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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 HEARINGS & 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

REPLY BRIEF OF PETITIONERS-APPELLANTS-PETITIONERS

von BRIESEN & ROPER, S.C.
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ARGUMENT

I. THE APPLICATION OF WIS. STAT. § 84.30(5)(br) IS PROPERLY BEFORE THE COURT.

DHA contends that the applicability of Wis. Stat. § 84.30(5)(br) is not properly before the Court. The contention is without support.

The Order granting the Petition for Review provides that Lamar "may not raise or argue issues not set forth in the petition for review." There are no additional restrictions.

DHA argues that Lamar only mentioned the issue in the introductory section of its petition. [DHA Brief, p. 10]. In addition to the introduction, Lamar addressed the issue at pages 8, 10, 18, 19 (four citations) and 20 ("Act 320") of its petition. The issue was "set forth in the petition" per Wis. Stat. § 809.62(6).

DHA further contends that Lamar's initial brief discussed the issue only in "arguing against DHA interpretation of a *different* provision." [DHA Brief, p. 10]. Lamar did argue that the promulgation of Act 320 refutes one of DHA's central arguments–that once a nonconforming sign becomes unlawful, statutory conformance cannot be restored. [Lamar's Initial Brief, p. 32].

Lamar also argued that "Wis. Stat. § 84.30 (br)(4) expressly provides that alleged violations remedied within 60 days' notice are not violations... 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." [Lamar's Initial Brief, p. 31]. Lamar presented numerous additional Act 320 arguments in its initial brief.

DHA's argument that Lamar's sign became illegal in 2007, five years before WisDOT filed its Sign Removal Order ("SRO"), is an affront to due process. The ability of aggrieved parties to appeal administrative determinations assures due process. *See* ***Knies v. Richardson***, 600 F. Supp. 763, 765 (E.D. Wis. 1985). Due process requires the ability to exhaust all remedies before legality is determined.

DHA ultimately argues, "Act 320 contains no indication of legislative intent to transform existing illegal signs into nonconforming signs." [DHA Brief, p. 11]. The argument misses the point. Act 320 provides that if illegal changes to a sign are removed within 60 days of receiving WisDOT notice, the sign is not considered illegal.

Wis. Stat. § 84.30(br)(4) provides that "[i]n determining whether a change to a sign constitutes a violation..., the department may not consider

any changes to that sign that no longer exist." Here, DHA determined that the changes to Lamar's sign were not in existence at the time WisDOT inspected the sign or issued the SRO. [R.8-21–22, P-App. 396–397]. If Act 320 applies, the previous extensions are irrelevant. The sign is legal.

II. NONCONFORMING SIGNS ERECTED AFTER MARCH 18, 1972 ARE NOT SUBJECT TO THE REQUIREMENTS OF TRANS 201.10.

A. THE ADMINISTRATIVE RULE MUST BE INTERPRETED CONSISTENTLY WITH ITS AUTHORIZING STATUTE.

WisDOT's SRO cites to Wis. Stat. § 84.30(5)(bm) and Trans. 201.10(2)(e) as the bases for illegality. [R.8-498, P-App. 389]. DHA concurs that Wis. Stat. § 84.30(5)(bm) applies exclusively to on-premise signs. [DHA Brief, p. 5, FN 3]. This concession is significant. Subsection (5)(bm) is the only statute providing for the uncompensated removal of signs.

Lacking statutory authority, DHA looks to Trans 201.10(2)(e) to support its position. Administrative rules must be interpreted consistent with their underlying statutory authority. In ***State ex rel. Parker v. Fiedler***, 180 Wis. 2d 438, 509 N.W.2d 440 (Ct. App. 1993), *rev'd sub nom. State ex rel. Parker v. Sullivan*, 184 Wis. 2d 668, 517 N.W.2d 449 (1994), the Court of Appeals discussed this topic.

> Although courts rightfully give deference to the interpretation of statutes by administrative agencies charged with their enforcement, this deference is not given when "the agency's interpretation directly contravenes the words of the statute." ... Indeed, "[a]n administrative rule, even of long duration, may not stand at variance with an unambiguous statute," ... because "[n]o agency may promulgate a rule which conflicts with state law," sec. 227.10(2), Stats.
>
> ***Parker v. Fiedler***, 180 Wis. 2d 438, 459, 509 N.W.2d 440, 448 (Ct. App. 1993) (citations omitted).

Lamar is not requesting the invalidation of Trans 201.10. It is not in conflict with state law. Rather, it is DHA's interpretation of Trans 201.10 that is in conflict with Wis. Stat. § 84.30. Lamar's interpretation is consistent with the statute.

The plain language of Trans 201.10(2)(e), interpreted consistently with Wis. Stat. § 84.30, requires the phrase "effective date of the state law" be interpreted to mean "March 18, 1972." DHA contends that "effective date of the state law" has different meanings in different circumstances. DHA agrees that sometimes it means "March 18, 1972." [DHA Brief, p. 15]. However, in Lamar's circumstances, it argues the phrase has nothing to do with the effective date of any state law, but rather refers to the date when sign extensions were added. [See DHA Brief, pp. 13-15].

There is no legal authority supporting this interpretation of the rule. Equally significant, DHA's interpretation is inconsistent with the plain

language of Wis. Stat. § 84.30. As discussed above and in Lamar's initial brief, no statutory authority supports the uncompensated removal of Lamar's sign. DHA's interpretation of Trans 201.10(2)(e) "directly contravenes the words of the statute," and an agency's interpretation of a "rule, even of long duration, may not stand at variance with an unambiguous statute." *See State ex rel. Parker v. Fiedler*, 180 Wis. 2d at 459, 509 N.W.2d at 448.

DHA repeatedly cites to Wis. Stat. § 84.30(5)(b) as evidence of legislative intent that nonconforming signs erected after March 18, 1972 be "phased out." [DHA Brief, pp. 20, 25]. However, DHA fails to recognize that this subsection provides only for the compensated removal of nonconforming signs.

B. FEDERAL REGULATIONS CANNOT SUPPORT THE INTERPRETATION OF A RULE WITH NO SUPPORT IN ITS AUTHORIZING STATUTE.

Wis. Stat. § 227.10 provides that "[n]o agency may promulgate a rule which conflicts with state law." There is no exception for rules consistent with federal law.

Two fundamental questions remain. (1) Does the authorizing statute support the agency's interpretation of the rule? Wis. Stat. § 84.30 does not support an interpretation of the rule providing for the uncompensated

removal of Lamar's sign. (2) Does the agency's interpretation of the rule create a conflict with state law? Any interpretation authorizing the uncompensated removal of Lamar's sign is in direct conflict with Wis. Stat. § 84.30.

DHA's interpretation cannot stand.

C. READING TRANS 201.10 IN HARMONY WITH WIS. STAT. § 84.30 SUPPORTS LAMAR'S POSITION.

Lamar maintains that the phrase "at the time the applicable state law became effective" in Trans 201.10(2)(e) must be afforded its plain meaning. It is unnecessary to resort to principles of statutory interpretation. Alternatively, DHA is not harmonizing the rule with its authorizing statute, only with itself.

DHA argues that Lamar is advocating rule invalidation by citing to Hy 19 - the first administrative rules promulgated pursuant to Wis. Stat. § 84.30. DHA mischaracterizes Lamar's argument.

Hy 19 supports interpreting the rules to provide for only compensated removal of post-1972 nonconforming signs. Hy 19.06(1) includes limitations on changing nonconforming signs existing on March 18, 1972. However, the only requirement for post-1972 signs is that they 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 of the SRO date. Neither the prior rule nor the statute restrict changes to post-1972 signs.

D. NONCONFORMING SIGNS REMAIN SUBJECT TO COMMON LAW REGULATION.

DHA claims that Lamar's interpretation of Trans 201.10(2) would lead to absurd results because it would leave post-1972 nonconforming signs unregulated. Not correct. As discussed, all nonconforming uses are subject to common law. In fact, Trans 201.10(3) specifically provides:

> Since the provisions of sub. (2) reflect the law of this state with respect to the treatment of nonconforming uses and the derivative policy of the department with respect to nonconforming signs, the adoption of sub. (2) shall not be construed to affect the applicability or validity of such state law or derivative policy prior to the adoption of sub. (2).

Under Lamar's interpretation of Trans 201.10, post-1972 nonconforming signs remain subject to those common law authorities and limitations discussed in Section III of Lamar's initial brief.

III. THE RIGHT TO CURE UNDER WIS. STAT. § 84.30(11) APPLIES TO LAMAR'S SIGN.

A. DHA CONCEDED LAMAR'S RULEMAKING ARGUMENT.

DHA contends the right to cure provided in Wis. Stat. § 84.30(11) applies only to illegally erected signs. DHA failed to address the Hy 19 argument included in Lamar's initial brief. The language of Wis. Stat. § 84.30(11) was substantially the same in 1972 as 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.

WisDOT's promulgation of Hy 19.09 refutes DHA's construction of subsection (11). By promulgating Hy 19.09, WisDOT acknowledged that subsection (11) applies to "[a]ny sign erected after March 18, 1972…which subsequently become nonconforming." By acknowledging the applicability of subsection (11) to signs lawfully erected after 1972, WisDOT recognized by rule the right to cure alleged unlawful changes to such signs. Because WisDOT's interpretation of subsection (11) changed, it was incumbent upon WisDOT to promulgate a new rule to remove this recognized right.

DHA did not respond to this argument. It must be deemed conceded. *See* ***Hoffman v. Economy Preferred Ins. Co.***, 2000 WI App 22, ¶ 9, 232 Wis. 2d 53, 606 N.W.2d 590.

The Department did not promulgate a new rule disavowing the applicability of subsection (11) to post-1972 nonconforming signs. WisDOT's changed interpretation, effectuated without statutory rulemaking, constituted unlawful rulemaking. 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).

B. A SIGN THAT HAS UNDERGONE UNLAWFUL CHANGES CAN BE BROUGHT BACK INTO CONFORMITY WITH WIS. STAT. § 84.30.

Lamar stands by the syntax arguments presented regarding Wis. Stat. § 84.30(11) in Section III.B.4 of its initial brief.

DHA repeatedly argues that it is impossible to bring a nonconforming sign that has undergone unlawful changes back into conformance with the requirements of Wis. Stat. § 84.30. DHA equates "conformance" with eligibility for a permit. Nowhere in Wis. Stat. § 84.30 is "conformance" defined this way, or at all. It must therefore be afforded its ordinary meaning.

Conformance reflects a state of "conformity," which Merriam-Webster defines:

> *1: correspondence in form, manner, or character: AGREEMENT*
>
> *2: an act or instance of conforming*
>
> *3: action in accordance with some specified standard or authority*
>
> https://www.merriam-webster.com/dictionary/conformity

The third definition is the most instructive. In order for a sign to be in conformance with Wis. Stat. § 84.30, it must be in accordance with the standards specified therein. The requirements for permitted signs are different than those for nonconforming signs. DHA argues that a nonconforming sign would need to conform to permitting requirements in order to satisfy subsection (11). A nonconforming sign that meets the requirements of the statute for nonconforming signs is "in conformance" with statutory requirements. DHA's argument wrongly assumes that no legal, nonconforming sign may be in conformance.

Trans. 201.035(7) also refutes DHA's position. It provides:

> 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 erected legally. A sign with an expired permit becomes illegal, but "may be brought into conformance" by paying the required fee within 60 days. Trans. 201.035(7) disproves that Wis. Stat. § 84.30(11) applies only to signs erected illegally. DHA failed to respond to this argument included in Lamar's initial brief. It is conceded. *See* ***Hoffman***, 2000 WI App 22, ¶ 9.

Finally, regardless of the whether Act 320 is applicable to Lamar's sign, its enactment negates the argument that nonconforming signs that have undergone unlawful changes may not be brought into conformity with Wis. Stat. § 84.30. Wis. Stat. § 84.30(4) provides that "[i]f the alleged violation is remedied within 60 days," the sign is not subject to removal. In other words, the sign has been brought back into conformance.

DHA argues that codification of the right to cure in subsection (5) supports its argument that subsection (11) does not apply to nonconforming signs. DHA fails to recognize that subsection (11) relates exclusively to post-1972 signs. Act 320, codified in subsection (5), extends the 60-day right to cure to all nonconforming signs, including those in existence on March 18, 1972.

C. DHA'S INTERPRETATION OF SUBSECTION (11) WOULD DEPRIVE IT OF JURISDICTION TO HEAR SRO APPEALS RELATING TO NONCONFORMING SIGNS.

DHA's jurisdiction under Wis. Stat. § 84.30(18) is limited to "[h]earings concerning sign removal notices under sub. (11)." If subsection (11) is read to include only signs legally erected, DHA has no jurisdiction over SRO's issued for nonconforming signs.

Lamar is not challenging the validity of Trans 201.09. It is challenging DHA's jurisdiction over an action under the rule that is not within the scope of subsection (11).

DHA argues that it has the authority to hear the appeal of an SRO under Wis. Stat. § 227.42(1). The statute identifies facts entitling an aggrieved party to a contested case hearing. Subsection (1) might appear to authorize hearings to contest SRO's. However, subsection (3) provides that "[t]his section does not apply to…actions where hearings at the discretion of the agency are expressly authorized by law."

The discretion of DHA to conduct SRO hearings is "expressly authorized by law" at Wis. Stat. § 84.30(18). DHA's SRO authority is limited to that provided for in subsection (18). See ***Vill. of Silver Lake v. Wisconsin Dep't of Revenue***, 87 Wis. 2d 463, 468–69, 275 N.W.2d 119,

122-23 (Ct. App. 1978). Because subsection (18) specifically provides that SRO hearings are to be conducted before DHA (not WisDOT), Wis. Stat. § 227.43(1)(br) is inapplicable. If subsection (11) does not apply to Lamar's sign, DHA has no jurisdiction.

IV. WISDOT FAILED TO ENGAGE IN REQUIRED RULEMAKING.

DHA argues that WisDOT's change of policy regarding the addition of extensions to nonconforming signs falls within the individualized decision-making exception at Wis. Stat. § 227.10(1). Well-established authorities provide otherwise.

> In *Citizens for Sensible Zoning,* the Wisconsin Supreme Court explained that "to be of general application, a rule need not apply to all persons within the state." *Id.* at 815–16, 280 N.W.2d 702. "Even though an action applies only to persons within a small class, the action is of general application if that class is described in general terms and new members can be added to the class." *Id.* at 816, 280 N.W.2d 702.
>
> ***Cholvin v. Wisconsin Dep't of Health & Family Servs.***, 2008 WI App 127, ¶ 23, 313 Wis. 2d 749, 761, 758 N.W.2d 118, 124.

Cholvin found that the policy at issue did not speak to a specific case and was not limited to an individual applicant. Rather, it announced the general policy of the Department in relation to a class of applicant. ***Cholvin,*** 2008 WI App 127, ¶ 25. *Accord,* ***Frankenthal v. Wisconsin Real Estate Brokers' Bd.***, 3 Wis. 2d 249, 257B, 89 N.W.2d 825, 827 (1958).

Here, WisDOT (the entire Department[1], not a single employee) previously interpreted Wis. Stat. § 84.30(11) as providing owners with an opportunity to cure an alleged unlawful enlargement caused by the addition of sign extensions. This interpretation was one of general application to all sign owners. Likewise, WisDOT's current interpretation of Wis. Stat. § 84.30(11) is not limited to the facts of this case. WisDOT no longer recognizes the right of any sign owner to cure an alleged unlawful change resulting from the addition of extensions. [R.108-66, P-App. 066].

DHA also argues that rulemaking was not necessary to bring WisDOT's practices in conformity with the plain meaning of Wis. Stat. § 84.30(11). As evidenced by the parties' analysis, the plain meaning of the statute is disputed.

Further, the record does not support DHA's argument that WisDOT made a determination that it had been interpreting the statute in error, or that it felt duty-bound to cease its prior practice.

[1] Robert Hardie, who testified as to WisDOT's policy of allowing 60 days to remove any unlawful extensions, was the Department's Sign Permit Program Supervisor (R.108-188, P-App. 188), responsible for statewide regulation and oversight of all outdoor advertising signs. [R.108-189, P-App. 189].

Like WisDOT's interpretation of the urban mass transportation statute in ***Schoolway***, its changed interpretation of subsection (11) "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." WisDOT's changed interpretation of Wis. Stat. § 84.30(11), effectuated without formal rulemaking, constituted unlawful rulemaking. See ***Schoolway,*** 72 Wis. 2d at 236-237.

V. ABSENT REGULATION BY STATUTE OR RULE, COMMON LAW CONTROLS THE TREATMENT OF NONCONFORMING USES.

DHA does not dispute that all nonconforming uses are entitled to equal treatment under the law or Lamar's analysis of controlling common law authorities. DHA's only response is that a single administrative rule (Trans 201.10(2)(e)) overrides all such authorities. No supporting legal authority was identified.

No authority supports DHA's position that nonconforming signs erected after March 18, 1972 may be treated less favorably than other nonconforming uses. This Court should 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 1st day of July, 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 2,963 words.

Dated: July 1, 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: July 1, 2019.

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CERTIFICATE OF SERVICE

I certify that on July 1, 2019, I personally caused copies of Petitioners-Appellants-Petitioners' Reply Brief to be personally hand delivered to:

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