

NO. A08-233

State of Minnesota
In Supreme Court

Halla Nursery, Inc., Donald E. Halla,
and Sandra Cwayna Halla,

Appellants,

v.

City of Chanhassen,

Respondent.

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Appellants Donald E. Halla¹ and Halla Nursery, Inc. (collectively “Appellants” or “Halla”) obtained a permit from Respondent the City of Chanhassen (“Respondent”) to construct an illuminated monument sign (the “New Sign”) near the intersection of Pioneer Trail and Highway 101. Halla intended the New Sign to replace an existing sign (the “Old Sign”) at the same intersection that was demolished several months prior for the expansion of Highway 101. Between the date of the permit application and the date of its completion, Respondent had at least five separate and distinct opportunities to review and comment on the permit application file.

Upon only one occasion prior to April 30, 2006, the date construction was completed, did Respondent ever contend that the New Sign was inconsistent with the permit conditions or the City Code, and that sole occasion related to an alleged set-back requirement that Halla ultimately met.² On the day that Appellants completed construction, however, Respondent red tagged the New Sign. Respondent informed Appellants for the first time that contrary to the plain conditions set forth in the permit it issued, the New Sign was allegedly too large and could not be illuminated.

Respondent’s brief highlights the errors made initially by the district court and subsequently by the Court of Appeals. The interpretation of a 1997 stipulation and judgment between Respondent and Appellants (“1997 Stipulation and Judgment”)

¹ Sandra Cwayna Halla was a party to the district court and Court of Appeals proceedings. She is recently deceased but previously held a dower interest as Donald Halla’s spouse.

² Respondent has failed to ever provide evidence establishing the alleged 25-foot setback.

offered by Respondent (which was adopted by the district court) and affirmed by the Court of Appeals is unquestionably contrary to the document's plain language and violates the canons of construction established under Minnesota law. Respondent and the Court of Appeals' misinterpretation of the City Code and the record evidence also led them to erroneously conclude that the New Sign violated City Code in effect in 2005. Additionally, the Court of Appeals erred in concluding, contrary to the district court's valid exercise of its discretionary powers, that the New Sign did not substantially comply with the 1997 Stipulation and Judgment. Finally, the Court of Appeals erred in refusing to apply the vested rights doctrine based on a faulty conclusion that the New Sign was clearly illegal pursuant to the City Code and the 1997 Stipulation and Judgment.

Because the New Sign Appellants constructed is consistent with the plain and unambiguous language of the 1997 Stipulation and Judgment and complies with all applicable City Code provisions, there is no basis to deny Appellants' claim for a permanent injunction prohibiting interference with its use of the New Sign as clearly intended in the permit that Respondent authorized. For all of the reasons set forth in Appellants' initial brief and for all of the reasons that follow, the Minnesota Supreme Court should reverse.

ARGUMENT

I. RESPONDENT AND THE COURT OF APPEALS MISCONSTRUED THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE 1997 STIPULATION AND JUDGMENT.

The Court of Appeals erred when it held that the permit exception language in Section 6C did not apply to Section 6A.3 of the 1997 Stipulation and Judgment. This error forms much of the basis for the remaining errors in the Court of Appeals' decision addressed in Halla's initial brief and this reply brief. Because the interpretation of Respondent and the Court of Appeals is contrary to the plain language of the document and would violate the canons of construction established under Minnesota law, the Minnesota Supreme Court should reverse.

Respondent believes, and the Court of Appeals held, that the permit reference in Section 6C applies only to other signage at Halla's retail location. This is inconsistent with the plain and unambiguous language of Section 6C and would render other language of the 1997 Stipulation and Judgment meaningless. Courts are to avoid interpreting contracts in a manner that ignores their plain and unambiguous language or that renders their provisions meaningless. See Brookfield Trade Ctr., Inc. v. County of Ramsey, 584 N.W.2d 390, 394 (Minn. 1998) (in interpreting contracts governed by Minnesota law, the language is to be given its plain and ordinary meaning); Art Goebel, Inc. v. N. Suburban Agencies, Inc., 567 N.W.2d 511, 515 (Minn. 1997) ("The cardinal purpose of construing a contract is to give effect to the intention of the parties as expressed in the language they used in drafting the whole contract."); Minn. Stat. § 645.08 (words and phrases are

construed according to rules of grammar and according to their common and approved usage).

Section 6 of the 1997 Stipulation and Judgment provides:

6. SIGNAGE.

A. Permitted Signage. The following signs are allowed:

1. Existing sign on the roof of the Garden Center.
2. Existing sign at the entrance to the Subject Property from Highway 101, or an updated pylon sign of the same height and square footage.
3. One off premises directional sign may be placed in the southeast quadrant of the intersection of Highway 101 and Pioneer on Lot 2, Block 1, Halla Great Plains Addition. The sign content shall be as approved by City Staff in the sign permit. The sign may not exceed eight (8) feet in height and seventy-two (72) square feet in size per sign face. The sign may have two sides back-to-back or "V" shaped. The sign shall not be lit. Before erecting the sign, a sign permit must be obtained from the City. The sign must be removed when the lot on which it is located is sold.
4. Plant identification signs not to exceed two (2) square feet each.

B. Directional/Safety Signage. On-site directional and safety signage as shown on the Site Plan. Additional on-site directional and safety signage may be allowed provided that it is approved by the City Staff.

C. Prohibited Signage. All signs are strictly prohibited, except as expressly allowed pursuant to paragraphs 6A and 6B of this Stipulation, or pursuant to a sign permit issued by the City.

(S.Ct.App. at 244-45). The plain language reads that Appellants were prohibited from constructing any sign that is not expressly provided for in Sections 6A or 6B unless they

were issued a sign permit from Respondent. To interpret this language any other way would ignore the document's plain language.

Stated another way, Section 6A states "[t]he following signs are allowed" and it goes on to authorize four types of signs. Section 6B provides for two other types of signs that are allowed pursuant to the site plan or by Respondent's approval. Section 6C states that all signs are strictly prohibited, except for those in Sections 6A or 6B, or pursuant to a sign permit issued by Respondent. The language set forth in Section 6C "or pursuant to a sign permit issued by the City," has no meaning other than to provide for signs not specifically enumerated in Sections 6A and 6B. Had the parties intended the permit exception to apply only to the signs not addressed in Sections 6A and 6B, they could have simply inserted that specific language into Section 6C of the 1997 Stipulation and Judgment, or left the language out completely.

To reach the conclusion of the Court of Appeals that the "or pursuant to a sign permit issued by the City" language applies to all of the provisions in Section 6 except for Section 6A.C makes no sense and is contrary to the canons of construction. Although the Court of Appeals was correct that the reference in Section 6C to sign permits was unnecessary for the Old Sign, which already carried a permit requirement, it is incorrect in its suggestion that the Section 6C permit authorization language applies only to other signs because authorization for all signs is already set forth in Section 6. Because a mechanism already exists in Sections 6A and 6B for the construction or authorization of permitted signs, those issues are resolved. Thus, the only logical conclusion is that

Section 6C addresses signs other than those already enumerated. That Section 6A.3 contains a permit requirement does not mean that Section 6C does not apply; instead, it simply means that Section 6C applies to signs not specifically enumerated, like the New Sign.³

Further, Respondent's reliance on Burgi v. Eckes, 354 N.W.2d 514 (Minn. Ct. App. 1984) is misplaced. This is not an issue where a specific provision should trump a general conflicting term. There is no conflict in the language of Section 6. Section 6C plainly states that it applies to all signs. Further, Section 6C specifically references Sections 6A and 6B and clearly states that such signs set forth in those sections are allowed, as are any signs allowed pursuant to a permit issued by Respondent. Thus, the contractual provisions can be interpreted in harmony as both sections indicate the necessity and importance of sign permits and they both contemplate and leave open certain flexibility for future signs.

Although Respondent may now wish it had struck a different bargain with respect to the 1997 Stipulation and Judgment, it can not deny that the plain and unambiguous language of Section 6C leaves open the possibility that future sign permits could be obtained that contain terms different from those set forth in the 1997 Stipulation and Judgment. The Court of Appeals erred in its interpretation of the document. Contrary to

³ Contrary to the Respondent's argument, no amendment to the 1997 Stipulation and Judgment was required (S.Ct.App. 246, 1997 Stipulation and Judgment, ¶ 12) to obtain approval for the New Sign. The New Sign did not constitute an amendment to the 1997 Stipulation and Judgment; instead, as explained herein, it was issued as provided by Section 6C of the 1997 Stipulation and Judgment.

the conclusion of the Court of Appeals that Halla's interpretation would allow Appellants to construct any sign they wish so long as they receive a permit, Halla agrees that any approved sign permit must still comply with all zoning regulations that Respondent did not bargain away. As described below the New Sign does not violate any applicable City Code provisions in effect at the time it was constructed.⁴ Thus, the Minnesota Supreme Court should reverse.

II. THE NEW SIGN COMPLIES WITH CITY CODE.

Respondent alleges that the New Sign violates three provisions of the City Code. Specifically, Respondent contends that the New Sign violates the City Code in that it is an off-premises sign advertising Appellants' business, is too large for the City's Agricultural Zoning District's sign restrictions, and that it constitutes a "motion" or "flashing" sign. However, Respondent and Court of Appeals, to the extent that it addressed the issue, misread the code and misconstrued the evidence. Accordingly, the Minnesota Supreme Court should reverse.

A. There is no Violation of City Code Sec. 20-1255.

Although the Court of Appeals did not address it, Respondent continues to allege in its brief to the Minnesota Supreme Court that the New Sign violates the City Code in that it is an off-premises sign advertising Appellants' business. Throughout the

⁴ Respondent's allegation that Halla's position fails to give effect to the parties' express intention that the 1997 Stipulation and Judgment be liberally construed to protect the public interest is without merit. Other than speculative possibilities and conclusory allegations, there is no actual evidence in the record that the public interest has been compromised or harmed. Speculative possibilities and conclusory allegations are insufficient to meet Respondent's burden of proof.

proceedings, Respondent alleged that the New Sign did not fit into any of the categories of off-premises signs allowed by the City Code. However, this allegation is incorrect for at least two reasons.

First, City Code Sec. 20-1259 contains a list of the types of prohibited signs. See Id. at S.Ct.App. 281-82. Off-premises signs such as the New Sign are plainly not on the list. Id. The City Code contains no general prohibition on off-premises signs as Respondent argued to the trial court. Second, the City Code simply provides that certain off-premises signs are allowed without a sign permit: City Code Sections 20-1255(2)(b) (where access is confusing and traffic safety could be jeopardized); 20-1255(10)(b) (temporary real estate signs advertising the sale, rental or lease of businesses or industrial buildings); and 20-1255(10)(c) (showing the direction to new residential developments). See Id. at S.Ct.App. 276-80. This means that the City Code has merely carved out exceptions to permit requirements concerning certain off-premises signs. These exceptions actually authorize instances in which sign construction may occur without a permit.

In this matter, it is undisputed that the New Sign was authorized by a permit issued by Respondent. Further, the New Sign as constructed substantially conformed to the permit issued. As a result, not only does the City Code fail to prohibit the New Sign, but Section 20-1255 is entirely inapplicable as it is undisputed that that Appellants obtained not only a permit to construct the sign but also obtained off-premises sign rights pursuant

to the 1997 Stipulation and Judgment. If the New Sign violated the City Code, then so did the Old Sign authorized by the 1997 Stipulation and Judgment.

Thus, to the extent that the Court of Appeals accepted Respondent's argument that the New Sign somehow was not allowed by City Code, that conclusion is contrary to law. Moreover, to the extent that there could be any uncertainty or ambiguity concerning the City Code in this regard, which there is not, Minnesota law requires the courts to construe zoning ordinances strictly against the municipality and in favor of the property owner. See Frank's Nursery Sales, Inc. v. City of Roseville, 295 N.W.2d 604, 608 (Minn. 1980) (zoning ordinances are construed strictly against municipalities and favorably to property owners).

B. The New Sign Does Not Violate City Code Sec. 20-1301.

Again, although not addressed by the Court of Appeals, Respondent continues to argue to the Minnesota Supreme Court that the New Sign is too large for the City's Agricultural Zoning District's sign restrictions. The City Code provides that signs contained on property zoned Agricultural may not exceed 24 square feet. See S.Ct.App. 283, Tr. Ex. 5, Metzger Aff. at Ex. K. However, this ignores the 1997 Stipulation and Judgment that allowed Appellants to construct a sign with faces of 72 square feet, not to mention the permit exception contained in Section 6C. In accordance with the 1997 Stipulation and Judgment, Halla obtained the right to construct a sign with faces of 72 square feet, regardless of the limits set forth in the City Code. The district court correctly

determined that the New Sign substantially complied with the 1997 Stipulation and Judgment in this regard and the Court of Appeals did not disturb that holding.

Accordingly, it can not be argued on the one hand that Respondent may bargain with Appellants for an exception to the City Code, execute a stipulation to authorize that exception, file the stipulation as a judgment, and then on the other hand seek to enforce the Code contrary to the bargain it struck.

C. **The Minnesota Supreme Court Should Reverse the Holding of the Court of Appeals that the New Sign Violated City Code Sec. 20-1259 in Effect in 2005.**

Contrary to the conclusion reached by the Court of Appeals, there was no evidence introduced in the district court proceedings that the New Sign violated City Code Sec. 20-1259 in effect in 2005. The applicable 2005 version of this Code Section provided:

The following signs are prohibited:

(2) Motion signs and flashing signs, except time and temperature signs and barber poles which may be permitted by conditional use permits

See S.Ct.App. 281-82, Tr. Ex. 5, Metzger Aff. at Ex. K.

No evidence was introduced in the district court proceedings to support a conclusion that the New Sign in and of itself constituted a “motion” or “flashing” sign. Instead, the only evidence in the record introduced by Respondent to support its position came in the form of a written report from Respondent’s engineering firm. See S.Ct.App. 307-09. This report describes the New Sign in great detail. However, it makes absolutely no mention of a “moving” or “flashing” sign and merely describes it as a message board

sign. Thus, Respondent's own engineer could not support any conclusion that the New Sign was "moving" or "flashing."

The district court's Amended Findings of Fact, Conclusions of Law, Order for Judgment and Judgment contains no finding that the New Sign is a "motion" or "flashing" sign. Instead, there is merely a reference in Finding of Fact No. 34 to the capability of the New Sign to periodically change messages. This is an insufficient basis to determine that the sign violates City Code Sec. 20-1259 in effect in 2005.

Further, the district court was provided with a DVD containing evidence of other signs within the City of Chanhassen containing matrix message board signs, several of which operated either similarly or identically to Appellant's New Sign. These message board signs all predated the New Sign. Respondent, since it issued permits for these signs, obviously did not consider these message board signs to be "motion" or "flashing" signs under the City Code in effect in 2005. If Respondent had considered them as prohibited "moving" or "flashing" signs, it could not have authorized them at all since the code prohibition applies to all zoning classifications. In fact there was absolutely no code provision regulating message board signs at the time of Appellants' permit application.

For its part, Respondent alleges that the DVD evidence has no relevancy to the issues before the Minnesota Supreme Court because they are authorized by conditional use permits. There was no actual evidence produced that any such conditional use permits were issued. However, the relevant language of the code provision prohibits all "[m]otion signs and flashing signs, except time and temperature signs and barber poles which may

be permitted by conditional use permits.” Thus, the plain language of the code provides for a conditional use permit exception for only time and temperature signs, or barber poles. As is plainly evident from the DVD, the signs allegedly authorized pursuant to conditional use permits could not reasonably be considered time and temperature signs or barber poles. Accordingly, Respondent’s allegation has no merit and these signs must not be considered to be prohibited “motion” or “flashing” signs pursuant to the City Code in effect in 2005.

Without evidence or findings that the New Sign is even considered a “moving” or “flashing” sign as described in City Code 20-1259(2), in light of the evidence presented concerning message board signs similar and nearly identical signs that Respondent approved and therefore did not consider to be in violation of that code provision, and in the absence of any code provisions regulating message board signs, there is no foundation or basis for the district court’s conclusion of law or for the Court of Appeals’ determination that the record supports the conclusion “that the sign is a ‘moving and flashing sign’ that violates the city code.” See also Frank’s Nursery Sales, Inc., 295 N.W.2d at 608 (zoning ordinances are construed strictly against the municipality and in favor of the property owner).

Perhaps more significant is the evidence in the record concerning subsequent City Code sign amendments in 2006. With the 2006 amendments, Respondent for the first time attempted to regulate message board signs such as the New Sign in certain zoning classifications and under certain conditions. Stated another way, prior to these

amendments, there is absolutely no reference to message board signs anywhere in the City Code. (S.Ct.App. 176, 4-16-2007 T p. 16). As mentioned above, clearly Respondent did not take the position that prior to the 2006 amendments, message board signs were unauthorized since several such signs were authorized and existed within the City.

The determination reached by the Court of Appeals is even more questionable as evidence in the record indicates that in addition to amending the City Code to regulate message board signs for the first time in 2006, Section 20-1259(2) (“moving” and “flashing” prohibition) remained entirely intact and unchanged. As a result, if “moving” and “flashing” signs already covered message board signs as Respondent argued to the Court of Appeals, the 2006 amendments would not have been necessary.

Under the circumstances, it is impossible to reconcile these two provisions under the present City Code. If message board signs were prohibited in 2005 because they constitute “moving” and “flashing” signs, it is impossible that any such signs could have ever been approved under the City Code. Despite this obvious contradiction, such signs were approved by the City and predated the New Sign. Under these circumstances, the holding of the Court of Appeals in this regarding is plainly contrary to law and the Minnesota Supreme Court should reverse.

III. THE NEW SIGN SUBSTANTIALLY COMPLIES WITH THE PERMIT ISSUED BY RESPONDENT.

The Court of Appeals determined that the district court erred in holding that the New Sign measurements are in substantial compliance with the permit Respondent

issues. However, the conclusion of the Court of Appeals is not supported by the record and should be reversed.

An affidavit from city planner Josh Metzger was introduced as Trial Exhibit 5. (S.Ct. App. 256-295). Exhibit A to the Metzger Affidavit is a drawing of the New Sign. (Id. at 260-62). The dimensions of the reader board sign face as indicated in Exhibit A are plainly 60 inches by 14 feet, nine inches. (Id. at 262). The square footage of these dimensions is 73.75 square feet as set forth in the district court's finding.

The Court of Appeals held that the district court erred in failing to consider surface area other than the reader boards in determining the total sign face surface area. In addition to the district court having properly exercised its discretion in weighing the evidence in this regard, the district court's measurements are supported by other evidence contained in the Metzger Affidavit. Attached as Exhibit J to the Metzger Affidavit is a drawing of the Old Sign. (Id. at 273-75). For purposes of determining the 72 square feet of its sign faces, the measurements include only the areas that contain advertising print, which is comparable to the print that would be used on the message reader boards. Accordingly, the district court's finding that the New Sign substantially complies with the 1997 Stipulation and Judgment is not clearly erroneous and is supported by the evidence.

IV. ALTHOUGH IT MAY BE UNNECESSARY TO REACH THIS ARGUMENT BECAUSE THE NEW SIGN VIOLATES NEITHER THE 1997 STIPULATION AND JUDGMENT NOR THE CITY CODE, APPELLANTS OBTAINED VESTED RIGHTS TO USE THE NEW SIGN CONSISTENT WITH THE PERMIT RESPONDENT ISSUED

As described and explained extensively in Appellants' initial brief and this reply brief, the New Sign complies with the 1997 Stipulation and Judgment and the City Code in effect in 2005. In addition, Appellants constructed the New Sign in accordance with a permit obtained from Respondent. Accordingly, the vested rights doctrine may not be necessary to entitle Appellants to a permanent injunction prohibiting interference with the operation of the New Sign as authorized by the permit.

According to Minnesota law, a right becomes vested when:

[i]t has arisen upon a contract, or transaction in the nature of a contract, authorized by statute and liabilities under that right have been so far determined that nothing remains to be done by the party asserting it.

Jasaka Co., v. City of St. Paul, 309 N.W.2d 40, 44 (Minn. 1981); Concept Properties, LLP v. City of Minnetrista, 694 N.W.2d 804, 820 (Minn. Ct. App. 2005) (a person acquires vested rights when he or she has progressed significantly with the physical aspects of the property). The "contract" in construction cases is the issuance of a permit issued in error or later revoked. Yeh v. County of Cass, 696 N.W.2d 115, 132 (Minn. Ct. App. 2005).

In Jasaka Co., this Court determined that the structure being constructed pursuant to the permit was 90 percent complete. But for Jasaka's failure to construct the tower in

conformity to the permit issued by the city, the Court stated that Jasaka may have acquired a vested right to keep the tower, despite the invalidity of the permit.

In this matter, the New Sign conforms directly to the permit issued and construction of the New Sign was actually 100 percent complete when Respondent red tagged it. As a result, there can be no question that Appellants progressed significantly with the physical aspects of the project as required by Concept Properties, LLP. Moreover, because construction was completed consistent with the permit issued, the district court correctly determined that Appellants have established the applicability of the vested rights doctrine.

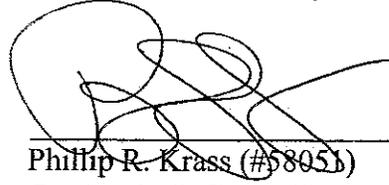
Because the vested rights doctrine applies, it can only overcome if the New Sign was clearly illegal either because it violated the 1997 Stipulation and Judgment or because it failed to comport with City Code in effect in 2005. As described herein, the Court of Appeals erred when it answered these questions in the affirmative. Accordingly, the Minnesota Supreme Court should reverse and determine that Appellants are entitled to an order enjoining Respondent from interfering with the use of the New Sign as authorized by the permit.

CONCLUSION

For all of the foregoing reasons, the Minnesota Supreme Court should reverse the decision of the Court of Appeals.

Dated: August 27, 2009

KRASS MONROE, P.A.

A handwritten signature in black ink, appearing to be "P. Krass", written over a horizontal line.

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STATE OF MINNESOTA

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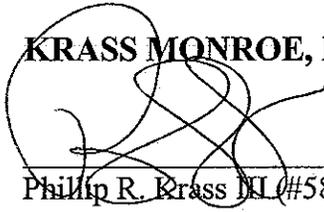
City of Chanhassen,

Respondent.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,211 words, and the font size is 13 point. This brief was prepared using MicrosoftWord 2003 software.

Dated this 27th day of August, 2009


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