

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF TRANSPORTATION

In the Matter of the Application of Ted Kornder  
for an Advertising Device Permit on Highway  
169 at 10476 Old Highway 169 Boulevard in  
Scott County

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

This matter came before Chief Administrative Law Judge Tammy L. Pust for a hearing on July 19, 2013. The factual record remained open until August 2, 2013 pending submission of facts relevant to the zoning history of Respondent's real property. The hearing record closed on August 14, 2013 upon receipt of the Respondent's post-hearing memorandum.

At the hearing in the matter, Natasha Karn, Assistant Attorney General, appeared on behalf of the Minnesota Department of Transportation. Brian P. Farrell, Brian P. Farrell, P.A., appeared on behalf of Respondent Ted Kornder.

**STATEMENT OF THE ISSUES**

This case presents the following issues for determination:

1. With respect to its actions in 2008, did the Department properly nonrenew and revoke Respondent's earlier issued advertising device permit?
2. Did the Department properly deny Respondent's 2013 application for an advertising device permit?

**SUMMARY OF RECOMMENDATION**

The Administrative Law Judge finds that the Department acted outside its statutory authority when it refused to renew and effectively revoked Respondent's previously issued advertising device permit in 2008, and recommends that the permit be reinstated upon payment of required annual renewal fees. Given this recommendation, it is unnecessary to address the propriety of the Department's denial of the Respondent's 2013 application.

## FINDINGS OF FACT

### The Parties

1. The Minnesota Department of Transportation (Department) regulates the placement of advertising devices under the authority of federal<sup>1</sup> and state law and regulation.<sup>2</sup>

2. Jeffrey Constant (Constant) is a Transportation Specialist with the Department, serving with the Advertising Control Agent Roadway Regulation Unit, Metropolitan District Permits. Constant's duties involve the regulation and control of outdoor advertising for the metropolitan area, duties he performs by patrolling the highways on a daily basis and notifying noncompliant sign owners and operators of relevant regulatory requirements.<sup>3</sup> Unless otherwise indicated herein, all actions attributed to the Department were accomplished by Constant acting within the scope of his assigned duties on behalf of Department.

3. Scott Robinson is the Coordinator of Outdoor Advertising for the Department, and Constant's supervisor.<sup>4</sup>

4. With his wife Mary Kornder, Respondent Ted Kornder is the owner of property located at 10476 Old Highway 169 Boulevard, St. Lawrence Township, Scott County, State of Minnesota (the Property).<sup>5</sup>

### Department's Sign Permitting Practices

5. The Department implements a permitting process for outdoor advertising devices adjacent to interstate and primary highways as required by federal and state statutes and applicable regulations.

6. In pertinent part, the Department's permitting process prohibits the issuance of a permit if the subject property is not properly zoned, which zoning the Department refers to as "commercial or industrial."<sup>6</sup>

7. When the zoning designation changes for an already permitted advertising device such that the device becomes a legal nonconforming use under local zoning

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<sup>1</sup> The Federal Highway Beautification Act, 23 U.S.C. § 131(b), requires states receiving federal-aid highway funds to effectively control the erection and maintenance of outdoor advertising signs, displays, and devices within 660 feet of the nearest edge of the right-of-way of any interstate or primary highway, including any highway on the National Highway System.

<sup>2</sup> See, Minnesota Outdoor Advertising Control Act, Minnesota Statutes Chapter 173, and regulations promulgated at Minnesota Rules 8810.0200-.1400.

<sup>3</sup> Testimony (Test.) of Jeffrey Constant.

<sup>4</sup> Test. of Scott Robinson.

<sup>5</sup> Test. of Ted Kornder; Exhibit 11.

<sup>6</sup> Test. of J. Constant.

controls, the Department's policy and practice is to allow the permit to continue in effect but not to allow the permit holder to expand the use or rebuild a destroyed device.<sup>7</sup>

8. As a matter of policy and past practice, upon request the Department transfers the ownership of previously granted permits for conforming signs but does not transfer permit ownership for nonconforming signs.<sup>8</sup>

9. With respect to permits for nonconforming signs that have lapsed for reasons unrelated to Department action and for which a new owner has requested reissuance and transfer of the lapsed permit, the Department's policy and practice has been to deny the permit application.<sup>9</sup>

## **The Property**

10. This matter involves the existence and use of an outdoor billboard sign (Sign) located on the Property and situated at milepost 93.50 in the SE Quarter of the SE Quarter of Section 32, Township 114 North, Range 24 West, St. Lawrence Township, Scott County, State of Minnesota.<sup>10</sup>

11. The Property is located adjacent to U. S. Highway 169, a part of the federal primary highway system in Minnesota.<sup>11</sup>

12. In 1977, the Property was zoned "Business B-2" pursuant to the Scott County Zoning Ordinance (Zoning Ordinance).<sup>12</sup>

13. On May 22, 2001, Scott County adopted its 2020 Comprehensive Plan, within which the Property was changed from a B-2 Business Zoning District to an Urban Expansion Reserve Zoning District. The adopted Plan became effective on May 23, 2001.<sup>13</sup>

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<sup>7</sup> Test. of J. Constant.

<sup>8</sup> Test. of J. Constant.

<sup>9</sup> Test. of S. Robinson.

<sup>10</sup> Exhibit (Ex.) 6; Ex. 11.

<sup>11</sup> Ex. 1; Ex. 5.

<sup>12</sup> Ex. 11.

<sup>13</sup> Ex. 7. For purposes of the record, the Department's Post-Hearing Memorandum of Law, at page 6, correctly notes the effective date of the adopted Scott County 2020 Comprehensive Plan as May 23, 2001, though it also contains a typographical error in identifying the effective date as May 23, 2011 on page 4, footnote 1. The correct date is May 23, 2001. See Scott County 2020 Comprehensive Plan Land Use Map and Land Use Category Summary, attached as Appendix B to Scott County 2030 Comprehensive Plan, publicly available at <http://www.co.scott.mn.us/PropertyGISLand/2030CompPlan/2030PlanDoc/Documents/Appendix%20B%202020%20Land%20Use%20Plan.pdf>, at p. 2, of which the Administrative Law Judge takes judicial notice as an adjudicative fact capable of accurate and ready determination pursuant to Minn. R. Evid. 201.

14. The majority of the neighboring properties within a two mile radius of the Property are also zoned Urban Expanse Reserve, although a few properties are zoned C-1 General Commercial and/or Urban Business Reserve.<sup>14</sup>

15. Currently, at least 20 other outdoor billboards, signs and advertising devices are located on other properties in the immediate vicinity of the Property. All of these signs are located on properties zoned Urban Expansion Reserve.<sup>15</sup> The record contains no evidence relevant to the dates the signs were first constructed or used, and insufficient evidence regarding whether the Department has issued permits for any of the signs.

### **Use of the Sign**

16. The record is silent as to whether the Sign's existence and use predates the enactment of the Federal Highway Beautification Act in 1965 or the Minnesota Outdoor Advertising Control Act in 1971.

17. At all times relevant to this matter, Minnesota Harvest Orchard (Minnesota Harvest), an apple orchard and retail sales outlet, has been located adjacent to the Property.<sup>16</sup>

18. On September 26, 1977, Scott County issued Conditional Use Permit Number 482-C-10 to Minnesota Harvest, allowing Minnesota Harvest to lawfully maintain the Sign on the Property.<sup>17</sup> The record is silent as to whether and, if applicable, how long the Sign existed prior to Scott County's issuance of the conditional use permit.

19. In conformity with its standard practice which requires knowledge of current zoning designations, on June 29, 1978, the Department issued Advertising Device Permit Number 1440 to Minnesota Harvest (Minnesota Harvest Permit), allowing Minnesota Harvest to advertise on the Sign.<sup>18</sup>

20. Respondent Ted Kornder (Respondent) purchased the Property, including the Sign, in 1984.<sup>19</sup>

21. From 1984 through 2007, Respondent allowed Minnesota Harvest to use the Sign to advertise the following message: "Minnesota Harvest Orchard – Turn Right Here."<sup>20</sup>

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<sup>14</sup> Ex. 7.

<sup>15</sup> Test. of J. Constant; Test. of T. Kornder; Ex. 12.

<sup>16</sup> Test. of T. Kornder.

<sup>17</sup> Exhibit 11.

<sup>18</sup> Test. of J. Constant; Exhibits 11 and 13.

<sup>19</sup> Test. of T. Kornder.

<sup>20</sup> Test. of J. Constant; Exhibit 13.

22. Following a death involving the long-term operator of Minnesota Harvest, Sheila Mitchell (Mitchell) assumed control of Minnesota Harvest in 2006. Subsequently, Minnesota Harvest failed to make payment to Respondent for the Sign's use, which led to a dispute between Respondent and Mitchell regarding Minnesota Harvest's continued permission to use the Sign.<sup>21</sup>

23. On April 27, 2007, the Department received an Advertising Device Permit Application dated April 18, 2007, together with correspondence from Respondent, in which Respondent: reported that Minnesota Harvest had no legal permission to use the Sign; requested that the Minnesota Harvest Permit be transferred to Respondent's name; and identified the zoning for the Property as "B-1 Business."<sup>22</sup>

24. After confirming with Mitchell that Minnesota Harvest had no lease with Respondent authorizing its continued use of the Sign, the Department "cancelled" the Minnesota Harvest Permit.<sup>23</sup>

25. After cancelling the Minnesota Harvest Permit, the Department issued Advertising Device Permit Number 12473 to Respondent (Kornder Permit) on or about May 7, 2007, thereby authorizing the Sign's continued use by Respondent through June 30, 2008.<sup>24</sup>

26. On May 14, 2007, the Department sent Respondent, then the permit holder, Advertising Devices Permit Renewal Invoice Number 20618 requesting payment of a \$60 renewal fee in exchange for renewal of the Kornder Permit for a year ending June 30, 2008.<sup>25</sup>

27. On or about May 23, 2007, Respondent submitted and the Department processed the required annual renewal fee for the Sign, thereby authorizing its use from July 1, 2007 through June 30, 2008.<sup>26</sup>

28. Several months before June 30, 2008, likely on or about February 19, 2008, Mitchell contacted Constant and reported that the Property was not zoned B-1 Business but instead was zoned Urban Expansion Reserve. She further informed Constant that billboards are not allowed in Urban Expansion Reserve zones pursuant to the Scott County Zoning Ordinance.<sup>27</sup>

29. Constant subsequently confirmed this information with Scott County.<sup>28</sup>

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<sup>21</sup> Test. of T. Kornder.

<sup>22</sup> Test. of J. Constant; Test. of T. Kornder; Ex. 1.

<sup>23</sup> Test. of J. Constant.

<sup>24</sup> Test. of J. Constant; Ex. 1.

<sup>25</sup> Test. of J. Constant; Test. of T. Kornder; Ex. 8.

<sup>26</sup> Test. of J. Constant; Test. of T. Kornder; Ex. 8.

<sup>27</sup> Test. of J. Constant; Ex. 13, regarding February 19, 2008 date as addressed in Test. of J. Constant.

<sup>28</sup> Test. of J. Constant.

30. As a result of this information, Constant “decided to let [the Kornder Permit] run out” or “expire.”<sup>29</sup>

31. On May 13, 2008, the Department sent Respondent Advertising Devices Permit Renewal Invoice Number 25376 requesting payment of a \$60 renewal fee in exchange for renewal of the Kornder Permit through June 30, 2009.<sup>30</sup>

32. Respondent submitted his renewal application and required fees to the Department on or about May 30, 2008.<sup>31</sup>

33. The Department negotiated Respondent’s check for the renewal fees.<sup>32</sup>

34. When the annual renewal period had run, Constant “didn’t reissue” the Kornder Permit but instead took the necessary administrative steps to issue a refund check to Respondent for the renewal fees paid on May 30, 2008, and then “cancelled [the Kornder Permit] out of the system.”<sup>33</sup>

35. When he cancelled the Kornder Permit and sent the refund check to Respondent, Constant did not notify Respondent, in writing or otherwise, why the Kornder Permit had been cancelled, nor did he inform Respondent, in writing or otherwise, that he had a right to a hearing with regard to the Department’s action.<sup>34</sup>

36. At the time, Constant was unaware of any legally required notice requirements relevant to an involuntary cancellation of a previously issued advertising device permit. Constant was further unaware of any legally required steps necessary for the Department to refuse to renew an already issued permit. Other than with respect to an “inaccurate application” as described in Minnesota Statutes Chapter 173, Constant was unaware of any lawful basis upon which the Department could refuse to renew an already issued permit upon payment of the required renewal fee.<sup>35</sup>

37. When Respondent called Constant to ask why he had received a refund of his paid and processed renewal fee, Constant informed him that the Kornder Permit had been cancelled because the Property’s zoning had changed from B-1 Business<sup>36</sup> to Urban Expansion Reserve and billboard signs were not allowed on properties with that zoning classification.<sup>37</sup>

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<sup>29</sup> Test. of J. Constant.

<sup>30</sup> Test. of J. Constant; Test. of T. Kornder; Ex. 9.

<sup>31</sup> Test. of J. Constant; Test. of T. Kornder; Ex. 9.

<sup>32</sup> Test. of T. Kornder.

<sup>33</sup> Test. of J. Constant.

<sup>34</sup> Test. of J. Constant; Test. of T. Kornder.

<sup>35</sup> Test. of J. Constant.

<sup>36</sup> Constant understood that the zoning had changed from B-1 Business to Urban Expansion Reserve, based primarily on the notation “B-1Business” contained on Kornder’s May 18, 2007 permit application. See Ex. 1. In fact, the Property had been previously zoned “B-2 Business.” See Ex. 11.

<sup>37</sup> Test. of J. Constant.

38. Constant did not inform Respondent that he had to remove the Sign. Instead, Constant informed Respondent that he could reapply for the advertising device permit once the zoning “was figured out.”<sup>38</sup>

### **State Court Litigation**

39. On August 29, 2008, Minnesota Harvest commenced a conciliation court action against Respondent alleging conversion of the Sign. The matter was eventually appealed and tried to the District Court. Judgment was issued against Respondent in the amount of \$6,500 on or about May 4, 2009.<sup>39</sup>

40. During the pendency of the litigation, Respondent displayed no commercial advertising on the Sign but instead displayed an American flag and other information relevant to the United States military. After the completion of the litigation, in 2010 Respondent began to use the Sign for advertising purposes.<sup>40</sup>

41. On or about April 14, 2010, Scott County granted Respondent’s application to transfer Conditional Use Permit No. 482-C-10, originally issued to Minnesota Harvest, to Ted and Mary Respondent, and notified the Department that Scott County considered the Sign to constitute a “legal non-conforming (grandfathered) use” subject to the county’s zoning code requirements.<sup>41</sup>

42. On January 17, 2012, Minnesota Harvest commenced further litigation against Respondent, this time alleging conversion of the Minnesota Harvest Permit and loss of associated income. After an evidentiary hearing, the matter was dismissed with prejudice on December 17, 2012.<sup>42</sup>

43. On or about September 17, 2012, Mitchell contacted Constant by email to inquire about the Sign’s permit status and to complain that the Sign was in use for commercial advertising purposes. Constant assured Mitchell that “[t]here is not and will not be a State Permit on this sign until it meets the zoning and spacing requirements of Minnesota Statutes 173.13, subd. 1.”<sup>43</sup>

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<sup>38</sup> Test. of J. Constant; Test. of T. Kornder.

<sup>39</sup> Test. of T. Kornder; See also Minnesota Harvest Apple Orchard v. Ted Kornder and Mary Kornder, Scott County District Court File No. 70-CV-09-659, of which the Administrative Law Judge takes judicial notice as an adjudicative fact capable of accurate and ready determination by a review of the publicly available court records at <http://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=1612397181>, pursuant to Minn. R. Evid. 201.

<sup>40</sup> Test. of T. Kornder.

<sup>41</sup> Test. of J. Constant; Ex. 2.

<sup>42</sup> Test. of T. Kornder; See also Minnesota Harvest Farms, Inc. v. Ted Kornder and Mary Kornder, Scott County District Court File No. 70-CV-12-1225, of which the Administrative Law Judge takes judicial notice as an adjudicative fact capable of accurate and ready determination by a review of the publicly available court records at <http://pa.courts.state.mn.us/CaseDetail.aspx?CaseID=1615058284>, pursuant to Minn. R. Evid. 201.

<sup>43</sup> Test. of J. Constant; Ex. 10.

44. After receiving Mitchell's 2012 complaint, Constant called Respondent and told him it was unlawful to display off-premises advertising on the Sign without a valid permit. When Respondent questioned why outdoor billboards were not allowed on properties zoned Urban Expansion Reserve, Constant told him that outdoor advertising signs were allowed only in business and commercial zoning areas. During the discussion, Respondent informed Constant that he was still engaged in litigation with Mitchell regarding the Sign. As a result, Constant decided to "let things play out to see what would happen with the county court system before we made any moves."<sup>44</sup>

45. On November 12, 2012, the Department issued to Respondent a "Notice of Violation" directing Respondent to either obtain a permit for the Sign or remove it from the Property. The Notice of Violation did not contain any notification of a right to a hearing related to the Department's determination.<sup>45</sup>

46. Within the specified 60 days, on January 14, 2013 Respondent submitted an Advertising Device Permit Application to the Department.<sup>46</sup>

47. On January 29, 2013, the Department notified Respondent in writing that his application had been denied. The correspondence from the Department did not contain any notification to Respondent of a right to a hearing to contest the Department's determination.<sup>47</sup>

48. The record does not indicate that Department ever offered Respondent any compensation related to the cancellation of the 2008 Respondent Permit or the denial of Respondent's application for an advertising device permit in 2013.

49. The record contains no evidence that the Department's renewal of the 2008 Kornder Permit or approval of Respondent's 2013 permit application would result in a loss of federal highway funds.

## **Procedural Findings**

50. Respondent objected to the Department's determination and filed a timely appeal in this matter on February 22, 2013.<sup>48</sup>

51. On April 3, 2013, the Department issued a Notice and Order for Hearing setting the hearing for April 30, 2013.<sup>49</sup> The hearing was later continued to July 19, 2013.<sup>50</sup>

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<sup>44</sup> Test. of J. Constant.

<sup>45</sup> Test. of J. Constant; Ex. 4.

<sup>46</sup> Test. of J. Constant; Test. of T. Kornder; Ex. 5.

<sup>47</sup> Test. of J. Constant; Ex. 6.

<sup>48</sup> Notice and Order for Hearing dated April 3, 2013, p. 2, ¶ 12.

<sup>49</sup> Notice and Order for Hearing dated April 3, 2013.

<sup>50</sup> Third Pre-Hearing Order dated June 19, 2013.

52. In its Notice and Order for Hearing, the Department alleges that its actions are lawful based on the provisions of Minn. Stat. § 173.13, subd. 1 and Minn. Rule 8810.1400.

53. Any of the foregoing Findings properly considered Conclusions of Law are hereby adopted as such.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. The Department and the Administrative Law Judge have jurisdiction to consider this matter under Minn. Stat. §§ 14.50, 173.07 and 173.13.

2. The Department gave proper notice of the hearing and has complied with all applicable procedural requirements of statute and rule.

3. Pursuant to Minn. R. 1400.7300, subd. 5, the proponent of an action has the burden of proof to establish by a preponderance of the evidence the facts necessary to supports its claim. As applied to the claims in the present matter, the rule dictates as follows: (1) the Department has the burden of establishing by a preponderance of the evidence that it was entitled to nonrenew and revoke the Kornder Permit in 2008; and (2) Respondent has the burden of establishing by a preponderance of the evidence that it was entitled to the issuance of an advertising permit pursuant to its application in 2013.<sup>51</sup>

4. The Federal Highway Beautification Act<sup>52</sup> requires states to regulate outdoor advertising devices in areas adjacent to interstate and primary highways. Failure to make provision for adequate controls can subject the state to withholding of 10% of the state's apportioned federal highway funds.

5. The Minnesota Outdoor Advertising Control Act<sup>53</sup> was enacted to "conserve the natural beauty of areas adjacent to certain highways" by "reasonably and effectively regulat[ing] and control[ing] the erection or maintenance of advertising devices on land adjacent to" highways.<sup>54</sup> In order to ensure that state and federal policy in this area of law remain consistent, Minn. Stat. § 173.185, subd. 1, requires "the

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<sup>51</sup> At this hearing in this matter, the Department assumed the burden of proof with respect to the 2013 application issue. As the Department was not the proponent of the application, allowing the Department to shoulder the burden of proof would be inconsistent with Minn. R. 1400.7300, subd. 5. Given the Administrative Law Judge's conclusion that a determination of this issue is unnecessary to the overall resolution of the case, no prejudice has resulted to Respondent as a result of the inaccurate identification of the burden of proof at the hearing.

<sup>52</sup> 23 U.S.C. § 131(b).

<sup>53</sup> Minn. Stat. Chapter 173.

<sup>54</sup> Minn. Stat. § 173.01.

Commissioner of Transportation [to] comply with federal law and federal rules and regulations relating to billboard control on the interstate and primary systems.”

6. An “advertising device” is defined as “any billboard, sign, notice, poster, display, or other device visible to and primarily intended to advertise and inform or to attract or which does attract the attention of the operators and occupants of motor vehicles....”<sup>55</sup>

7. At all times that the Sign erected on the Respondent Property displayed commercial advertising content,<sup>56</sup> it constituted an advertising device subject to regulation under applicable law.

8. The Commissioner of Transportation is legally authorized to adopt rules governing the issuance and renewals of permits for advertising devices adjacent to the interstate and primary system of highways.<sup>57</sup>

9. Minn. Stat. § 173.13, subd. 1, prohibits the erection or maintenance of any advertising device along an interstate or primary highway “without a permit therefor being first obtained from the commissioner.”

10. Minn. Stat. § 173.08, subd. 1(8) provides legal authority for the Department to issue permits for “advertising devices which are located, or which are to be located, in business areas and which comply, or will comply when erected, with the provisions of sections 173.01 to 173.27.”

11. Scott County Zoning Ordinance No. 3 defines the purpose of the Urban Expansion Reserve Zoning District as follows:

This district is to preserve land in those areas of Scott County identified in its Comprehensive Plan for logical future extension of urban land uses served by public utilities. This zoning district is intended to preserve these areas of the County in very low rural development densities or clustered residential developments that may be compatibly integrated with future urban development. This district is also meant to perform the following functions;

(1) To conserve land in a viable economic status until such time as public utilities may be extended and urban development densities may be supported.

(2) To reduce the possibility of urban/rural land use conflicts in both the use of the land and future extension of public utilities and other infrastructure items.<sup>58</sup>

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<sup>55</sup> Minn. Stat. § 173.02, subd. 16.

<sup>56</sup> From some point in 2008 to some point in 2010, the Sign displayed only an American flag and other messages related to support for the nation’s military services. Test. of T. Kornder.

<sup>57</sup> Minn. Stat. §§ 173.06, subd. 1; 173.185, subd. 2.

<sup>58</sup> Scott County, Minn., Zoning Ordinance No. 3, ch. 30, § 1.

12. The Scott County Urban Expansion Reserve Zoning District does not meet the definition of a “business area” found in Minn. Stat. § 173.02, subd. 17(a) in that it is not zoned for business, industrial or commercial activities.<sup>59</sup>

13. The Zoning Ordinance prohibits advertising signs in Urban Expansion Reserve zones.<sup>60</sup>

14. Pursuant to the terms of the Zoning Ordinance, upon the county’s 2001 amendment of its zoning code in conformity with its 2010 Comprehensive Plan, the Sign became a legal nonconforming use and structure, which was lawful to maintain and use as an outdoor billboard sign but could not be enlarged or its use expanded.<sup>61</sup>

15. Minnesota Rule 8810.0900, subp. 4, requires the Department to recognize a currently permitted sign, located on property which loses its required zoning designation as a “business area,” to thereafter constitute a “legal nonconforming device.”

16. Minnesota Rule 8810.1400, subp. 10, specifies the Department’s authority with regard to nonrenewal of an issued advertising sign permit.

For the purpose of Minnesota Statutes, section 173.13, an advertising device for which a permit can be issued shall when erected be a complete billboard, sign, notice, poster, or display intended to advertise a product or legend. An advertising device which is painted out, or painted over, or advertising space for lease and which has so existed for one permit period shall not be considered for a permit or renewal. Where there are posts only, partial structure, company name markers, or no structure at all, a renewal shall not be issued.

17. Minn. Stat. § 173.13, subd. 7, allows the Department to renew even an expired advertising device permit upon payment of the required renewal fees and statutory penalty.

18. Minn. Stat. § 173.13, subd. 10, allows the Department to revoke an issued advertising device permit in specified circumstances upon compliance with identified statutory requirements, as follows:

The commissioner may revoke any permit granted herein for cause upon 30 days' written notice of such hearing to the permittee. Such notice and hearing and all rules with respect thereto shall be in accordance with

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<sup>59</sup> Federal regulations at 23 C.F.R. § 750.703 define “commercial or industrial areas” as “those districts established by the zoning authorities as being most appropriate for commerce, industry, or trade, regardless of how labeled. They are commonly categorized as commercial, industrial, business, manufacturing, highway service or highway business (when these latter are intended for highway-oriented business), retail, trade, warehouse, and similar classifications.”

<sup>60</sup> Scott County, Minn., Zoning Ordinance No. 3, ch. 11, § 4.

<sup>61</sup> Scott County, Minn., Zoning Ordinance No. 3, ch. 3, § 4, subps. 5(b) and 7.

chapter 14. The commissioner within ten days after hearing shall notify the permittee what the permittee must do to retain the permit and the permittee shall have 30 days therefrom in which to comply with the order of the commissioner

19. The Department had no express or implied legal authority to refuse to renew Respondent's Permit in 2008.

20. The Department had no express or implied legal authority to revoke Respondent's Permit in 2008.

21. These Conclusions are reached for the reasons set forth in the attached Memorandum, which is hereby incorporated by reference in these Conclusions.

Based upon the foregoing Conclusions, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS RESPECTFULLY RECOMMENDED that the Commissioner REVERSE the Department's determination that its 2008 non-renewal and revocation of Respondent's advertising device permit was proper. It is further recommended that the Department reinstate the 2008 permit subject to Respondent's payment of all required renewal fees. Based upon this recommendation, it is unnecessary to reach a determination regarding the propriety of the Department's refusal to grant Respondent's 2013 application for an advertising device permit.

Dated: September 13, 2013

s/Tammy L. Pust  
TAMMY L. PUST  
Chief Administrative Law Judge

Reported: Digitally recorded

### **NOTICE**

This report is a recommendation, not a final decision. The Commissioner of Transportation will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report, and the Commissioner must consider the exceptions in making a final decision. Parties should contact the Office of the Commissioner, Minnesota Department

of Transportation, 395 John Ireland Blvd., St. Paul, MN 55155, telephone number (651) 296-3000, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

### **MEMORANDUM**

The facts of this matter are not substantively in dispute. The user of the Sign lawfully obtained a conditional use permit from the Scott County zoning authority in 1977, allowing it to maintain a billboard on Respondent's Property. The Property was zoned B-2 Business when the conditional use permit was granted. Billboards and other outdoor advertising devices were allowed as a conditional use in a B-2 Business Zoning District under the Zoning Ordinance at that time.

The Department granted a state permit to the user of the Sign in 1978. In compliance with its standard permitting processes, the Department was aware of the Property's zoning classification and of the existence of the Scott County conditional use permit related to the Sign.

The Property's zoning changed from B-2 Business to Urban Expansion Reserve in 2001 when Scott County adopted its 2020 Comprehensive Plan. Billboards are not a permitted use in an Urban Expansion Reserve Zoning District in Scott County. Upon the rezoning, the Sign became a lawful nonconforming use, a type of authorized use defined in specific provisions of the Zoning Ordinance. Department policy and practice required it to renew an existing permit for a billboard classified as a legal nonconforming use, but did not allow it to issue new permits for legal nonconforming signs.

The Department did not learn about the rezoning until 2008. In the meantime, it renewed the Permit for the Sign seven times, once each state fiscal year. Upon request, it also transferred the ownership of the Minnesota Harvest Permit to the Respondent, the owner of the Property. Respondent paid, and the Department accepted, the required fees for two annual renewal cycles after the Permit was transferred into Respondent's name.

The Department accepted Respondent's 2008 renewal application and fees but did not process them. Instead, and without providing any notice to Respondent, the Department held onto the submissions until the renewal period had lapsed. Asserting that it then had no legal authority to issue a new permit for the Sign, a legal nonconforming advertising device, the Department notified the Respondent that, in

effect, the Kornder Permit had expired and could not be reissued given the Property's Urban Expansion Reserve zoning.

## I. The Department Lacked Authority for Nonrenewal and Revocation.

The Department contends that its 2008 nonrenewal<sup>62</sup> of Respondent's Permit was lawful based on local zoning restrictions then applicable to the Property. Because the Property was then zoned Urban Expansion Reserve and not "commercial or industrial,"<sup>63</sup> the Department asserts that state law prevented it from processing Respondent's 2008 renewal application and supported its cancellation of the existing Permit.

### A. The Law Did Not Authorize Nonrenewal of Respondent's Permit.

The Department asserts that the Permit lapsed when the Department failed to renew it by July 1, 2008, and that due to this lapse the Respondent was required to submit a new application, which the Department was forced to deny because the Property lacked the requisite zoning designation. The Department points to no clear authority for this conclusion, nor is such evident in the applicable law.

A state agency cannot create new governing authority but must instead abide by the authority it has been provided.

"Administrative agencies are creatures of statute and they have only those powers given to them by the legislature." *In re Hubbard*, 778 N.W.2d 313, 318 (Minn.2010) (citing *Great N. Ry. Co. v. Pub. Serv. Comm'n*, 284 Minn. 217, 220, 169 N.W.2d 732, 735 (1969)). An agency's statutory authority may be either express or implied. *Id.* "In determining whether an administrative agency has express statutory authority, we analyze whether the relevant statute unambiguously grants authority for an administrative agency to act in the manner at issue." *Id.* at 320. "[A]ny enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature." *In re Qwest's Wholesale Serv. Quality Standards*, 702 N.W.2d 246, 259 (Minn.2005) (emphasis omitted).

Novation Educ. Opportunities v. Minnesota Dept. of Education, A11-1351, 2012 WL 1380381 (Minn. Ct. App. Apr. 23, 2012). See also Minnegasco v. Minnesota Public Utilities Commission, 549 N.W.2d 904, 097 (Minn. 1996), quoting Peoples Natural Gas Co. v. Minnesota Public Utilities Commission, 369 N.W.2d 530, 534 (Minn. 1985) ("Any enlargement of express powers by implication must be fairly drawn and fairly evident from ... powers expressly given by the legislature.")

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<sup>62</sup> Though the Department's representative used the term "cancel" to describe his actions with regard to the Kornder Permit, his actions constituted a nonrenewal of the Kornder Permit in that he chose not to process the renewal application and refunded the tendered, and processed, renewal fees.

<sup>63</sup> Test. of J. Constant.

A thorough review of the applicable statute and rule does not reveal that the Department had either express or implied authority to refuse to renew the Kornder Permit based on the fact that the Property's zoning had changed. Minn. R. 8810.1300, subp. 10, restricts the Department from renewing an already issued permit, but only in certain specified scenarios: "when a sign has been painted out, or painted over, or advertising space for lease ... for one permit period" or "[w]here there are posts only, partial structure, company name markers, or no structure at all." None of these scenarios existed in the present matter. Notably missing from this list is the situation wherein a permit has been issued for compliant property, which later becomes a lawful nonconforming use authorized to continue by local zoning controls. The adopted rule also provides that "[a]ll applications will be processed by the necessary department personnel and a permit will be issued or denied within 30 days after its arrival at the district office."<sup>64</sup> The Department failed to comply with this requirement when it decided to hold onto rather than process the renewal application, purposefully causing it to expire.<sup>65</sup> In light of these authorities, the Department has failed to meet its burden of establishing by a preponderance of the evidence that its 2008 nonrenewal of Respondent's Permit was authorized by law.

B. The Law Did Not Authorize Revocation of Respondent's Permit.

The Department may revoke<sup>66</sup> an issued permit in compliance with its granted authority to do so, found in Minn. Stat. § 173.13, subd. 10:

**Revocation.** The commissioner may revoke any permit granted herein for cause upon 30 days' written notice of such hearing to the permittee. Such notice and hearing and all rules with respect thereto shall be in accordance with chapter 14. The commissioner within ten days after hearing shall notify the permittee what the permittee must do to retain the permit and the permittee shall have 30 days therefrom in which to comply with the order of the commissioner.

Application of the statute requires two independent criteria: (1) a determination of sufficient "cause," constituting "any violation of sections 173.01 to 173.11 or rules adopted thereunder ..."<sup>67</sup>; and (2) 30 days written notice in advance of a hearing, to be held in accordance with the contested case provisions of chapter 14.

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<sup>64</sup> Minn. R. 8810.1300, subp. 1.

<sup>65</sup> Minn. R. 8810.1300, subp. 4, provides that all nonscenic area permits expire on June 30 of each year, and that renewal requests cannot be accepted more than 60 days in advance of that date; the rule is silent with regard to the Department's authority to accept and process renewals after the expiration date has passed. The statute specifically allows the Department to renew permits that have expired for lack of payment, Minn. Stat. § 173.13, subd. 7. Read together, it is clear that the Department has the authority to renew even expired permits.

<sup>66</sup> According to the Merriam-Webster Online Dictionary, the term "revoke" means "to officially cancel the power or effect of (something, such as a law, license, agreement, etc.): to make (something) not valid." *Merriam-Webster.com*. Retrieved September 12, 2013, from <http://www.merriam-webster.com/dictionary/revoke>.

<sup>67</sup> Minn. Stat. § 173.07, subd. 2. Given the rules of statutory construction which require that related statutory sections be read together to give meaning to the whole, In re Phillips' Trust, 252 Minn. 301, 310,

1. The Department Failed to Establish Sufficient Cause.

In essence, the Department takes the position that it had sufficient cause to revoke the Kornder Permit in that the continued existence of the Sign would have been in violation of Minn. Stat § 173.08, subd. 1(8). The statute allows advertising devices to be “maintained,” meaning “allow[ed] to exist,”<sup>68</sup> if they are located ... in business areas.”<sup>69</sup> By definition, a business area includes any area “zoned for business, industrial or commercial activities” under state law or local ordinance. Minn. Stat. § 173.02, subd. 17(a). Because the Property was no longer zoned for business, industrial or commercial activities, the Department asserts that renewal of the Permit in 2008 would have been in violation of Minn. Stat § 173.08, subd. 1(8) and so the Department’s revocation of the Permit was proper.

This position is unsupported by both the facts in the record and the law as it applies to legal, nonconforming uses of real property. The factual record establishes that the Sign became a legal non-conforming use on the Property in 2001, fully allowed by the Scott County Zoning Ordinance. It has remained an authorized, legal nonconforming use since that point in time.

The Department’s governing authority specifically directs it to recognize this legal standard in Minn. R. 8810, 0900, Subp. 4, which specifies as follows:

**Termination of classification.** For the purposes of Minnesota Statutes, section 173.02, subdivision 17, *if a business area is rezoned or ceases to meet the requirements of the law, these rules, or any other authority, such business area shall cease to exist and any then legal advertising device existing therein at such time shall become a legal nonconforming device.*

[Emphasis added.] By requiring the recognition of this tenet of law, the rule requires the Department to apply the law of legal nonconforming use to its permitting actions in the same manner it is applied to other actions affecting the rights of property owners.

“It is a fundamental principle of the law of real property that uses lawfully existing at the time of an adverse zoning change may continue to exist until they are removed or otherwise discontinued.” Hooper v. City of St. Paul, 353 N.W.2d 138, 140 (Minn. 1984). See also Wajda v. City of Minneapolis, 246 N.W.2d. 455, 459 Minn. 1976) In compliance with this authority, the Department’s long-standing practice has been to process annual renewals for, and thereby allow to exist, signs that have become legal, nonconforming uses as the result of zoning changes. Based upon the preponderance

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90 N.W.2d 522, 530 (1958), it is reasonable to conclude that the Department’s ability to revoke an issued permit for cause under Minn. Stat. § 173.13, subd 10, requires a showing that the continued existence of the permit is in violation of sections 173.01 to 173.11 or applicable rules.

<sup>68</sup> Minn. Stat. § 173.02, subd. 21.

<sup>69</sup> In testimony at the hearing in this matter, the Department representatives identified the required zoning designations as either “commercial or industrial” only. The statute actually uses the broader term “business area.”

of evidence in the record in this matter, the Administrative Law Judge concludes that the Department erred in choosing not to do so in the present case.

In an effort to avoid this result, the Department argues that the statute's requirement that permissible signs be located only "in business areas" is more restrictive than the local zoning authority's grant of legal nonconforming use status, and that the more restrictive state law provisions should be accorded controlling effect pursuant to Minn. Stat. § 173.10. In fact, the cited statute provides only as follows:

Nothing in sections 173.01 to 173.11 shall be construed to abrogate or affect the provisions of any other law, municipal ordinance, regulation, or resolution which is more restrictive concerning advertising devices than are the provisions of such sections or of the rules adopted hereunder.

The Department's suggested reading of the statute is overbroad. By its terms, the language provides that the statute and rules do not preempt a more restrictive local ordinance. It does not state the opposite: that the legal effect of a less restrictive local ordinance cannot be used to affect or abrogate the state statute. In addition, the cited statutory provision limits its reach to "sections 173.01 to 173.11." As the Department's permitting process is set forth in section 173.13, it is not apparent that this provision has any applicability in the present case.

## 2. The Department Failed to Provide Required Notice.

The statute is clear in its requirement that the Department provide a permittee with "30 days' written notice" in advance of a revocation "hearing" held in accordance with Minnesota Statutes Chapter 14.<sup>70</sup> The record is just as clear that the Department failed to comply with this statutory requirement. The Department did not provide the Respondent with any written notice prior to the Department's revocation of the Kornder Permit. The Department's representative testified that he was not even aware that the requirement existed.<sup>71</sup> This failure to comply with the governing statute is not, as the Department now argues, a mere "technical" and inconsequential deficiency,<sup>72</sup> cured by the fact that Respondent was provided the current hearing over five years after his Permit was revoked. To the contrary, this failure constitutes clear evidence that the Department's revocation of the Kornder Permit was not in accord with applicable law.

The Administrative Law Judge concludes that the Department's acts of both nonrenewing and then revoking the Kornder Permit was not supported by Minnesota law. As such, the Administrative Law Judge recommends that the revocation and the nonrenewal be REVERSED and the Respondent's Permit reinstated.

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<sup>70</sup> Minn. Stat. § 173.13, subd. 10.

<sup>71</sup> Test. of J. Constant.

<sup>72</sup> See Countryside Village v. City of North Branch, 442 N.W.2d 304, 308 (Minn. 1989) (noting that an agency's failure to comply with a statutory requirement related to notification of appeal rights can constitute a jurisdictional defect in some contexts.)

## II. The Department Erred in Denying the 2013 Application.

If the Commissioner adopts the recommendation of the Administrative Law Judge with respect to the 2008 nonrenewal and revocation, it is unnecessary to address the propriety of the Department's denial of Respondent's 2013 application for a new permit. In case the Commissioner should choose not to adopt the foregoing recommendation in any significant respect such that examination of the 2013 action is required, the Administrative Law Judge hereby addresses the issue in order to make legally appropriate recommendations to the Commissioner.

The Department contends that it had no legal authority to issue the requested 2013 permit given that the Property was then zoned Urban Expansion Reserve, which does not constitute a "business area" under Minnesota law. The Department is correct in its reading of the Scott County Zoning Ordinance, which defines an Urban Expansion Reserve in terms of future residential development and does not designate it for business, commercial or industrial activities.

The Administrative Law Judge disagrees with the Department's conclusion that the language of the Minnesota statute forecloses it from considering the nonconforming use status of the Sign as a sufficient basis for granting a new permit. In a similar case, a Florida district court has found comparable statutory language an insufficient bar to prevent issuance of a sign permit. In Hobbs v. Dep't of Transp., 831 So. 2d 745, 747 (Fla. Dist. Ct. App. 2002), a leaseholder obtained a state permit allowing the use of an advertising sign. The subject property was eventually rezoned, causing the sign to become a nonconforming use. Recognizing that the sign's continued use was lawful, the Florida Department of Transportation continued to renew the sign permit after the zoning change. When the leaseholder voluntarily cancelled the permit, causing the property owner to apply for a new permit, the agency denied the application and argued that a new permit could not be issued for a nonconforming sign, relying on a statutory restriction limiting signs to "commercial-zoned and industrial-zoned areas..."<sup>73</sup> The Florida court disagreed and ordered the issuance of the permit, noting: "there is no statute or rule which supports DOT's determination that it cannot issue a new permit for a legally existing, nonconforming sign."<sup>74</sup>

The present case presents many similarities to Hobbs: a leaseholder obtained a permit for a Sign on Property appropriately zoned for business use; the Property was rezoned to a non-business district; the ownership of the permit was transferred; and the department denied the owner's new permit application based on a perceived lack of authority to permit nonconforming signs. Also similar is the lack of any "statute or rule which supports [the Department's] determination that it cannot issue a new permit for a legally existing, nonconforming sign."<sup>75</sup> While Minn. Stat. 173.08, subd.1(8) limits permissible signs to "business areas," it does not specifically prohibit the Department from recognizing the legal effect of a local zoning ordinance granting lawful

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<sup>73</sup> Fla. Stat. § 479.111.

<sup>74</sup> Hobbs, 831 So.2d at 748.

<sup>75</sup> Id.

nonconforming use status to a previously compliance advertising device. As such, the Administrative Law Judge concludes that the Respondent has met its burden of establishing, by a preponderance of the evidence, that the Department's denial of the 2013 permit application was not authorized by law.

Should it become necessary to reach this issue and upon the facts in the record as applied to the governing law, the Administrative Law Judge recommends that the Commissioner REVERSE the Department and grant Respondent's 2013 application for an advertising device permit on the Property.

**T. L. P.**