

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

In the Matter of Granting an Outdoor Advertising Device Permit for Certain Locations along Interstate Trunk Highway 35E near Cayuga Street in The City of St. Paul, Minnesota.

**RECOMMENDATION ON
MOTIONS FOR
SUMMARY DISPOSITION**

The active parties to this contested case proceeding are two competing outdoor advertising companies — Outdoor Systems Advertising, Inc. (Outdoor Systems), successor to 3M National Advertising (3M), and Midwest Advertising, Inc. (Midwest). Both claim they are entitled to receive a permit from the Minnesota Department of Transportation to erect a billboard at approximately the same location along Interstate Trunk Highway 35E (I-35) in St. Paul, Minnesota. Although the Department is nominally a party, it is currently only a passive one, since it has indicated that it will not be taking position on the merits until after it receives the Administrative Law Judge's report. In other words, at its current stage this proceeding is somewhat similar to an interpleader action in district court practice.^[1]

On April 27, 1998, the parties filed a Stipulation of Facts, supplemented by five written exhibits.^[2] Outdoor Systems has also submitted three affidavits, which Midwest has not challenged. In short, there are no genuine issues of material fact here, and both claimants have agreed that the Administrative Law Judge can make his recommendations to the Commissioner on cross motions for summary disposition. The administrative record closed on May 22, 1998, when responsive briefs were due.

Thomas R. Haugrud, Attorney at Law, Rosene, Haugrud & Staab, Suite 1250, Capital Centre, 386 North Wabasha Street, St. Paul, Minnesota 55102-1300, is representing Midwest. Erik A. Lindseth, Attorney at Law, Faegre & Benson, 2200 Norwest Center, 90 South Seventh Street, Minneapolis, Minnesota 55402-3901, is representing Outdoor Systems. David L. Phillips, Assistant Attorney General, Suite 200, 525 Park Street, St. Paul, Minnesota 55101, is representing the Department.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Transportation will make the final decision after reviewing the administrative record. The Commissioner may adopt, reject or modify the Administrative Law Judge's recommendations. Under Minnesota law,^[3] the Commissioner may not make his final decision until after the parties have had access to this report for at least ten days. During that time, the Commissioner must give each party adversely affected by this report an opportunity to file exceptions and present argument to him. Parties should contact the office of James N. Denn, Commissioner, Minnesota Department of Transportation, 395 John Ireland Boulevard, St. Paul, Minnesota 55155, to find out how to file exceptions or present argument.

After considering everything in the administrative record, the Administrative Law Judge HEREBY RECOMMENDS:

(1) That the Commissioner GRANT Midwest's motion for summary disposition;

(2) That the Commissioner DENY Outdoor System's motion for summary disposition;

(3) That the Commissioner rule that Outdoor System's January 14, 1998, application for a state outdoor advertising device permit for its Cayuga Street site is defective and incomplete because Outdoor Systems failed to make that application with all necessary local permits in hand;

(4) That the Commissioner rule that Midwest's state outdoor advertising device permit for its Cayuga Street site remains effective for an additional eight calendar days from the effective date of the Commissioner's final order; and

(5) That the Commissioner direct the Department to require applicants for state outdoor advertising device permits to have all necessary local permits in hand before considering their applications to be valid, effective, and complete and before taking any further action to process or issue state permits.

Dated this _____ day of June, 1998.

BRUCE H. JOHNSON
Administrative Law Judge

MEMORANDUM

This contested case proceeding's purpose is to complete an agreement between the Department and Outdoor Systems that resulted in dismissal of the latter's appeal from an earlier contested case proceeding that had been pending in the Minnesota Court of Appeals.^[4] The Department began this proceeding by issuing a Notice of and Order for Hearing, on March 3, 1998, and serving that Notice on both Outdoor Systems and Midwest. That Notice scheduled an evidentiary hearing in this matter for April 23, 1998. But during a prehearing conference on April 15th, the parties and the Administrative Law Judge concluded that the Administrative Law Judge could make his recommendations to the Commissioner based on stipulated facts. The Administrative Law Judge therefore cancelled the evidentiary hearing and established a briefing schedule. Neither party requested a hearing on its motion for summary disposition.

I. Summary Disposition

In considering motions for summary disposition in administrative contested case proceedings, administrative law judges have adopted the standards developed in district court practice for considering motions for summary judgment.^[5] Like summary judgment, summary disposition is appropriate "where there is no genuine issue as to any material fact."^[6] Here, the parties have stipulated to the material facts. Outdoor Systems has supplemented the record with affidavits from three Department employees stating their beliefs about various Department policies and practices. Midwest has not challenged the authenticity, contents, or relevance of those affidavits. So what remains for the Administrative Law Judge is to draw conclusions and make recommendations based on uncontested facts.

II. Underlying Facts

The stipulations and affidavits submitted by the parties and the exhibits offered to supplement them establish the following facts:

The legislature adopted the Minnesota Outdoor Advertising Control Act of 1971^[7] in order to comply with Title I of the Federal Highway Beautification Act of 1965 and thereby remain eligible to receive certain federal highway funding.^[8] One provision of the state legislation prohibited persons from erecting billboards along interstate highways, except when authorized by a permit issued by the Department.^[9] That statute went on to empower the Commissioner to adopt rules "governing the issuance of permits or renewals thereof for the erection and maintenance of advertising devices adjacent to the interstate and primary system of highways."^[10] On May 3, 1972, the Department adopted rules^[11] regulating billboards along the state's highways and establishing a permit process.^[12] The draft rules initially proposed that permits would become void if a permit holder failed to erect a billboard within 90 days after the Department issued the permit.^[13] But in response to public comment at the rule

hearing, the Department extended this deadline to 120 days when it adopted the final rules.^[14]

In mid-July of 1996, 3M applied to the Department, in the way prescribed by the law,^[15] for a permit to put up an outdoor advertising device (billboard) along the west side of I-35E, 910 feet north of Cayuga Street (Cayuga Street site) in St. Paul, Minnesota (the City). On July 17, 1996, the Department issued 3M permit No. 3192 to erect a billboard on that site. Under the Department's rules,^[16] 3M had to put the billboard up within 120 days or its permit would become void. 3M's permit also specified that it was subject to the provisions of local ordinances.^[17] The City has an outdoor advertising ordinance requiring billboard owners to obtain a City permit and also providing that billboards must not be located less than 1000 feet from one another.

On September 25, 1996, Midwest applied to the Department for a permit to put a billboard up within 100 feet of 3M's site. Midwest had obtained a City billboard permit for that site. The Department received that application on October 15, 1996. Minnesota law does not allow billboards closer than 500 feet of one another,^[18] so the Department denied Midwest's application on October 16th. On October 17, 1996, Midwest resubmitted its billboard permit application. Five days later, the Department's Metro Division Advertising Control Agent called Midwest and explained why the Department could not issue the permit. On the same day, the Department returned Midwest's application and accompanying check, along with a handwritten note indicating that it had been denied. On October 24, 1996, Midwest resubmitted its permit application yet again, together with a copy of a letter from the City to 3M indicating that it had denied 3M's application for a City permit. The Department did not act on Midwest's second resubmission until December 13, 1996, when it denied the application yet again.

Outdoor advertising companies are frequently unable to put up billboards within the 120 days specified by their Department permits. A common reason is that they have not yet received permits from local authorities that consider permit applications less frequently than the Department does.^[19] It has been the Department's practice to grant another permit to permit holders unable to meet the 120-day deadline if the permit holder reapplies before the 120 days expires or is the first to apply for a billboard at that location after the 120 days expires.^[20] The Department commonly refers to subsequent permits issued to a permit holder under these circumstances as "renewal permits." Since 1971, the Department's consistent practice has been to continue issuing new permits to permit holders that reapply for a location before the 120-day deadline expires and to deny any permit applications for sites within 500 feet of those locations.^[21] Over the years, the Department has renewed billboard permits for both Midwest and 3M when both have been unable to meet their permits' 120-day deadlines. Outdoor advertising companies have relied on this Department practice in conducting their businesses.

3M never obtained a City permit for its Cayuga Street site, and it did not put a billboard up there by November 13, 1996, when its 120-day time limit expired. But on November 1, 1996, 3M had submitted an application to the Department for a renewal

permit for that site. On November 5th, eight days before 3M's first permit expired, the Department issued it a another permit, under Permit No. 3201, for the Cayuga Street site. The 120-day time limit for that second permit expired on March 4, 1997. On November 12, 1996, Midwest sent a letter requesting the Department to issue a billboard permit for its Cayuga Avenue site. That letter was followed on December 13, 1996, by a permit application requesting the same thing. On the same day, the Department yet again denied Midwest's permit application and returned it. The reason it gave was that Midwest's billboard would have been located within 500 feet of the site for which the Department had already issued a permit to 3M. Again, 3M did not put up a billboard at its Cayuga Street site by March 4, 1997, when its re-issued permit expired. But 3M applied for third permit for the same site, which the Department issued on February 19, 1997. 3M's third permit expired on June 19, 1997. On June 18, 1997, 3M applied for a fourth permit.

Meanwhile, on December 20, 1996, Midwest had requested the Department to initiate an administrative contested case hearing to allow it to challenge the Department's denial of its permit applications for its own Cayuga Street site. The Department granted Midwest's request, and on March 25, 1997, Administrative Law Judge Allen Giles conducted a hearing on the matter. 3M neither received notice of nor participated in that contested case proceeding. Administrative Law Judge Giles issued his report to the Commissioner on June 11, 1997. With the exception of two incorrect date references, neither Outdoor Systems nor Midwest disputes Administrative Law Judge Giles findings of fact, and the parties incorporated those findings, as corrected, into their Stipulations of Fact in this contested case proceeding.

In his report to the Commissioner, Administrative Law Judge Giles recommended that "the practice of renewing billboard permits that are required to become null and void after a passage of time be discontinued and that the permit application of Midwest Outdoor be granted."^[22] On September 15, 1997, Darryl E. Durgin, the Department's Deputy Commissioner and Chief Engineer, issued a final order in the contested case proceeding. In essence, he adopted Administrative Law Judge Giles' report and recommendations without any material modifications. Besides granting Midwest's permit application and discontinuing the Department's practice of issuing permit renewals for permits becoming void after 120 days, the Deputy Commissioner also declared any permits for billboards located within 500 feet of Midwest's Cayuga Street site to be null and void. On August 15, 1997, Outdoor Systems had purchased and acquired 3M's rights and interests in its Cayuga Street site. The Department did not serve either 3M or Outdoor Systems with a copy of the Deputy Commissioner's order. On September 19, 1997, Midwest submitted a permit application to the Department for its Cayuga Street site with a notation stating: "THIS APPLICATION IS SUBMITTED RETROACTIVE TO 10/24/96 PURSUANT TO THE COMMISSIONER'S ORDER."^[23] And on September 24, 1997, the Department issued Midwest a permit for that site.^[24]

On October 15, 1997, Outdoor Systems appealed the Deputy Commissioner's final order in the contested case proceeding to the Minnesota Court of Appeals.^[25] But in November of 1997 before the Court of Appeals heard the appeal, Outdoor Systems

entered into a stipulation^[26] under which it agreed to dismiss it. For its part, the Department agreed to begin a new contested case proceeding, in which Outdoor Systems would also be a party, to determine which of the two companies was entitled to erect a billboard at the Cayuga Street site. But the Department did not specifically agree to withdraw the Deputy Commissioner's final order granting a permit for that location to Midwest or to suspend that permit pending the outcome of the contested case proceeding. Nor did it specifically rescind his order directing the Department not to process "renewal permits" for permits that automatically became void after 120 days.

In fact, the Department had already granted a permit for the Cayuga Street site to Midwest, which subsequently applied for and received a new City permit for that site. With both permits in hand, Midwest ordered sign materials, staked the site, and checked it for safety in late December of 1997. On January 8, 1998, Midwest began constructing a billboard there. Upon learning of the construction, Outdoor Systems asked Midwest to stop erecting the billboard until after the contested case proceeding ended. Outdoor Systems also asked the Department to order Midwest to stop, since there was still an ongoing dispute over which company was entitled to a Department permit for that site. The Department did not order Midwest to stop, and Midwest did not stop voluntarily. So Outdoor Systems applied, without notice to Midwest, to the Ramsey County District Court for an order temporarily restraining Midwest from further construction.^[27]

Meanwhile, Outdoor Systems submitted its own application to erect a billboard on the Cayuga Street site on January 14, 1998. On February 5th, the Department returned the application and indicated that it would not consider any applications for that site until after the second contested case proceeding ended. Between January 19th and 22nd, Outdoor Systems applied three more times for that same billboard; the Department returned all three applications for the same reason. At about the same time, Outdoor Systems took the position with the Department that Midwest's permit for the Cayuga Street site, which the Deputy Commissioner's order had granted on September 15, 1997, had expired because Midwest had not erected a billboard on its Cayuga Street within the 120 days prescribed by the Department's rules. Midwest took an opposite position with both the Department and the Ramsey County District Court, arguing that its permit for the Cayuga Street site was still valid.

After hearing the parties' arguments, the district court dissolved the order temporarily restraining Midwest from erecting its billboard and dismissed Outdoor System's complaint on the merits and with prejudice. The court's reason for dissolving the temporary restraining order was that under the stipulation between the Department and Outdoor Systems, the Department permitted Midwest:

To continue to operate under a permit which it must now concede should have been suspended pending the contested case proceeding. Simply stated, it is axiomatic that MnDOT cannot continue to permit construction of a billboard on a site that is within 500 feet of a site which it concedes was subject to a permit which may have been improperly revoked. That

said, jurisdiction is with MnDOT, and there is no judiciable (sic) controversy over which this court can take jurisdiction.^[28]

The Department subsequently suspended Midwest's billboard permit and began this contested case proceeding on March 3, 1998, to determine whether Outdoor Systems or Midwest is entitled to a state permit to erect a billboard at the Cayuga Street site.

III. Issues

The Department's rules make a billboard permit void if the permittee fails to erect the billboard within 120 days of the permit's issuance. The Department's longstanding practice has been to give existing permit holders priority in re-applying for permits before the previous deadline expires if they cannot erect their billboards in time. Although it has a Department permit for the Cayuga Street site, Outdoor Systems cannot meet the deadline because Midwest has an exclusive city permit for the same site:

- (1) Can a state permit holder without a required city permit for its billboard site effectively prevent another party with a city permit for the same site from obtaining a state permit by continuing to apply for consecutive state permits before each of the 120-day construction deadlines expire?
- (2) Is the Department estopped from abandoning its longstanding renewal practice of re-issuing another permit for the same site before the existing permit becomes void when the permit holder lacks a necessary local permit?
- (3) Does the Department's abandonment of its longstanding renewal permit practice represent an unconstitutional taking of a property interest without just compensation when the permit holder lacks a necessary local permit?

IV. Analysis

A. The Department's billboard permit rules do not specifically allow it to issue consecutive permits preferentially to a permittee unable to erect its billboard within 120 days.

The primary question presented to Administrative Law Judge Giles in the previous contested case proceeding was whether there was a legal basis for the Department issuing renewal permits to a permit holder unable to erect its billboard within 120 days, so long as the permit holder reapplied for a new permit before the deadline expires. Both Administrative Law Judge Giles and the Deputy Commissioner concluded that there was no legal basis. In so doing, Administrative Law Judge Giles left open the question of whether the Department could issue consecutive new permits

preferentially to a permit holder unable to erect its billboard within the 120 days limit. For the reasons expressed below, this Administrative Law Judge concludes that it is unnecessary to address those issues in order to make legally appropriate recommendations to the Commissioner in this matter.

B.The Department is not obliged to issue a billboard permit to Midwest based on its January 14, 1998, application.

Outdoor Systems has contended that Midwest's permit expired before this proceeding began and that the application it made for a billboard permit for its Cayuga Street site is now the only valid permit application currently pending for that site. Since the Department's rules require it to process new applications "in the order in which they are received,"^[29] Outdoor Systems reasons that the Department is now obliged to issue it a permit for the Cayuga Street site.

1.Midwest's permit for the Cayuga Street side has not yet expired.

Outdoor Systems argues that the Department "issued" Midwest a permit for the Cayuga Street site on September 15, 1997, when the Deputy Commissioner issued his order granting Midwest's application and declaring "any other permits for sites within 500 feet of Midwest's site . . . null and void."^[30] Outdoor Systems then goes on to argue that even accepting Midwest's legal position, the 120-day deadline in the rules caused Midwest's permit to become void no later than January 13, 1998. Midwest then points out that it submitted a permit application for the Cayuga Street site on January 14, 1998.

On September 19, 1997, four days after the Deputy Commissioner entered his order, Midwest submitted a permit application containing the following notation: "THIS APPLICATION IS SUBMITTED RETROACTIVE TO 10/24/96 PURSUANT TO THE COMMISSIONER'S ORDER."^[31] Outdoor Systems argues that this application was "completely superfluous" because the order specifically granted a permit application that Midwest had submitted in October of 1996 and because Midwest's right to erect a billboard on its Cayuga Street site was conclusively established by the Deputy Commissioner's order on September 15, 1997. But Midwest's argument ignores an important fact. Even if the Deputy Commissioner had intended to grant the permit application Midwest had made on October 24, 1996, he could not have done so because that application had already been denied and returned to Midwest on December 13, 1996.^[32] Likewise, the Department also denied and returned a permit application that Midwest subsequently submitted on December 13, 1996.^[33] Implicit in the Department's permit rules is that it must have a pending application to act on before it can issue a permit.^[34] For example, the Department's rules^[35] provide that "for the purpose of processing and approval, permit applications will be filed at or forwarded to the department's district office having jurisdiction over the area in which the advertising device is located." Here, notwithstanding the Deputy Commissioner's order, the

Department had no permit application to act on until Midwest submitted one on September 19, 1997.

Midwest also assumes there are no distinctions in sense between the terms “grant” and “issue.” But the dictionary defines the relevant sense of the term “grant” as to “allow fulfillment of [a request]”; while defining the relevant sense of “issue” as “to put forth or distribute usually officially.”^[36] In other words, “grant” means to create the circumstances necessary for an act to happen, while “issue” means the official act that is being allowed to happen — here, issuing a billboard permit. This interpretation is confirmed by the Department’s permit rules,^[37] which require that department personnel in the “district office having jurisdiction over the area when the advertising device is located” actually issue a billboard permit. In sum, although Midwest’s permit may have been granted by the Deputy Commissioner’s order of September 15, 1997, the permit itself indicates that it was actually issued by a district engineer, as required by the rules, on September 24, 1997.^[38]

The distinction between “grant” and “issue” is important because of the way the Department’s rule specifying a 120-day deadline is framed. That rule states that the permit is “null and void if the erection of the device is not completed within 120 calendar days after the permit has been issued.” [Emphasis supplied.] The sum of all this is that the permit the Department issued to Midwest would not have expired until January 22, 1998. But expiration was forestalled first by the district court’s temporary restraining order of January 14, 1998,^[39] and next by the district court’s implicit conclusion in its memorandum and order of January 29, 1998,^[40] that Midwest’s permit should be considered suspended. So if the Commissioner adopts the Administrative Law Judge’s other conclusions and recommendations, Midwest will still have eight calendar days in which to complete construction of its billboard before it becomes null and void under the existing permit rules.

2.Outdoor Systems does not have a valid pending permit application.

Even if Midwest’s billboard permit had expired before this proceeding began, Outdoor Systems’ January 14, 1998, permit application is invalid because it did not first obtain a billboard permit from the City of St. Paul for the Cayuga Street site. In Minn. Stat. § 173.13, subd. 1, the legislature described the general relationship between state and local billboard permit systems by providing that:

[n]o advertising device shall be erected or maintained in any adjacent area without a permit therefor being first obtained from the commissioner, except that permit systems of legitimate local zoning authorities shall take precedence inside a business area. [Emphasis supplied.]

Chapter 173 does not define or explain what the term “precedence” means in this context, and what the legislature meant here is “reasonably subject to more than one

interpretation” and is therefore ambiguous.^[41] For the reasons that follow, the Administrative Law Judge concludes that this statute means that in order to obtain a state billboard permit in a “business area,” an applicant must come to the Department with any required local billboard permits in hand.

Outdoor Systems argues that Minn. Stat. § 173.13, subd. 1, is merely a cross-reference to Minn. Stat. § 173.16, subd. 5, which establishes a process by which the Commissioner can allow a local billboard permit system to supplant the state’s billboard permit system:

Subd. 5. Local control. (1) Whenever a bona fide county or local zoning authority has made a legitimate determination of customary usage and in the judgment of the commissioner, reasonably provides for size, lighting and spacing control of advertising devices, such determination shall be accepted in lieu of the provisions of this chapter in the zoned commercial and industrial areas within the geographical jurisdiction of such authority.

Outdoor Systems goes on to argue that since the Commissioner has not certified the City of St. Paul as a “bona fide county or local zoning authority” for purposes of Minn. Stat. § 173.16, subd. 5, it is unnecessary for the Department to give a City of St. Paul billboard permit the “precedence” that Minn. Stat. § 173.13, subd. 1, requires.

By treating Minn. Stat. § 173.13, subd. 1, as a mere cross-reference, Outdoor Systems is essentially arguing that subsection is superfluous, since the state’s practice of giving precedence to a city permit would already be an inevitable consequence of allowing a city permit system to supplant the state’s permit system. But this interpretation violates an important rule of statutory construction. Whenever possible, “a statute is to be construed as a whole so as to harmonize and give effect to all its parts, and where possible, no word, phrase, or sentence will be held superfluous, void, or insignificant.”^[42] [Emphasis supplied.] Moreover, other rules of statutory construction compel the conclusion that the legislature did not intend Minn. Stat. § 173.13, subd. 1, simply to be a cross-reference to another statute. Unless they represent technical terms, words and phrases must be construed “according to their common and approved usages.”^[43] The dictionary describes the sense of “precedence” in this context as “priority of importance.”^[44] The word therefore necessarily applies only to situations where there is a series of similar things that one can order by priority. In other words, Minn. Stat. § 173.13, subd. 1, applies to situations where both state and local billboard permit systems co-exist, with Minn. Stat. § 173.16, subd. 5, referring to situations where the Commissioner has allowed a local system to supplant the state system. Finally, the difference in the way the legislature described local zoning authorities in the two statutes further supports the proposition that the legislature did not intend Minn. Stat. § 173.13, subd. 1, to be a mere cross-reference to Minn. Stat. § 173.16, subd. 5. By using the term “legitimate local zoning authority” in the former, the legislature clearly intended to establish a contrast, and not a cross-reference, to the term “bona fide county or local zoning authority” in the latter. What the Administrative Law Judge must

next consider is what the legislature meant by a legitimate local zoning authority “taking precedence.”

A billboard permitting authority, whether state or local, acts primarily by either issuing or denying permits. So, it stands to reason that the term “precedence” refers to those kinds of acts by local zoning authorities. In other words, the legislature intended for the Department to give precedence, or priority, to applicants for billboard permits in business areas to whom local zoning authorities have issued local billboard permits. Although the Department appears to have designed its rules as if there were no necessary relationship between state and local billboard systems, it has attempted to give some effect to the legislature’s intent in a somewhat different way. The Department customarily makes its state permits “[s]ubject to local ordinance.”^[45] But this practice allows situations where one applicant can receive a state permit and another a local permit for essentially the same site. It therefore fails to give full effect to the legislature’s intent that the Department defer to local decisions about which of multiple applicants should receive a billboard permit for a particular site. And it was granting Outdoor a state permit for its Cayuga Street site without taking the City’s decisions into account that created the stalemate that has occurred here — that is, Outdoor Systems having a state permit and Midwest having a City permit for essentially the same site. In summary, in order to give full effect to the legislature’s intent in enacting Minn. Stat. § 173.13, subd. 1, the Department may not issue a state permit for a billboard located in a business area to an applicant who does not have any necessary local permit in hand.^[46] What is left to determine is whether the Cayuga Street site is a “business area,” within the meaning of Minn. Stat. § 173.13, subd. 1.

In Minn. Stat. § 173.02, subd. 9, the legislature defined “business area” as:

any part of an adjacent area which is (a) zoned for business, industrial or commercial activities under the authority of any law of this state or any political subdivision thereof; or (b) not so zoned, but which constitutes an unzoned commercial or industrial area as herein defined.

Outdoor Systems argues that since the Cayuga Street sites are located next to railroad tracks, they are not located in a “business area,” since Minn. Stat. § 173.02, subd. 15(1) and (7) exclude billboards and railroad tracks from being considered “industrial or commercial activities.” But there is a major flaw in that argument. Those exclusions specifically apply only to Minn. Stat. § 173.02, subd. 9(b) — that is, to unzoned commercial and industrial areas — and not to areas that are zoned for “business, industrial or commercial activities.” Here, subsection (a) rather than subsection (b) clearly applies because the Cayuga Street sites are located in one of the City’s “industrial” zones.^[47] Moreover, even if the exclusions did apply to Minn. Stat. § 173.02, subd. 9(a), there would still be the question of whether railroads and billboards amounted to “business” activities. And to say that they did not would fail the test of common sense. To summarize, the Administrative Law Judge concludes that in order to obtain a state billboard permit for a site located in a business area, an applicant must come to the Department with any necessary local billboard permits in hand. An

application that fails to meet that requirement is defective. Since Outdoor Systems lacks a City billboard permit for its Cayuga Street site and cannot obtain one as long as Midwest holds a valid City permit, Outdoor Systems' state application of January 14, 1998, is defective, as would be any subsequent application made without a City permit in hand.

C. Equitable Considerations.

Outdoor Systems also argues that the doctrine of equitable estoppel requires the Department to reinstate its permit for its Cayuga Street site and that revocation of its permit is barred by Midwest's "unclean hands." In contested cases such as this, an administrative law judge merely sits as a surrogate for the Commissioner, and the administrative law judge's powers cannot exceed the Commissioner's statutory powers. The legislature has never given commissioners the general equitable powers that courts have.^[48] So, for example, even if the prerequisites for applying the equitable doctrine that "he who comes into equity must come with clean hands"^[49] were met here, the Administrative Law Judge, as a surrogate for the Commissioner, lacks the equitable powers needed to apply it.

Outdoor Systems also argues that equitable estoppel should be invoked to prevent the Department from abandoning a longstanding practice — that is, giving priority to existing permit holders' successive applications for new permits when their permits are about to become invalid because they failed to erect a billboard within 120 days. Outdoor Systems claims that it relied on that practice to its detriment and that equities in its favor outweigh any countervailing public interest. While there is authority for applying the doctrine of equitable estoppel in administrative contested case proceedings, the Minnesota Supreme Court has limited its availability.^[50] In addition to showing detrimental reliance on agency representations or practices, one must also show that the agency action involved an element of fault or wrongful conduct. It is dubious whether a mistake by agency officials in interpreting the law is sufficient to establish the requisite "fault or wrongful conduct."^[51] But there are more fundamental reasons why the doctrine of equitable estoppel cannot be invoked against the Department here.

What is at issue in this proceeding is not whether the Department should abandon its practice of giving preference to the applications of existing permit holders when their previous permit is about to become void. Rather, the issue here is whether the Department must observe a statutorily mandated practice to require applicants to have any necessary local permit in hand before entertaining an application for a state billboard permit. The Administrative Law Judge must therefore view Outdoor Systems' request for equitable estoppel as a request to prevent the Department from applying the latter practice here because of its failure to comply with Minn. Stat. § 173.13, subd. 1, for the last 27 years. But a government agency cannot be estopped from rejecting the unlawful practices of its own officials.^[52] The Department lacked authority to issue previous permits to Outdoor Systems because the company did not have a City permit

for its Cayuga Street site. If the Department was without authority to act in the first place, its actions cannot be validated by estoppel.^[53]

D. Constitutional Issues.

Generally, neither an administrative law judge nor a commissioner can decide whether a statute or rule is constitutional on its face because that power is vested exclusively in the judicial branch.^[54] So, if Outdoor Systems is arguing that provisions of Minnesota Statutes, Chapter 173, are unconstitutional on their face because they prevent the Department from re-issuing a permit for Outdoor Systems' Cayuga Street site, it must assert those arguments in a judicial forum. But an administrative law judge or agency head can determine whether a statute or rule is constitutional as applied to particular facts.^[55]

Outdoor Systems argues that the applicable provisions of Minnesota Statutes, Chapter 173, and of the Department's rules, as applied to the particular facts of this case, result in two separate infringements of its constitutional rights. It first argues that revocation of its previous permits (and, presumably, failure to grant its pending permit application) violate constitutional prohibitions against retroactive legislation and impairment of contracts. In order for these two constitutional guarantees to come into play, agency action must implicate some vested right belonging to Outdoor Systems. Outdoor Systems correctly points out that a right becomes vested when it has "arisen upon a contract, or transaction in the nature of a contract, authorized by statute and liabilities under that right have so far determined that nothing remains to be done by the party asserting it."^[56] [Emphasis supplied.] It is also correct in asserting that a permit "is in the nature of a contract between [the government] and a private party for the use of land."^[57] But Outdoor Systems' earlier permits never became vested under this test. All of those permits stated that they were "[s]ubject to local ordinance."^[58] In terms of property law, they are subject to a condition subsequent according to the Department's past practices or subject to a condition precedent under the Administrative Law Judge's interpretation of Minn. Stat. § 173.13, subd. 1. In either event, Outdoor Systems has never satisfied the condition of obtaining a City billboard permit and its rights in those permits never became perfected or vested. Moreover, the permits that the Department issued to Outdoor Systems were issued when it lacked a necessary City permit in violation of Minn. Stat. § 173.13, subd. 1, and Outdoor Systems has never cured the defect by obtaining the requisite local permit. A permit that is invalid because it does not conform to the law cannot give rise to a vested right.^[59]

Outdoor Systems' second constitutional argument is that by failing to re-issue its state billboard permit, the Department has deprived it of a constitutionally protected property interest without just compensation. This proceeding is being heard on stipulated facts, and the factual record is insufficient to decide the issue of whether Outdoor Systems has a property interest that commands constitutional protection.^[60] But assuming for purposes of argument that one can acquire a constitutionally protected property interest in a state billboard permit, those permits were "[s]ubject to local

ordinance^[61] and therefore only represented contingent property rights. Again, Outdoor Systems has never satisfied the condition of obtaining a City billboard permit and has therefore not perfected any property rights that it otherwise might have possessed.

V. Summary and Recommendations

In summary, the Administrative Law Judge concludes that Minnesota law requires a party seeking a state billboard permit to have any necessary local billboard permit in hand before the Department may consider the application. An application submitted by someone who lacks a necessary local permit is therefore legally defective. And the Department's longstanding practice of requiring its permit holders to obtain necessary local permits after obtaining their state permits but before beginning construction of their billboards does not conform completely to what the legislature intended. The fact the Department failed to enforce this requirement for the last 27 years should not cause dislocations within the industry because, in most cases, the permit holders' rights to a state permit became perfected when they later did obtain the necessary local permit.

Requiring applicants to have any necessary local billboard permits in hand will resolve most situations where state permits become void because a billboard was not erected within the 120-day deadline. The Department would only be able to issue a new permit for the same site to an applicant holding a local permit, who almost invariably would be the original permit holder. But it would still leave open, for example, the question of who, if anyone, should receive preference when re-issuing permits for those locations when no local billboard permit is required. The Administrative Law therefore suggests that the Commissioner consider amending the Department's outdoor advertising device rules both to incorporate the results of this report, if accepted, and to clarify other issues that may be raised by the Department's "renewal" practices.

B. H. J.

^[1] See Minn. R. Civ. P. 22.

^[2] Exhibits A through E.

^[3] Minn. Stat., § 14.61 (1996). (Unless otherwise specified, citations to Minnesota Statutes refer to the 1996 edition.)

^[4] Case No. C7-97-1901. See Exhibit C.

^[5] See Minn. R., pt. 1400.6600 (1997). (Unless otherwise specified, citations to Minnesota Rules refer to the 1997 edition.)

^[6] Minn. Rules, pt. 1400.5500(K); compare Minn. R. Civ. P. 56.03; Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Theile v. Stich, 425 N.W.2d 580, 583 (Minn. 1988).

^[7] Laws 1971, chapter 883, codified as Minnesota Statutes, chapter 173.

^[8] Minn. Stat. § 173.01.

^[9] Minn. Stat. § 173.13, subd. 1.

^[10] Minn. Stat. § 173.13, subd. 2.

^[11] Now found in Minn. R., pts. 8810.0200 through 8810.1400.

^[12] Affidavit of Gary E. Erickson (Erickson Affidavit).

^[13] Id.

^[14] Id. Minn. R. pt. 8810.1300, subpart 5.

^[15] Minn. Stat. Ch. 173.

^[16] Minn. R., pt. 8810.1300, subpart 5.

^[17] Exhibit A.

^[18] Minn. Stat. § 173.16, subd. 4.

^[19] Affidavits of Michael Constant (Constant Affidavit) and Terry McCain (McCain Affidavit).

^[20] Id.

^[21] Id.

^[22] Findings of Fact, Conclusions of Law and Recommendation, In the Matter of the Denial of an Outdoor Advertising Device Permit to Midwest Outdoor Advertising, Inc., etc., OAH Docket No. 3-3000-10951-2, June 11, 1997, at p. 5.

^[23] Exhibit B.

^[24] Id.

^[25] No. C7-97-1901.

^[26] Exhibit C.

^[27] Exhibit D.

^[28] Exhibit E.

^[29] Minn. R. pt. 8810.1300, subp. 8.

^[30] Stipulation No. 14.

^[31] Exhibit B.

^[32] Stipulation No. 6.

^[33] Stipulation No. 8.

^[34] See, for example, Minn. R. pt. 8810.1300, subp. 1, which provides that “permit applications will be filed at or forwarded to the department’s district office having jurisdiction over the area in which the advertising device is located.”

^[35] Minn. R. pt. 8810.1300, subp. 1.

^[36] Webster Dictionary, Merriam-Webster Online (1998).

^[37] Minn. R. pt. 8810.1300, subp. 1.

^[38] Exhibit B.

^[39] Exhibit D.

^[40] Exhibit E.

^[41] Tuma v. Commissioner of Economic Security, 386 N.W.2d 702, 706 (Minn. 1986).

^[42] Anderson v. Commissioner of Taxation, 93 N.W.2d 523, 528 (Minn. 1958); see also Owens v. Federated Mutual Implement and Hardware Ins. Co., 328 N.W.2d 162, 164 (Minn. 1983).

^[43] Minn. Stat. § 645.08; Current Technology Concepts, Inc. v. Irie Enterprises, Inc., 530 N.W.2d 539, 543 (Minn. 1995).

^[44] Webster Dictionary, Merriam-Webster Online (1998).

^[45] See, for example, Exhibit A to the Stipulation of Facts.

^[46] This does not necessarily mean that the Department must issue a state permit to every applicant who has obtained a local permit, since in some cases there are federal and state billboard statutes, regulations, and rules that may pre-empt provisions in local billboard ordinances.

^[47] Exhibits A and B to the Stipulations of Fact.

^[48] In re New Ulm Telecom, Inc., 399 N.W.2d 111, 122 (Minn. App. 1987).

^[49] Johnson v. Freberg, 228 N.W. 159, 160 (Minn. 1929).

^[50] Brown v. Minnesota Dep't of Public Welfare, 368 N.W.2d 906, 910 (Minn. 1985).

^[51] In re Westling Mfg. Co., Inc., 442 N.W.2d 328, 332 (Minn. App. 1989).

^[52] Jasaka Co. v. City of St. Paul, 309 N.W.2d 40, 44 (Minn. 1981).

^[53] Senior Citizens Coalition v. Minnesota Pub. Utils. Comm'n, 355 N.W.2d 295, 304-305 (Minn. 1984).

^[54] Neeland v. Clearwater Memorial Hospital, 257 N.W.2d 366, 368 (Minn. 1977).

^[55] Petterssen v. Commissioner of Employment Services, 236 N.W.2d 168, 169 (Minn. 1975).

^[56] Jasaka Co. v. City of St. Paul, supra, 309 N.W.2d at 44; Yaeger v. Delano Granite Works, 84 N.W.2d 363, 366 (Minn. 1957).

^[57] State v. Larson Transfer & Storage, Inc., 246 N.W.2d 176, 182, n.4 (Minn. 1976)

^[58] See, e.g., Exhibits A and B.

^[59] Jasaka Co., supra.

^[60] See Naegele Outdoor Advertising Co. v. City of Lakeville, 532 N.W.2d 249 (Minn. App. 1995) (holding there was no compensable property interest where the property owners terminated the outdoor advertising company's leaseholds before the city required the company to remove its billboards).

^[61] Exhibits A and B.