

**APPELLATE COURT CASE NO. A08-233
STATE OF MINNESOTA
IN COURT OF APPEALS**

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

Respondents,

v.

City of Chanhassen, a municipal corporation,

Appellant.

**APPELLANT'S REPLY BRIEF
AND ADDENDUM**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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ARGUMENT

I. The District Court Correctly Determined that the Issuance of the Permit Did Not Amend the 1997 Stipulation.

The District Court correctly concluded that the sign permit administratively issued by a city planner did not amend the 1997 Stipulation because any amendment required written approval by resolution of the City Council. (Conclusion of Law No. 4, App-47) In their effort to show that the general sign permit provision in Paragraph 6.C. trumps the specific provision detailing the sign allowed at the intersection of Highway 101 and Pioneer Trail, it is Respondents, and not the District Court, that attempt to rewrite the language of the Stipulation, and obfuscate a simple, straightforward provision.

Paragraph 6.A.3. of the Stipulation sets forth the specifics of the off premises directional sign allowed at the southeast quadrant of Highway 101 and Pioneer Trail. It required a sign permit, which was issued in 1997 for the old sign. Paragraph 6.C. then states that all signs are strictly prohibited, except as expressly allowed pursuant to Paragraph 6.A. and 6.B. of the Stipulation, or pursuant to a sign permit issued by the City.

In 2005, Respondents requested a permit for a new sign at this location which was erroneously issued. Respondents now argue that the general sign permit exception in Paragraph 6.C. gives them the right to have the new sign that does not comply with either the terms of the Stipulation or the zoning ordinance in effect in 2005. Respondents' argument is fatally flawed for numerous reasons.

Respondents when they signed the Stipulation in 1997 agreed that the provisions of the Stipulation could only be amended or waived by a writing signed by the parties and approved by written resolution of the City Council. App-41. Respondents also agreed that the Stipulation would be liberally construed to protect the public interest. App-41.

Respondents' position that the general permit exception trumps the specific provision identifying the type of sign allowed at this specific location would amount to an amendment of the express language of the Stipulation by an administratively issued permit. Respondents' position also contradicts the basic rule of construction that a specific provision trumps any conflicting general term of a contract. *Burgi v. Eckes*, 354 N.W.2d 514, 519 (Minn.App.1984) (rule of construction is that the specific in a writing governs over the general) Finally, adopting Respondents' position is certainly not giving effect to the parties' express intention that the Stipulation would be liberally construed to protect the public interest.

The District Court's interpretation that the only sign allowed by the Stipulation at this particular location is the one expressly provided for in Paragraph 6.A.3. with its own sign permit provision makes perfect sense. The general provision is simply an acknowledgment that, in addition to the signs expressly allowed by the Stipulation, which may or may not be allowed by the zoning ordinance as the years go by and zoning regulations change, the City may also allow additional signage by sign permit. If the express signage provisions are to be changed, then the Stipulation must be amended by resolution of the City Council, and submission to the Court for an amendment to the Judgment.

Another glaring defect in Respondents' argument is Respondents' incorrect assumption that Paragraph 6.C. of the Stipulation authorizes the City to issue (and Respondent the corresponding right to utilize) a permit which purports to authorize the construction of a sign in contravention of the City's zoning ordinance.

Respondents' position means that the City, by acknowledging in Paragraph 6.C. that other signs could be allowed by permit, gave up on behalf of its citizens the right to enforce its zoning ordinance if a permit was erroneously issued. The City has neither the authority to agree to such a provision nor would such an interpretation be guided by the parties' express agreement that the terms of the Stipulation would be construed liberally to protect the public interest. *Minneapolis St. Ry. Co. v. City of Minneapolis*, 229 Minn. 502, 509, 40 N.W.2d 353, 359 (1949) (in absence of express authorization by the legislature, a municipal corporation cannot by contract surrender or curtail its police power)

II. Respondents Misrepresent the Supreme Court's Holding in *Jasaka Co. v. City of St. Paul*, 309 N.W.2d 40 (Minn.1981).

In its Brief Respondents state that the Supreme Court in *Jasaka Co. v. City of St. Paul*, 309 N.W.2d 40, 44 (Minn.1981) stated that "Jasaka would have acquired a vested right to keep the tower, despite the invalidity of the permit." Resp. Brief, p. 22. (emphasis added) What the Court actually stated, as dicta, was the following:

Jasaka's tower is nearly 90% completed. If the tower now stood wholly on Jasaka's property, and thus conformed with the terms of the permit, the rule developed in *Ridgewood and Hawkinson* might support a decision that

Jasaka had acquired a vested right despite the invalidity of the building permit. (emphasis added)

Jasaka Co., 309 N.W.2d at 44.

The Court added:

We note in passing that with rare exception a city is not estopped from denying the unlawful functions of its own officials. The proposed tower did not meet the requirements of either "I-1" zoning or the more restrictive "B-3" zoning. It was the duty of Jasaka to determine for itself the propriety of the proposed construction it undertook, and had it done so the most cursory inquiry would have disclosed the problems it now seeks to correct.

Jasaka Co., 309 N.W.2d at 44.

Echoing the Supreme Court's comments concerning Jasaka's duty to determine the propriety of his project, the District Court in its Memorandum summarized

Respondent Donald Halla's conduct:

The Plaintiff is not entitled to additional rights to operate the sign under the doctrine of equitable estoppel. Donald Halla had actual knowledge of the 1997 Stipulation and Judgment when he ordered the sign from Attracta. Donald Halla knew or should have known that the size, illumination and use of the sign in a manner that was not "directional" were in violation of the 1997 Stipulation. Donald Halla had actual knowledge or could have easily ascertained that the City zoning ordinance prohibited flashing or motion signs and limited the brilliance of the sign. Although the Plaintiffs properly applied for a sign permit, they cannot claim surprise or inequitable conduct when the City subsequently sought to enforce the 1997 Stipulation and its ordinance.

App-54.

Additionally, contrary to Respondents' assertion, the new sign was not constructed in accordance with the permit. The two new sign faces each added an 18" x 12' 5" illuminated cabinet sign along the bottom of the structure which are not shown on the

plans submitted with the application and approved by the City. (Finding of Fact No. 29, App-45)

Respondents also mischaracterize the holding in *Yeh v. County of Cass*, 696 N.W.2d 115, 132 (Minn.App.2005). In their Brief Respondents cite *Yeh* for the proposition that “the vested rights doctrine was intended to apply to permits issued, in error and later revoked.” Resp. Brief p. 20, Ftnt. 9. The Court in *Yeh* actually stated the following:

But the doctrine of vested rights exists to protect developers from changes in zoning laws aimed at frustrating development. See *Naegele Outdoor Adver. Co. of Minneapolis v. City of Lakeville*, 532 N.W.2d 249, 254 (Minn.App.1995) (holding that, where appellant did not submit permit application until four years after the ordinance in question was amended, appellant had no vested rights), *review denied* (Minn. July 20, 1995).

Id., 696 N.W.2d at 132.

Respondents’ reliance on the other cases cited in their Brief to support a vested rights argument is misplaced. *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288 (Minn.1980) involved a situation where a state law was changed making a project financially impossible. Again, not an erroneously issued permit. *Concept Properties, LLP v. City of Minnetrista*, 694 N.W.2d 804 (Minn.App.2005), likewise involves a situation where regulations were changed to preclude previously allowed urban development. As discussed extensively in Appellant’s Brief and in the Defendant’s Post Trial Brief submitted to the District Court, the core concept of a vested rights claim, notwithstanding the dicta in *Jasaka Co.*, is that the property owner’s actions were initially lawful and in accordance with existing regulations, which were then subsequently

changed. Put another way, a property owner cannot have vested rights to do something that was illegal from the get go.

III. Respondents Mischaracterize Appellant's Argument Challenging the Court's Conclusion that the Size of the Sign Faces are in Substantial Compliance with the 1997 Stipulation and Judgment.

Appellant is not challenging the Court's finding relating to the size of the sign faces as stated by Respondents. Appellant accepts the Court's Finding No. 29 that "each sign face totaled approximately 120 square feet in surface," together with the Court's Finding No. 8 that the 1997 Stipulation and Judgment states that the sign may not exceed 72 square feet in size per sign face. These findings simply do not support the Court's Conclusion of Law No. 2 that the sign faces are in substantial compliance with the 1997 Stipulation and Judgment.

IV. The New Sign Violates the Zoning Ordinance in Effect in 2005 when the Permit was Erroneously Issued.

Respondents concede that City Code Section 20-1301 prohibits signs in excess of 24 square feet in the Agricultural Estate District. Resp. Brief, p. 23. More precisely, the 24 square foot limitation applies to the total sign display area. City Code §20-1301(3); R.App. 243. Respondents' new sign has two faces with a total sign display area of 240 square feet, ten times the allowed size. App-45.

The sign is also a prohibited flashing sign in violation of City Code §20-1259. R.App. 241. A "flashing sign" is defined as "any directly or indirectly illuminated sign which exhibits changing natural or artificial light or color effects by any means whatsoever." City Code §1-2 definition; R.App. 244. Contrary to Respondents' assertion

that there is no evidence in the record that the sign is a flashing sign, Donald Halla submitted a video of the sign in operation which formed the basis for the District Court's Finding No. 34 which states:

The Court was provided with a video tape of the 2005 sign when it was in operation. The sign, when in message board mode, changes to a new message approximately every six seconds. As it is along a county road which otherwise does not have commercial signage, the brilliance and changing messages could be distracting to traffic and an annoyance to residences that have a view of the sign.

App-46.

The sign is also a prohibited off-premises sign. As Respondents' concede, the sign is not one of the enumerated, allowed off-premises signs. R.App. 236-240. Since it is not specifically allowed, the sign is subject to the general provision in the zoning ordinance, City Code Section 20-204, that "uses of land, buildings, and structures not permitted below as either principal, accessory or conditional are prohibited. (See Addendum-1)

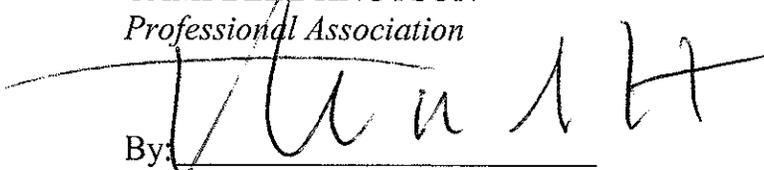
CONCLUSION

The City's position has been consistent throughout these proceedings. Respondents can continue to have a sign at the southeast corner of the intersection of Highway 101 and Pioneer Trail that complies with the 1997 Stipulation and Judgment. Respondents have no right to the new sign erroneously permitted by the City which violates both the Stipulation and the Zoning Ordinance in effect in 2005 when the permit was issued.

The District Court correctly applied the law in its initial Order for Judgment. Appellant renews its request that the Judgment be modified to grant it Judgment on its Counterclaim ordering Respondents to remove the electronic message center components of the sign and bring the sign into compliance with the 1997 Stipulation and Judgment.

Respectfully submitted this 10th day of July, 2008.

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