

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.

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Appellants Halla Nursery, Inc., Donald E. Halla and Sandra Cwayna Halla (hereinafter collectively "Halla") sued Respondent City of Chanhassen requesting a temporary and permanent injunction, or alternatively a writ of mandamus, prohibiting the City from interfering with the use and illumination of a business sign. The City counterclaimed, seeking a determination that the sign violates both a prior 1997 Judgment and the City Code.

On August 2, 2006, the District Court conducted an evidentiary hearing on Halla's Motion For a Temporary Injunction. On August 16, 2006, the District Court entered its Order granting Halla's Motion For a Temporary Injunction. The Order allowed Halla to complete the construction of the sign and operate it in a manner that did not conflict with Chanhassen City Code §20-1259(2) which prohibits motion and flashing signs.

On April 16, 2007, the matter was tried to the Court without a jury. On August 8, 2007, the District Court filed its Findings of Fact, Conclusions of Law, Order for Judgment and Judgment. The Judgment dismissed the Complaint in its entirety, awarded the City judgment on its Counterclaim and ordered that the electronic message center component of the sign be removed and that the sign comply with the 1997 Judgment.

Halla brought a motion for Amended Findings. On December 10, 2007, the District Court entered its Amended Findings of Fact, Conclusions of Law, Order for Judgment and Judgment. The District Court made several minor amendments to its Findings. The Court then modified its Conclusions and ordered that the sign could remain, but must be operated consistent with the 1997 Judgment, the City Code in effect

in 2005 and the pattern of prior use as an illuminated sign. The Court then specified in its order the conditions of operation.

On February 7, 2008, the City served and filed its Notice of Appeal. On February 11, 2008, Halla served and filed a Notice of Review.

On March 27, 2009, the Court of Appeals filed its decision holding that the 1997 Judgment prohibited the construction of the sign and that Halla had not acquired any vested rights in the sign. In reaching this decision, the Court determined that the City had not waived its right to enforce the 1997 Judgment prohibiting an illuminated sign, that the size of the sign faces did not substantially comply with the 1997 Judgment and that the City's erroneous issuance of the permit did not mean the sign complied with the 1997 Judgment.

STATEMENT OF FACTS

Appellant's Statement of Facts set forth below adopt and set forth verbatim the Amended Findings adopted by the District Court.

1. Plaintiffs Donald E. Halla and Sandra J. Cwayna Halla are the fee owners of property located at 10,000 Great Plains Boulevard in the City of Chanhasen consisting of approximately 12 acres used for a retail nursery, garden center and contractors yard ("Halla Nursery Property"). (S. Ct. App. 040.)

2. Plaintiff Halla Nursery, Inc., owned and operated by Donald and Sandra Halla, leases the Halla Nursery Property. (S. Ct. App. 040.)

3. The Halla Nursery Property is located southwest of the intersection of Highway 101 and Pioneer Trail, with the entrance to the nursery on Highway 101, 1/4 mile south of the intersection. (S. Ct. App. 040.)

4. Plaintiffs Donald Halla and Sandra Cwayna Halla also own property located in the southeast quadrant of Highway 101 and Pioneer Trail, which has recently been developed as a golf course and driving range. The sign that is the subject matter of this lawsuit is located on the golf course property. (S. Ct. App. 040.)

5. In early 1994, Halla Nursery, Inc. constructed a new retail sales building of approximately 5,000 square feet on the Nursery Property without obtaining a building permit, allegedly having been told that because the site was agricultural property, a building permit was not required. (S. Ct. App. 040.)

6. On June 1, 1994, the City initiated a civil lawsuit against Halla Nursery, Inc. seeking to permanently enjoin Halla's operation of a retail commercial business from

the new building without obtaining a building permit and satisfying the building code requirements for this type of use. (S. Ct. App. 040.)

7. On February 10, 1997, the City and Halla Nursery, Inc. entered into a Stipulation for Entry of Judgment (hereinafter "Stipulation"). Donald E. Halla and Sandra J. Cwayna Halla, as fee owners, consented to and agreed in writing to be bound by the Stipulation. (S. Ct. App. 041.)¹

8. Paragraph 6.A.3. of the Stipulation addressed the issue of signage in the southeast quadrant of Highway 101 and Pioneer Trail, which is part of the golf course property. It stated:

A. Permitted Signage. The following signs are allowed: * * *

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.

(S. Ct. App. 041.)

9. The Stipulation also contained the following provisions:

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

12. WAIVERS/AMENDMENTS. The action or inaction of the City shall not constitute a waiver or amendment to the provisions of this

¹ As to Appellants' Footnote No. 3 and other similar statements elsewhere in the Brief, Campbell Knutson represented the City in the litigation that resulted in the 1997 Judgment. Halla was represented by legal counsel. The Judgment was a result of a negotiated Stipulation between the parties. Contrary to Halla's statements, there is nothing in the record as to who drafted what language in the 1997 Stipulation.

Stipulation. To be binding, amendments or waivers shall be in writing, signed by the parties and approved by written resolution of the City Council. The City's failure to promptly take legal action to enforce this Stipulation shall not be a waiver or release.

18. PUBLIC INTEREST. This Stipulation shall be liberally construed to protect the public's interest.

(S. Ct. App. 041.)

10. This Stipulation was incorporated into the Court's Order for Judgment and Judgment (hereinafter "1997 Judgment") which was entered on March 6, 1997 in the matter of *City of Chanhassen v. Halla Nursery, Inc., a Minnesota corporation*, Carver County District Court File No. C8-94-851. There have been no Amendments to the Stipulation. Although a portion of the owner's property was acquired through the right-of-way taking by MnDot, the lot on which the sign is located has not been sold. (S. Ct. App. 041-042.)

11. The 1997 Judgment also contained the following provision:

2. Defendant Halla Nursery, Inc. is hereby permanently enjoined from using the Subject Property in violation of the Stipulation for Entry of Judgment. Defendant's violation of any obligation under the Stipulation will constitute immediate and irreparable damage to the Plaintiff not compensable in money damages and entitles the Plaintiff to preliminary and permanent injunctive relief to cure the violation upon application to the District Court.

(S. Ct. App. 042.)

12. Donald Halla signed the Stipulation as president of Halla Nursery, Inc. and also signed the Consent to Stipulation in his individual capacity as fee owner of the property along with Sandra Cwayna Halla. (S. Ct. App. 042.)

13. On January 31, 1997, the City issued a sign permit for the southeast quadrant of Highway 101 and Pioneer Trail, expressly “contingent upon approval and signing of the stipulation agreement.” The approved sign faces were eight feet in height and 72 square feet in total area. The overall structure was listed on the permit application as being nine feet high by sixteen feet wide. The approved message on the two sign faces included the name of the nursery, a directional arrow with the words “1/4 mile ahead” and the telephone number. The approved sign did not show or describe any illumination (hereinafter “1997 Sign”). (S. Ct. App. 042.)

14. Shortly after the 1997 Sign was erected, Chanhassen Community Development Director Kate Aanenson (hereafter “Aanenson”) observed that the sign faces were illuminated in violation of both the permit and the Stipulation. (S. Ct. App. 042.)

15. Aanenson contacted Mark Halla, the vice president of Halla Nursery, Inc., Donald Halla’s son and signer on the 1997 sign permit application, about the fact that the sign was not suppose to be illuminated. Aanenson’s discussion with Mark Halla became somewhat confrontational because there were a number of issues still to be resolved pursuant to the Stipulation. (S. Ct. App. 042-043.)

16. Mark Halla did not remove the illumination, nor did the City take any further action to have the illumination removed. Aanenson testified that the City chose to wait, assuming the property on which the sign was located would be sold in the near future and the sign removed in accordance with the Stipulation. The sign constructed in 1997 remained illuminated until it was torn down in 2005. (S. Ct. App. 043.)

17. In 2005, MNDot was improving the intersection of Highway 101 and Pioneer Trail which necessitated the acquisition of additional right of way from Donald Halla and Sandra Cwayna Halla and relocation of the 1997 Sign. (S. Ct. App. 043.)

18. In 2005, Donald Halla on behalf of Halla Nursery, Inc. consulted with Paul Punt of Attracta Sign Company ("Attracta Sign") about the design of a new sign and authorized the company to apply to the City of Chanhassen for a sign permit. (S. Ct. App. 043.)

19. Donald Halla had actual knowledge of the 1997 Judgment provisions relating to the sign at the time he authorized Attracta Sign to make application for a new sign, but did not inform Attracta of the 1997 Judgment or the signage restrictions it contained, only saying that he had a signed stipulation with the City granting him the right to place a sign on the corner. (S. Ct. App. 043.)

20. Donald Halla did not obtain an amendment to Paragraph 6.A.3. of the 1997 Judgment in writing signed by the parties and approved by the City Council by written resolution. (S. Ct. App. 043.)

21. On March 28, 2005, the City received the Sign Permit Application for an illuminated monument sign on the southeast corner of Pioneer Trail and Highway 101. The applicant was Attracta Sign and the property owner listed as Don Halla. Attached to the permit application was a drawing of the proposed replacement sign, including notations that the sign was to be a double-faced, illuminated ground sign, with a "Full Matrix Message Center," and would be set back ten feet from the property line. (S. Ct. App. 043-044.)

22. The sign application was processed by City Planner Josh Metzger who had started working for the City in 2004. Metzger was not aware of the 1997 Judgment, nor did he see that the proposed sign included two electronic message centers. (S. Ct. App. 044.)

23. On April 8, 2005, Sign Permit No. 2005-0573 was issued to Attracta Sign for a new illuminated monument sign. Metzger sent the permit to Mr. Punt on April 11, 2005. (S. Ct. App. 044.)

24. In February of 2006 and after the highway construction was complete, Metzger confirmed with Mr. Punt that the permit was still valid. Plaintiff then formalized the agreement with Attracta for the new sign, accepting Attracta Sign's proposal for construction at a cost of \$124,000.00. (S. Ct. App. 044.)

25. In March of 2006, Attracta Sign placed footings for the new sign. An individual from the Carver County Highway Department contacted the City claiming that the sign was being constructed in its right of way. On March 21, 2006, Metzger posted a stop work order. Halla and the County officials did not agree on the location of the right of way line which was eventually resolved. (S. Ct. App. 044.)

26. As part of the setback investigation, and though the 1997 Sign had been installed at a ten foot setback, the City determined that a 25 foot setback is required in the Agricultural Estate zoning district in which the property is located. Plaintiff chose not to challenge the setback requirement and Attracta Sign subsequently moved the sign

footings back to comply with the 25 foot setback. On March 21, 2006 stop work order was lifted. (S. Ct. App. 044.)²

27. On April 17, 2006, the new sign footings were approved by the City Building Inspector and construction of the remainder of the sign continued. (S. Ct. App. 045.)

28. On or about April 28, 2006, Metzger received a call from a homeowner in the area stating that a company called Daktronics was installing electronic message boards as part of the sign faces. That same day, Metzger went to the site, confirmed that electronic message boards were being installed and posted the second stop work order. Metzger had overlooked the reference to the electronic message board in the Sign Permit Application when he originally approved the permit. This was the first time the City realized the mistake. Donald Halla and Paul Punt testified that, at the time of the second stop work order, the final electrical connections were being made to put the sign into operation. (S. Ct. App. 045.)

² Halla repeatedly editorializes in his Statement of the Case and Statement of Facts about the City's opportunities to review the sign permit. The facts are the Assistant City Planner approved the application in March of 2005 and then simply reconfirmed with Halla in the Spring of 2006 that the permit was still good. (S. Ct. App. 044) The stop work order issued on March 17, 2006 resulted from an issue being raised by the County that the sign was being built in its right of way. (S. Ct. App. 044) The setback issue was then reviewed by City Staff and the City Attorney, with the resulting relocation of the sign footings, all of which had nothing to do with the installation of the electronic message boards, which were mistakenly not identified on the original permit and not discovered until the City was notified of their installation by a neighbor on April 28, 2006, resulting in an immediate stop work order. Additionally, the repeated innuendo put forth by Halla's counsel in these proceedings that the consultation with the City Attorney in March of 2006 about the setback requirement for a sign at this location constitutes, as counsel now puts it, a "fourth opportunity to review the sign permit" is disingenuous. A sign was allowed at this location by the 1997 Judgment. The idea that checking the City Code to determine what the setback is for a sign in the City's Agricultural District would involve a review of the contents of the 2005 sign permit application is farfetched at best. The point is counsel should have either developed the facts underlying this city attorney consultant in March of 2006 or dropped the innuendo. He chose to do neither.

29. Metzger subsequently measured the new sign. Each sign face totaled approximately 120 square feet in surface area, which includes the 73.75 square foot electronic reader boards and the addition of an 18" x 12' 5" illuminated cabinet along the bottom (showing an arrow and "1/4 mile south" language) which was never shown on the plans submitted with the application and approved by the City. Metzger also measured the old sign faces which were still at the site. They measured 6 feet high and 12 feet wide or 72 square feet as allowed by the Stipulation and Judgment. (S. Ct. App. 045.)

30. The property upon which the sign is located is zoned Agricultural Estate and guided in the City's Comprehensive Plan for residential use. (S. Ct. App. 045.)

31. The sign is located in an area where it currently can be seen by single family homes. (S. Ct. App. 045.)

32. Other moving and flashing signs within the City have been allowed subject to zoning restrictions and conditional use permits. (S. Ct. App. 045.)

33. At the time of the issuance of the sign permit for the 2005 sign, the City of Chanhassen had adopted certain ordinances relating to the construction of signs within the City, including in the relevant parts:

SEC. 20-1259. PROHIBITED SIGNS.

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 sections 20-231 through 20-237).

SEC. 20-1265. GENERAL LOCATION RESTRICTIONS.

(e) Illuminated signs shall be shielded to prevent lights from being directed at oncoming traffic both in brilliance that it impairs the vision of the driver.... Illumination for a sign or groups of signs shall not exceed one-half foot candle in brightness as measured at the property line.

(S. Ct. App. 046.)

34. 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. (S. Ct. App. 046.)

35. The sign was installed under the terms of a contract with Halla Nursery, Inc. and Attracta Sign at a total cost of \$124,000, half of which was paid at the time the contract was signed and the remaining half of which was paid for prior to the hearing on this matter. (S. Ct. App. 046.)³

36. The electronic message centers are components purchased by Attracta Sign from a company called Daktronics. The electronic message centers can be removed and reused at a different location, however they would have to be discounted because of constantly changing technology. (S. Ct. App. 046.)⁴

37. Plaintiffs can substitute unilluminated, directional sign faces that comply

³ Halla was also presumably compensated by MnDOT for the old sign and constructing a new sign as part of the 2005 eminent domain proceedings relating to the intersection improvements. (S. Ct. App. 115)

⁴ According to Donald Halla, the electronic message centers, which can be reused elsewhere, represent \$90,000 to \$100,000 of the sign cost. (S. Ct. App. 123).

with the 1997 Judgment. (S. Ct. App. 047.)

38. The sign violates the Chanhassen City Code in that it is an off premises sign generally advertising the Halla Nursery business, is too large for the Agricultural Estate Zoning District and is a moving and flashing sign not approved by conditional use permit and located on property zoned Agricultural Estate. (S. Ct. App. 047; Conclusion of Law No. 3.)

39. The sign also does not comply with the plans approved by the City. (S. Ct. App. 032, 258)

ARGUMENT

I. THE DISTRICT COURT AND COURT OF APPEALS 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. (S. Ct. App. 047.) In an 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 Halla, and not the District Court and Court of Appeals, that attempts 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, Halla requested a permit for a replacement sign at this location which was erroneously issued. Halla now argues that the general sign permit exception in Paragraph 6.C. gives him the right to have the replacement sign that does not comply with either the terms of the 1997 Stipulation or the zoning regulations in effect in 2005. Halla's argument is fatally flawed for numerous reasons.

Halla when he signed the 1997 Stipulation 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. (S. Ct. App. 041.) Halla also agreed that the Stipulation would be liberally construed to protect the public's interest. (S. Ct. App. 041.)

Halla's 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. Halla's 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. Ct. App. 1984) (rule of construction is that the specific in a writing governs over the general)

Adopting Halla's position also does not give effect to the parties' express intention that the Stipulation would be liberally construed to protect the public interest, which is substantial. This sign has significant adverse impacts on an area that is large lot residential, and will be continuing to develop residential in the future. The two "electronic message centers" are extremely large from the standpoint of a business sign, and completely out of place. There is no other sign like it in a residential district in the City. It can be programmed to do just about anything from a motion and color standpoint, including a machine gun like flashing light. (S. Ct. App. 200-201) Halla has installed an antenna at the site of the sign and computer software so that he and his staff can readily manipulate the sign from the nursery office. The sign installer, Paul Punt

testified that the sign has the biggest electronic message center sign faces he has ever sold. (S. Ct. App. 199) Neighbor Sharon Gatto testified that it gives the area a “casino” or “Las Vegas” image. (S. Ct. App. 229-230) There is no other commercial signage of this type anywhere in the area.

The District Court and Court of Appeals holding 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 District Court stated:

“The primary purpose of the Stipulation at issue was to address a retail sales building Plaintiffs had constructed without necessary City permits. The provision for the off-premises sign in Section 6A identifies specific limitations on the sign, and states that before erecting the sign, a sign permit must be obtained from the City. Because a permit requirement was incorporated into the language allowing the off-premises sign in Section 6A of the Stipulation, it follows that the permit referenced in Section 6C of the Stipulation would apply only to other signage at Plaintiffs’ retail location.”

(S. Ct. App. 055.)

The general provision in Section 6.C. is simply an acknowledgment that, in addition to the signs expressly allowed by the Stipulation, which may or may not be allowed by the City Code as the years go by and zoning regulations change, the City may also allow additional signage by sign permit. If the express provisions of the Stipulation are to be changed, then the Stipulation must be amended by resolution of the City Council (and submission to the District Court for an amendment to the Judgment) as agreed to by Halla. The Court of Appeals stated:

“Respondents contend that the language “or pursuant to a sign permit issued by [appellant]” means that they are allowed to construct any sign they wish as long as they have a permit. But paragraphs 6A and 6B are specific about the kinds of signs expressly allowed, including “[o]ne off premises directional sign,” which is

the sign at issue here. Because the judgment allows for only one off-premises sign, respondents' argument that they are permitted to construct any sign they wish as long as they first obtain a permit fails. The permit referenced in paragraph 6C applies only to the other signage at respondents' retail location."

Halla Nursery, Inc. v. City of Chanhassen, 763 N.W.2d 42, 47 (Minn. Ct. App. 2009)

Another glaring defect in Halla's argument as alluded to by the Court of Appeals is Halla's incorrect assumption that Paragraph 6.C. of the Stipulation authorizes the City to issue (and Halla the corresponding right to utilize) a permit which purports to authorize the construction of a sign in contravention of the City Zoning Ordinance.

Halla's 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. 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*, 40 N.W.2d 353, 359 (Minn. 1949) (in absence of express authorization by the legislature, a municipal corporation cannot by contract surrender or curtail its police power).

Halla's statement in its Brief rejecting as "incorrect" the Court of Appeals holding that Paragraph 6.C. applies to other signage at other locations is not supported by any coherent argument and in fact violates the very principles enunciated in the case law cited by Halla relating to the construction of the whole contract to harmonize all clauses. Adopting Halla's position and allowing a different sign in the southeast quadrant of Highway 101 and Pioneer by issuance of a permit amends the 1997 Stipulation

administratively, contrary to the provision of Paragraph 12 requiring that any amendment be in writing, signed by the parties and approved by written resolution of the City Council. Adopting the City's position and construing Paragraph 6.C. to mean that signage at other locations may be allowed by the issuance of a sign permit gives meaning to not only Paragraph 6.C. of the Stipulation, but also the specific language addressing the signage allowed at Highway 101 and Pioneer and the "council approval" requirement for amendments to the express terms of the Stipulation.

II. THE SIGN VIOLATES THE CITY ZONING ORDINANCE.⁵

It is the City's position that the 1997 Judgment controls what type of sign can be at this location. There is no need to analyze the City Zoning Ordinance. To the extent the Court may deem it relevant, as determined by the District Court, the sign violates at least three provisions of the Chanhassen Zoning Ordinance. (S. Ct. App. 047.)

First, the sign is an off premises sign which generally advertises the Halla Nursery business. It does not fit any of the categories of off premises directional signs allowed without a permit by the City Code § 20-1255(2)(b) (allowed where access is confusing and traffic safety could be jeopardized as approved by City Council) (S. Ct. App. 276-277.); City Code § 20-1255(10)(b) (temporary off premises real estate signs advertising the sale, rental or lease of businesses or industrial buildings) (S. Ct. App. 279.); City Code § 20-1255(10)(c) (off premises directional signs which show direction to new residential development) (S. Ct. App. 279.) Halla's sign is a general advertising sign,

⁵ The Chanhassen Zoning Ordinance is codified in Chapter 20 of the Chanhassen City Code.

not a directional sign at all.

Second, the sign is several times larger than any type of sign that is allowed by permit in the Agricultural and Residential Districts. Only public and institutional signs, area identification/entrance signs and monument signs with a total sign area of 24 square feet or less are allowed in these districts. City Code § 20-1301. (S. Ct. App. 283.) The Halla sign has two faces with a total display area of 240 square feet. (S. Ct. App. 045.)

Third, the sign is a prohibited flashing sign which is only allowed by Conditional Use Permit. City Code § 20-1259(2) (S. Ct. App. 281.) A “flashing sign” is “any directly or indirectly illuminated sign which exhibits changing natural or artificial light or color effects by any means whatsoever.” City Code § 1-2 (S. Ct. App. 284.) The evidence is clear that the sign is a flashing sign exhibiting changing artificial light and color effects. The Court of Appeals summarized the District Court’s findings on this issue:

The district court found that “[t]he 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.” The district court concluded that “[t]o operate the 2005 sign in a message center mode would be clearly illegal under the City code existing in 2005.”

Halla, 763 N.W.2d at 50.

Halla makes the circular argument that the sign complies with the 2005 zoning regulations because the sign complies with the 1997 Judgment, with the sign in turn complying with the 1997 Judgment because the City administratively and erroneously

issued the sign permit in 2005. The zoning provisions in effect in 2005 are separate and apart from the terms of the 1997 Stipulation and Judgment.

Halla attempts to make something of the fact that there are other signs located in the downtown commercial area of Chanhassen that have time and temperature or other flashing components. (Tr. Ex. 8, Tabs 9-14; Ex. 9 (Halla DVD).) The actual facts relating to these signs are as follows:

- Tr. Ex. 8, Tab 9 - An on-premises 18" x 5' (7.5 sq. ft.) time and temperature sign which is part of a TCF Bank sign approved by conditional use permit located at 900 West 78th Street in the downtown Chanhassen area.
- Tr. Ex 8, Tab 10 - An on-premises 8.46 sq. ft. LED display with letters 9" high as part of a permitted monument sign in an Office and Institutional District approved by conditional use permit in the downtown Chanhassen area.
- Tr. Ex. 8, Tab 11- An on-premises ground low profile sign containing an LED display approved by conditional use permit in a Highway Business District in the downtown Chanhassen area.
- Tr. Ex. 8, Tab. 12- An on-premises message board located on the drive thru canopy of the Chanhassen Bank in the downtown area located in a Commercial zoning district (C-1) approved as part of general site plan approval.
- Tr. Ex. 8, Tab. 13- An on-premises LED display allowed by conditional use permit as part of a ground low profile sign on property located in the Neighbor Business District along Highway 5.
- Tr. Ex. 8, Tab. 14- A double face LED display with each face being approximately 28 sq. ft. which is part of the Market Street Station commercial development in downtown Chanhassen.

Evidence relating to these signs has no relevancy to the issues before the Court for numerous reasons: first, the Halla sign regardless of its type, is only allowed by virtue of

the 1997 Judgment which regulates the structure; second, the Halla sign is located in an Agricultural zoning district. None of the other signs are in this district; and third, the Halla sign is a prohibited off-premises sign (allowed by virtue of the 1997 Judgment in accordance with the restriction in that Judgment).

Halla's video of the other signs, (Tr. Ex. 8) and the evidence relating to their modest size and location in the downtown commercial area, in fact buttresses the City's position that the mammoth Halla electronic message centers in an Agricultural, large lot rural residential area is totally out of place. There is a substantial public interest in not allowing this sign to become a permanent part of the present and future residential landscape.

III. THE SIGN VIOLATES THE CONDITIONS OF THE PERMIT ISSUED BY THE CITY.

The City admits that it mistakenly approved this sign application which violated the 1997 Judgment and City Zoning Ordinance. Halla, however, does not by any means come to this Court with clean hands from the standpoint of the permitting process.

Associate City Planner Metzger, with no personal knowledge of the prior Judgment, was treating the sign as the replacement of an existing sign. Halla's agent, Applicant, Paul Punt of Attracta Sign, stated in writing that the old sign faces were 8 feet x 12 feet or 96 square feet. (S. Ct. App. 256, 263.)

The old sign faces were actually 6' x 12' or 72 square feet. (S. Ct. App. 045, 257.) Additionally, the sign as constructed has an 18" x 12' 5" illuminated cabinet along the

bottom of the sign, which was never shown on the plans submitted with the application and approved by the City. (S. Ct. App. 045.)

IV. THE COURT OF APPEALS CORRECTLY HELD THAT THE CITY IS NOT PREVENTED BY ITS INACTION FROM ENFORCING THE PROVISION IN THE 1997 JUDGMENT PROHIBITING THE ILLUMINATION OF THE SIGN.

The District Court concluded that the 1997 Judgment remains valid and enforceable. (S. Ct. App. 047; Conclusion of Law No. 1.) The Court then concludes that the City “allowed” Halla to operate an illuminated sign for eight years (S. Ct. App. 047; Conclusion of Law No. 5.) and that Halla is entitled to use the sign in a manner consistent with the pattern of prior use as an illuminated sign. (S. Ct. App. 048; Conclusion of Law No. 9.)

The circumstances relating to the illumination of the old sign are undisputed and specifically set forth in the District Court’s Findings No. 14, 15 and 16. Donald Halla illuminated the old sign in blatant violation of the 1997 Judgment. The City’s Community Development Director told Don Halla’s son, Mark Halla, that the sign was not suppose to be illuminated and Halla refused to comply. The City did not take any enforcement action, choosing to wait, assuming that the property would be sold in the near future and the sign removed in accordance with the 1997 Judgment. (S. Ct. App. 042-043.)

The old sign had a wooden frame with lettering on plywood faces, illuminated by attached lights shining on the faces. (S. Ct. App. 112-114.) The new sign, by contrast, is illuminated by two 73.75 square foot reader boards, which are essentially large, full

color, instantly programmable computer screens that can exhibit a full array of moving color and light. There is also an internally illuminated cabinet along the bottom of the sign face. All of this is in addition to the non-illuminated portion of the sign faces. (S. Ct. App. 258, 270-72.)

The Stipulation signed by Respondents which was incorporated into the 1997 Judgment specifically states that the City's "failure to promptly take legal action to enforce this Stipulation shall not be a waiver or release." (S. Ct. App. 041.) This provision in the Judgment is reinforced by Minnesota case law holding that a lapse of time does not diminish a municipality's ability to enforce its zoning ordinance. *Stillwater Twp. v. Rivard*, 547 N.W.2d 906, 910 (Minn. Ct. App. 1996); *SLP P'ship v. City of Apple Valley*, 511 N.W.2d 738, 743 (Minn. 1994).

The District Court's determination that Halla Nursery acquired the right to have an illuminated sign, yet alone electronic message centers, in violation of the 1997 Judgment as a result of Halla's belligerent refusal to comply is clearly erroneous. As determined by the Court of Appeals, the conclusion is contrary to the explicit terms of the 1997 Judgment and no written waiver or amendment was signed. *Id.* at 47.

V. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE VESTED RIGHTS DOCTRINE HAS NO APPLICATION.

The Court of Appeals applying well established case law determined that the vested rights doctrine did not apply because the City did not change zoning laws after the permit was issued to make the sign illegal. The sign was always in violation of the Judgment and the 2005 zoning regulations. *Halla Nursery, Inc.*, 763 N.W.2d at 49.

Ridgewood Dev. Co. v. State, 294 N.W.2d 288 (Minn. 1980) involved a situation where the developer had spent over \$250,000 in reliance on a provision in state law which was then changed making the project financially impossible. The Court generally described the vested rights doctrine. The Court stated:

The vested rights doctrine in Minnesota developed to deal not with public funding of private ventures but with state control over private development through the use of zoning provisions and building permits.

Ridgewood Dev. Co. v. State, 294 N.W.2d at 294 (citing *Hawkinson v. County of Itasca*, 231 N.W.2d 279 (Minn. 1975); *State ex rel. Berndt v. Iten*, 106 N.W.2d 366 (Minn. 1960); *Kiges v. City of St. Paul*, 62 N.W.2d 363 (Minn. 1953)).

The *Hawkinson* case, like *Ridgewood* involved a change in the law after the property owner had commenced work on a project. Specifically, the county rezoned *Hawkinson*'s resort property to residential. The Court identified the issue as "whether the plaintiff has acquired a vested right to complete the work which he has commenced." *Hawkinson*, 231 N.W.2d at 280. In *Berndt*, the Village of Osseo changed the zoning ordinance to prohibiting the use of plaintiff's property after he had acquired it to develop a mobile home park. The Court determined that the owner did not have any vested rights under the prior ordinance. *Berndt*, 106 N.W.2d at 369. In *Kiges*, the City of St. Paul rezoned plaintiff's commercial property to residential after he had purchased it to build a retail dry cleaning establishment, obtained a building permit and commenced construction. Again, the Court found that the property owner had not acquired any vested rights to complete the project. *Kiges*, 62 N.W.2d at 372-73.

More recently in *Yeh v. County of Cass*, 696 N.W.2d 115, 132 (Minn. Ct. App.

2005) the Court stated:

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). And “[a] property owner is charged with knowledge of whether a local zoning ordinance permits construction undertaken on the property.”

(quoting *Stotts v. Wright County*, 478 N.W.2d 802, 805 (Minn. Ct. App. 1991).

In *Naegele*, the Court held that the billboard company had no vested right to construct replacement billboards under a repealed ordinance. *Naegele*, 532 N.W.2d at 254. In *Prop. Research and Dev. Co. v. City of Eagan*, 289 N.W.2d 157 (Minn. 1980), the city denied a preliminary plat to develop single family homes. Prior to trial the city changed its zoning ordinance to prohibit single family homes which had been allowed at the time the city denied the plat. The Court dismissed plaintiff’s mandamus action on the basis that the ordinance was amended to prohibit the development prior to trial and “there is no vested right in zoning.” *Id.* at 158. *Concept Props. LLP v. City of Minnetrista*, 694 N.W.2d 804 (Minn. Ct. App.2005), cited by Halla, likewise involves a situation where regulations were changed to preclude previously allowed urban development.

It is crystal clear that the doctrine of vested rights does not apply to this situation where the City is seeking to enforce the existing regulation after a mistake was made in the issuance of a permit. The vested rights doctrine applies when a use of land that was

permitted subsequently becomes prohibited because the city amends its zoning ordinance.

That is not the situation in this case.

Halla misrepresents the Supreme Court's holding in *Jasaka Co. v. City of St. Paul*, 309 N.W.2d 40 (Minn. 1981). In its Brief, Halla states that the Supreme Court in *Jasaka* stated that "Jasaka would have acquired a vested right to keep the tower, despite the invalidity of the permit." (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.

Id.

In *Anderson v. City of Minneapolis*, 178 N.W.2d 215 (Minn. 1970) a building permit was issued and revoked. In rejecting the Appellants damage claim, the Court said the permit was clearly illegal and that the owner was charged with knowledge of applicable law.

Echoing the Supreme Court's holding in *Anderson and Jasaka* concerning an owner's duty to determine the propriety of his project, the District Court in its Memorandum summarized 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.

(S. Ct. App. 054.)

In *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604 (Minn. 1980), decided six months after the Court's decision in *Ridgewood Development*, the Supreme Court explicitly stated as a matter of law that a municipality cannot be estopped from correctly enforcing a zoning ordinance. In *Frank's Nursery Sales*, the property owner contended that it had relied to its detriment on the words and conduct of city officials that authorized its desired use of the property. *Frank's Nursery Sales, Inc.*, 295 N.W.2d at 607. The Court stated:

We conclude Frank's contention that the city was estopped from denying the permit must be rejected as a matter of law. The law in Minnesota is clear that administration of zoning ordinances is a governmental not a proprietary function, and the municipality cannot be estopped from correctly enforcing the ordinance even if the property owner relied to his detriment on prior city action.

Id. (citing *W. H. Barber Co. v. City of Minneapolis*, 34 N.W.2d 710 (Minn. 1948); *State ex rel. Howard v. Village of Roseville*, 70 N.W.2d 404 (Minn. 1955); *The Alexander Co. v. City of Owatonna*, 24 N.W.2d 244 (Minn. 1946)); *See also Yeh*, 696 N.W.2d at 131; *Mohler v. City of St. Louis Park*, 643 N.W.2d 623 (Minn.Ct.App. 2002); *Prior Lake Aggregates Inc. v. City of Savage*, 349 N.W.2d 575, 580 (Minn. Ct. App. 1984).

In *Mohler*, the City Zoning Administrator overlooked a recent amendment to the city zoning ordinance reducing the allowed height of a garage from 15 feet to 12 feet, and issued a building permit for a garage that was initially measured at 14.87 feet. The City zoning official subsequently inspected the garage as it was being constructed and measured the height at 15' 6", six inches higher than what the City believed the ordinance permitted at that time, and still allowed substantial construction to continue. *Mohler*, 643 N.W.2d at 628. Subsequently, a stop work order was issued.

In spite of the erroneous building permit, subsequent inspection and reassurance to the homeowners by city staff, and the fact that the two-story garage was substantially constructed, the Court in *Mohler* concluded as a matter of law that the city was not estopped from enforcing the twelve foot height limitation. The Court stated:

The Christiansons next argue that they are entitled to a trial on their claim that estoppel prevents the city from requiring that they reduce the height of their garage. We cannot agree. While the results may be harsh, a "municipality cannot be estopped from correctly enforcing the ordinance even if the property owned relied to his detriment on prior city action."

Id., at 638 (citing *Frank's Nursery, Inc.*, 295 N.W.2d at 607).

Likewise in *Stillwater Township* the Court stated:

We note that the administration of zoning ordinances is a governmental function and that a “municipality cannot be estopped from correctly enforcing the ordinance even if the property owner relied to his detriment on prior city action.”

Stillwater Twp., 547 N.W.2d at 910 (quoting *SLS P’ship*, 511 N.W.2d at 763.).

More recently in *Yeh*, the Court stated:

It is well settled that a “municipality cannot be estopped from correctly enforcing [an] ordinance even if the property owner relied to his detriment on prior city action.” *Mohler*, 643 N.W.2d at 638 (quoting *Frank’s Nursery*, 295 N.W.2d at 607). As such, appellant’s estoppel argument is without merit.

Yeh, 696 N.W.2d at 131.

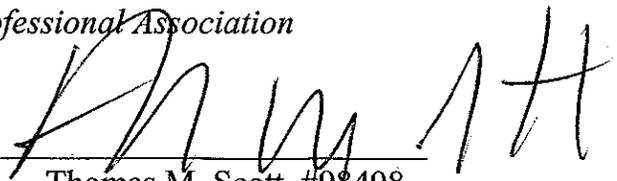
The Court’s speculative comment in *Jasaka* is not only dicta but also lends virtually no support to Halla’s position. The Court of Appeals correctly determined that the vested rights doctrine does not apply because the sign violated the 1997 Judgment and the zoning regulations in effect in 2005. There was no change in regulations that made an otherwise legal sign illegal. The vested rights doctrine does not apply.

CONCLUSIONS

The Court of Appeals’ decision should be affirmed.

Respectfully submitted this 17th day of August, 2009.

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NO. A08-233

STATE OF MINNESOTA
IN SUPREME COURT

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

Appellants,

v.

City of Chanhassen,

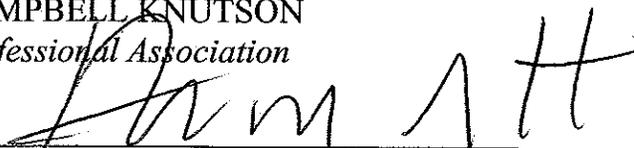
Respondent.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a 13 pt. Times New Roman font. The length of the brief is 8,016 words. This brief was prepared using Microsoft Word software.

Dated: August 17, 2009

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