in error, or that it felt duty-bound to cease its prior practice. The record reveals no departmental epiphany. The record establishes only that one permit coordinator afforded a right by policy to cure and the next did not.

Like the Department's interpretation of the urban mass transportation statute in ***Schoolway***, "this represents an interpretation of a statute within the meaning of sec. 227.10 (4)," and WisDOT's current "interpretation is in direct contrast to the manner in which the statute was previously administered by the Department." "[W]hen the Department changed its interpretation of sec. [84.30,] Stats., it was engaging in administrative rule making." See ***Schoolway***, 72 Wis. 2d at 237.

3. WIS. STAT. § 227.10 REQUIRED WISDOT TO ENGAGE IN RULEMAKING.

WisDOT argued to DHA that no person at WisDOT can change a law by executive fiat, and that only formal rulemaking can change agency policy. [R.8-165]. Lamar concurs.

WisDOT unquestionably changed its policy relating to the use of sign extensions on nonconforming signs following Mr. Hardie's departure. During his tenure, WisDOT provided owners of nonconforming signs with a 60-day right to cure by removing any unpermitted extensions. [R.108-194–195, P-App. 194–195]. Ms. Brucaya made it clear that WisDOT no longer recognizes that right. [R.108-63–64, P-App. 063–064]. WisDOT's change of policy and administration following Mr. Hardie's departure reflected its revised interpretation of Wis. Stat. § 84.30(11). The changes were made by "executive fiat" without the benefit of a duly promulgated rule.

Wis. Stat. § 227.10(1) mandates that "[e]ach agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." Use of the word "shall" means that WisDOT is required to codify its interpretations of a statute used to govern its administration of that

statute. Here, WisDOT was required to codify as an administrative rule those interpretations of Wis. Stat. § 84.30 used to enforce the statute.

DOT's *ad hoc* interpretations and policies cannot substitute for the rulemaking required by Wis. Stat. § 227.10(1). This Court has recognized that the judiciary must step in when agencies usurp the province of the legislature by subjecting citizens to *ad hoc* decision-making. See ***Hilton ex rel. Pages Homeowners' Association v. Department of Natural Resources***, 293 Wis. 2d 1, 36-37, 717 N.W.2d 166, 184 (Wis. 2006) (Wilcox, concurring, with two justices joining).

Here, WisDOT's change of policy regarding its treatment of temporary sign extensions required the agency to engage in formal rulemaking. It failed to do so. Instead, the Department's interpretation of Wis. Stat. § 84.30 has varied depending upon the perspective of WisDOT's outdoor advertising leadership team in place. As a result of the largely unreviewable *ad hoc* decision-making of WisDOT administrative officials, the property rights of sign owners have become more and more tenuous.

Wis. Stat. § 227.10(1) required WisDOT to promulgate as a rule its treatment of temporary extensions as unlawful "enlargements" and its interpretation of Wis. Stat. § 84.30(11) relating to the provision of a 60-day

right to cure. Departmental interpretations and *ad hoc* decision-making are not legally acceptable substitutes for required rulemaking. Such actions constitute impermissible "rulemaking." See ***Schoolway***, 72 2d at 237.

III. THERE IS A NEED FOR THE SUPREME COURT TO ESTABLISH, IMPLEMENT OR CHANGE A POLICY.

All nonconforming uses are entitled to equal treatment under the law. Despite the lack of legal authority warranting unequal treatment, nonconforming signs have been singled out.

A. NONCONFORMING USE COMMON LAW AUTHORITIES SUPPORT THE CONTINUED EXISTENCE AND VIABILITY OF LAMAR'S SIGN.

DHA found that "once a nonconforming use loses its nonconforming status, the nonconforming use is invalidated. 'The violation of the nonconforming use by expansion or enlargement **which changes the use** invalidates the legal nonconforming use as well as the illegal change.'" [R.108-27, P-App. 402; citing ***Waukesha County v. Pewaukee Marina, Inc.***, 187 Wis. 2d 18, 31 522 N.W.2d 536 (Ct. App. 1994) ("***Seitz II***").][3]

[3] There are two cases involving the same parties that make up the body of work known as *Seitz I* and *Seitz II*; *Waukesha County v. Seitz*, 140 Wis. 2d 111, 409 N.W.2d 403 (Ct.App.1987) (*Seitz I*) and *Waukesha County v. Pewaukee Marina, Inc.*, 187 Wis. 2d 18, 522 N.W.2d 536 (Ct.App.1994) (*Seitz II*).

(Emphasis supplied). Critically, DHA overlooked the importance of the phrase "which changes the use" in the ***Seitz II*** citation.

Seitz I and ***II*** are highly instructive on Wisconsin common law principles regarding the elimination of nonconforming uses. These companion decisions of the court of appeals were summarized in ***Racine County v. Cape***, 250 Wis. 2d 44, 639 N.W.2d 782 (Wis. App. 2001).

> The parties agree that the outcome of this case is governed by ... *Seitz I* and ... *Seitz II*. *Seitz I* concerned a marina owner who operated a lake resort providing cottage rentals, boat livery, and fuel and bait services. *Seitz I*, 140 Wis.2d at 114, 409 N.W.2d 403. Subsequent to an ordinance that rendered Seitz's use nonconforming, he expanded the resort by enlarging his pier and docking more boats. Id. We rejected the County's argument that this development constituted an illegal expansion of a nonconforming use. We wrote: "**If an increase in volume, intensity or frequency of use is coupled with some element of identifiable change or extension, the enlargement will invalidate a legal nonconforming use... However, a mere increase in the volume, intensity or frequency of a nonconforming use is not sufficient to invalidate it**." Id. at 117-18, 409 N.W.2d 403 (citations omitted). We noted that before the ordinance, Seitz dry-docked three to five boats whereas after the ordinance, he dry-docked fifty-four boats and wet-docked thirty-five boats. Id. at 114, 409 N.W.2d 403. Thus, Seitz engaged in the same activities after the ordinance as he did previously; he simply engaged in them on a larger scale. Id. at 121, 409 N.W.2d 403. On that basis, we held that the expansions in *Seitz I* were mere increases resulting from a change in the volume, intensity or frequency of the nonconforming use already existing. *Id.*
>
> By the time *Seitz II* commenced, Seitz had added a retail store and a place for lounging and entertainment. *Seitz II*, 187 Wis.2d at 20, 522 N.W.2d 536. He also engaged in boat sales. *Id.* We noted that the material issue was not whether these new uses were related to a marina, but rather, "what kind of marina enterprises existed at the time of the ordinances' enactment and have those marina enterprises changed." *Id.* at 27 n. 3, 522 N.W.2d 536. We articulated the rule that an identifiable change occurs when the type of service provided changes or "[i]f what the business puts into the stream of commerce changes." Id. We then affirmed the jury's conclusion that **the extensions since *Seitz I* represented an identifiable change in**

> **the type of services rendered and the products sold.** Id. at 27, 522 N.W.2d 536. *Seitz II*, 187 Wis.2d at 27, 522 N.W.2d 536."
>
> ***Cape***, 250 Wis. 2d at 48-50, 639 N.W.2d at 785. (Emphasis supplied).

In ***Seitz I***, the marina at issue significantly expanded operations after becoming nonconforming. When the marina became a nonconforming use, its dry-docking facilities accommodated 3-5 boats and it had no wet-docking facility. The marina increased its dry-docking facilities to accommodate 54 boats and created wet-docking facilities that could accommodate 35 boats. The Court found that such expansion constituted "a mere increase in the volume, intensity or frequency of a nonconforming use ... not sufficient to invalidate it." ***Seitz I***, 140 Wis. 2d at 118, 409 N.W.2d at 406.

In ***Seitz II***, the Court concluded that "if there is an identifiable change in the use, the enlargement is illegal. If the expansion is a result of a mere increase in the historically allowed use, the enlargement or expansion will be allowed subject to regulatory markers." ***Seitz II***, 187 Wis. 2d at 27, 522 N.W.2d at 540. (Emphasis supplied). ***Seitz II*** remains good law.

Here, assuming *arguendo* that on November 11, 1996 the sign had no extensions and did not exceed 1344 square feet, the sign was the identical size and shape on the date of the SRO (September 4, 2012) as it was when it

became nonconforming. The only alleged change is that for a short period of time in the existence of the sign (roughly 2 of 24 years, from 2007- 2009), the sign intermittently contained an extension of undefined dimensions. Even if it were within DHA's discretion to accept WisDOT's alleged facts as gospel, such revisions do not even approximate the "increase in the volume, intensity or frequency of a nonconforming use" expressly permitted by ***Seitz I*** and ***Seitz II***. There was no "identifiable change" in the use of the subject sign. The alleged revisions at issue simply are not of the nature that will terminate nonconforming rights. Termination of Lamar's rights would be contrary to the letter and spirit of controlling law in relation to nonconforming uses.

The court of appeals disagreed. It determined:

> *Seitz I* and *II* involved the common law doctrine of nonconforming use, which 'is implicated when lawful uses of land are made unlawful by a change in zoning regulations.' *Golden Sands Dairy LLC v. Town of Saratoga*, 2018 WI 61, ¶21, 381 Wis. 2d 704, 913 N.W.2d 118. In the present case, we are not concerned with a lawful use of land made unlawful by a change in zoning regulations.

[COA Decision, ¶83, P-App. 453–454].

The court's analysis of ***Seitz I*** and ***II*** is legally flawed. Like Lamar's sign, Seitz's marina was a nonconforming use. Both the sign and marina were originally permitted. Both uses subsequently became nonconforming

because of a change in the classification of the underlying real estate. The court suggests that changed zoning regulations drove the outcome in ***Seitz I*** and ***II***. That is an inaccurate characterization. The issue in ***Seitz***, as here, was whether an existing, nonconforming use was impermissibly expanded. Because there was no identifiable change in the use of Lamar's sign, any temporary enlargement of the sign did not render the sign illegal.

There are no statutes or administrative rules supporting a determination that nonconforming signs erected after March 18, 1972 should be treated less favorably than other nonconforming uses in the State. This Court should so find and exercise its policy-making authority to assure the equal protection of all nonconforming uses under the law.

CONCLUSION

For the foregoing reasons, Lamar respectfully requests that the Court reverse the decisions of the DHA and court of appeals.

Respectfully submitted this 9th day of May, 2019.

von BRIESEN & ROPER, S.C.

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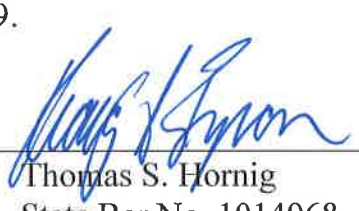
FORM AND LENGTH CERTIFICATION

I certify that this Brief conforms to the rules contained in § 809.19(8)(b) and (d) for a Brief produced with a proportional serif font.

The length of this Brief is 10,129 words.

Dated: May 9, 2019.

Signature: 

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)(f)

I hereby certify that I have submitted an electronic copy of this Brief which complies with the requirements of Wis. Stat. § 809.19(12)(f).

I further certify that this electronic brief in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties by hand delivery.

Dated: May 9, 2019.

Signature: _____

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CERTIFICATE OF SERVICE

I certify that on May 9, 2019, I personally caused copies of Petitioners-Appellants-Petitioners' Brief and Appendix to be personally hand delivered to:

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