

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF ST. PAUL

In the Matter of the Sign Contractor's
License Held by DeLite Outdoor
Advertising, Inc.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATIONS**

The above-captioned matter came on for hearing before Administrative Law Judge Barbara L. Neilson at 9:30 a.m. on April 24, 2001, in Room 40-B of the St. Paul City Hall. Virginia A. Palmer, Assistant City Attorney, 15 West Kellogg Boulevard, Suite 400, St. Paul, Minnesota 55102, appeared on behalf of the City of St. Paul. Gary A. Van Cleve, Attorney at Law, Larkin, Hoffman, Daly & Lindgren, Ltd., 7900 Xerxes Avenue South, Suite 1500, Bloomington, Minnesota 55431-1194, appeared on behalf of DeLite Outdoor Advertising, Inc. The record closed on May 4, 2001, when the parties' post-hearing reply briefs were filed.

This Report is a recommendation, not a final decision. The St. Paul City Council will make the final decision after a review of the record. The City Council may adopt, reject, or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to section 310.05 of the St. Paul Legislative Code, the City Council's final decision shall not be made until this Report has been made available to the parties to the proceeding and the Licensee has been provided an opportunity to present oral or written arguments alleging error on the part of the Administrative Law Judge in the application of the law or interpretation of the facts and an opportunity to present argument related to any recommended adverse action. The City Clerk should be contacted to ascertain the procedure for filing such argument or appearing before the Council.

STATEMENT OF ISSUES

There are two primary issues in this hearing. The first issue is whether DeLite's billboard located at I-94 and Vandalia violates height restrictions imposed by St. Paul Legislative Code § 66.214(b) and (g) and whether DeLite's failure to remove this billboard is a violation of St. Paul Legislative Code § 66.407. The second issue is whether DeLite's failure to obtain a permit before repairing its billboard located at 1651 Pierce Butler Road constituted a violation of St. Paul Legislative Code §§ 66.201, 66.404, and/or 66.405. If DeLite is found to have violated one or more ordinance provisions, it must further be determined whether such violations warrant adverse action against DeLite's Billboard and Sign license under St. Paul Legislative Code § 310.06(b)(6)(a).

Based upon all of the testimony, exhibits and evidence in the record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. DeLite holds an active Trade - Billboard and Sign license in the City of St. Paul under license number 00TR1344.^[1]

2. In July of 1999, DeLite purchased all of the assets of Midwest Outdoor Advertising, including the sign at I-94 and Vandalia involved in this proceeding.^[2]

Vandalia Sign

3. On September 13, 1996, Midwest Outdoor Advertising, Inc. (hereinafter referred to as "Midwest"), applied to the City for a permit to construct a new 6' by 12' billboard on the north side of I-94 and Vandalia. The initial application stated that the sign to be built would be 6' wide, 12' long, and 15' above grade. The permit application was approved by the St. Paul Office of License, Inspections and Environmental Protection (LEIP) on November 8, 1996.^[3] This sign was never built because Midwest decided it wanted a larger sign.^[4]

4. In order to obtain a permit for a larger sign at I-94 and Vandalia, Midwest decided to take down approximately twenty outdoor advertising signs at other locations in the City and thereby earn additional "non-conforming sign credits." Non-conforming sign credits are earned by sign companies in St. Paul when they remove signs in the City that do not conform to current ordinances. The City permits sign companies to "bank" credits that may then be used to build new signs at other locations in the City that need not conform to spacing requirements.^[5]

5. On February 21, 1997, Midwest filed a revised permit application seeking to construct a larger sign at the I-94 and Vandalia location (hereinafter referred to as the "Vandalia sign"), using non-conforming sign credits it had accumulated. Midwest indicated on its application that this sign was to be 13'6" wide, 48' long, and 37' above grade. (The words "above grade" were already included on the preprinted application form.) The revised permit application submitted by Midwest was approved by LEIP on February 25, 1997.^[6]

6. At the time the permit was issued and the sign was built, St. Paul's Legislative Code directed that "[t]he height of advertising signs may be measured from grade or surface of roadway, whichever is higher."^[7] The maximum allowed height for a sign was dependent upon the functional street classification. Signs located on intermediate and principal arterial roadways were limited to a maximum height of 37.5 feet.^[8]

7. The City requires permit holders to contact a building inspector prior to pouring the footing for the sign and also upon completion of construction. LIEP believes that both of these inspections were completed with respect to the Vandalia sign.^[9]

8. Construction of the Vandalia sign was completed by approximately March 17, 1997.^[10] The sign is a V-shaped sign, with west- and east-facing sign faces. As completed, and based upon the most recent survey of the site,^[11] the total height of the Vandalia sign measured from the ground level at the base of sign to the top of the sign is 58.8 feet, but the sign height measured from the surface of the nearby exit ramp is 36.3 feet.^[12] Peter Remes, the President of Midwest, believed that, as long as the sign was less than the maximum ordinance height of 37.5 feet as measured from either “grade or surface of the roadway, whichever is higher,” the sign complied with the height requirement. Mr. Remes understood the ordinance to allow Midwest to choose which roadway from which to measure the height of a sign. Because the top of the billboard was less than 37.5 feet above the elevation of the exit ramp, Mr. Remes believed the sign was in compliance with City ordinance.^[13]

9. A competing sign company notified the City at some point that it believed that the Vandalia sign was too high. LIEP thereafter requested that Midwest either submit information demonstrating that the sign was not too high or apply for a variance to the height requirement.^[14]

10. Midwest requested that a survey be conducted showing the relationship of the Midwest billboard and the right-of-way of I-94. The property was surveyed on March 17, 1997. The survey concluded that the elevation of the top of the billboard was 152.47, the elevation of the exit ramp opposite the sign was 123.11, and the elevation of the top of the sign’s footing was 100.00.^[15]

11. By letter dated April 28, 1997, LIEP informed Midwest that, according to a survey submitted by Universal Outdoor, the Vandalia sign was actually constructed at a height of 58 feet from the base to the top of the sign. LIEP stated that the sign thus was not constructed in compliance with the permit issued by the City and was in violation of the sign ordinance. The City’s letter to Midwest quoted the portion of the City’s sign ordinance stating that “[t]he height of advertising signs may be measured from grade or surface of roadway, whichever is higher”^[16] and stated that “[t]he surface of the roadway is the main roadbed of I-94.” The letter went on to state that, because the I-94 roadbed appeared to be lower than the grade at the sign pole, the sign height could be no more than 37 feet from the sign’s grade. The letter indicated that Midwest “must either reduce the overall height of the sign or obtain a height variance from the Planning Commission.” The letter noted that, if a variance was granted to allow the sign to remain at a height exceeding the 37 feet allowed by permit, a new sign permit would have to be obtained for the correct height and the permit would be reviewed by the City’s structural engineer. The second-to-last paragraph of the letter stated that “[a]ny decision we make regarding the sign ordinance is

subject to an appeal before the Planning Commission as specified in Section 66.408.”^[17] The letter did not state any specific steps that Midwest should take to file such an appeal or set forth a time limit for the filing of an appeal.

12. Midwest orally communicated its disagreement to the City in regard to the April 28, 1997, letter but took no other action in regard to the letter. Midwest did not apply for a height variance or take any action to reduce the height of the sign.^[18]

13. In June 1997, § 66.214(g) of the St. Paul Legislative Code was amended to “address[] an issue raised by a case recently before the zoning committee” and to “codify the zoning administrator’s interpretation of this section.” The new language read as follows: “The height of advertising signs may be measured from the grade of the sign or the surface of the roadway, whichever is higher. Surface of the roadway shall be the main bed of the roadway, from which the sign is intended to be read, at the location of the sign. The height shall not be measured from any entrance or exit ramps associated with the roadway.”^[19] The Planning Commission notes state this amendment clarified a “longstanding practice” that measurements are to be taken from the main roadbed.^[20]

14. On June 18, 1997, Midwest submitted an application for a zoning variance that requested approval to move the Vandalia sign 50 feet west of its current location and to rebuild the Vandalia sign at its new location to an overall height of 68 feet.^[21] The variance request was a result of an agreement between Midwest and Universal Outdoor, Inc., a competitor of Midwest, whereby the Vandalia sign would be relocated to allow Universal to build a sign nearby. Due to the spacing ordinance,^[22] Universal would have been unable to build its sign unless the Vandalia sign was relocated. Midwest and Universal submitted simultaneous variance applications to effect the agreement.^[23]

15. On August 8, 1997, the St. Paul Planning Commission approved the variance applications of Midwest and Universal.^[24] The Saint Anthony Park Community Council filed an appeal of the Planning Commission’s determination, and the St. Paul City Council ultimately reversed the Commission and denied the variance applications.^[25]

16. By letter dated April 16, 1999, the City issued a Notice of Violation to Midwest regarding the Vandalia sign. The notice stated that adverse action was recommended because the Vandalia sign was not built in compliance with its permit and because Midwest had not appealed the City Council’s denial of its variance request or removed the sign.^[26] The notice of violation was the first action the City had taken in regard to the Vandalia sign since its April 28, 1997 letter.^[27]

17. By letter dated April 30, 1999, counsel for Midwest responded to the City’s Notice of Violation by asserting that the Vandalia sign was constructed

in accordance with the permit and contending that the amendment to section 66.214(g) was inapplicable to the Vandalia sign. Counsel for Midwest requested reconsideration of the decision to seek adverse action against Midwest's license and requested an evidentiary hearing before an Administrative Law Judge.^[28]

18. Upon learning that DeLite had purchased the assets of Midwest in July 1999, the City notified counsel by letter dated July 28, 1999, that it would request that the administrative hearing that had been scheduled in regard to the adverse action against Midwest be canceled.^[29]

19. By letter dated July 30, 1999, the City notified DeLite that the Vandalia sign was constructed in violation of the terms of the permit and thus was an illegal structure that had to be removed with 30 days of the notice.^[30] By letter dated August 9, 1999, DeLite responded that the Vandalia sign was properly constructed in accordance with the ordinances in effect at the time of construction.^[31]

20. Beginning in approximately August 1999, then-counsel for DeLite^[32] began to engage in discussions with the St. Paul City Council regarding a number of issues, including the Vandalia sign.^[33] The City Council encouraged DeLite to submit a formal proposal to the City that would include a resolution of the Vandalia sign issue.^[34] Counsel for DeLite also met with Wendy Lane, Zoning Manager for LEIP, and other City staff regarding the Vandalia sign. City staff told DeLite counsel to submit a variance request. Neither the City Council nor City staff informed DeLite that the Vandalia sign issue could not be resolved because Midwest had not appealed the denial of its variance application or raise any issue as to whether DeLite could file an appeal based on the April 16, 1999, letter. City staff instead told counsel for DeLite that a proposal to the City Council was the appropriate way to resolve the issue.^[35]

21. By letter dated September 2, 1999, DeLite informed LIEP that it had been meeting with members of the City Council regarding a proposal to resolve the height issues relating to the Vandalia sign and asked that the City defer taking any action relating to the sign until the City Council had provided a definitive response to the DeLite proposal.^[36]

22. On October 8, 1999, DeLite submitted a variance application that, among other things, requested a 25-foot variance to the Vandalia sign for a total height of 102 feet above grade.^[37] DeLite also submitted a proposal to the City offering to take down numerous billboard faces in exchange for approval of the Vandalia variance and other variances and issuance of new sign permits.^[38]

23. By letter dated March 9, 2000, LEIP notified DeLite that the Vandalia sign must be removed because it was constructed in violation of the original building permit. The letter noted that DeLite had been given additional time in order to apply to the City Council to lift the existing advertising sign moratorium, amend the new special sign district, and seek a height variance from

the Planning Commission, but that effort had been unsuccessful. Accordingly, LIEP indicated that DeLite was ordered to remove the Vandalia sign within 30 days.^[39] By letter dated March 17, 2000, DeLite responded that it disagreed with the City's contention that the sign was illegal and stated that it would not dismantle the sign.^[40] By letter dated April 10, 2000, LIEP reiterated its position that the sign was out of compliance and that the City Council had declined to consider the variance request. LEIP further stated that the City would consider taking action against DeLite's business license if the Vandalia sign was not removed.^[41]

24. By letter dated March 14, 2000, Henry D. Nelson, RLS, of McCombs Frank Roos Associates, Inc., informed DeLite that the distance from top of the concrete base of the Vandalia sign to the top of the sign is 58.8 feet; the distance from the top of the sign to the top of the bituminous at the center of the exit ramp opposite the sign is 36.3 feet; and the distance from the top of the sign to the top of the sidewalk on the bridge over the railroad track is 35.2 feet.^[42]

25. DeLite also asked the surveyor to check the height of a sign owned by Infinity (hereinafter "the Infinity sign")^[43] which is located immediately west of the Vandalia sign.^[44] The survey showed the Infinity sign to be 80.2 feet from base of sign grade to top of sign. The Infinity sign's height from the adjacent I-94 exit ramp was assessed at 65.6 feet.^[45]

26. On March 25, 1987, the City issued a permit to Infinity to build the Infinity sign. The permit approved the height of the sign at 50 feet above average grade.^[46] There is no City ordinance that permits height measurement based upon average grade.^[47] There was no evidence presented at the hearing that the City has notified Infinity that its sign does not conform with City height restrictions, has directed Infinity to remove the sign, or has proposed to take adverse action against Infinity's license.

Pierce Butler Sign

27. On March 9, 2000, LEIP sent a memorandum to sign companies licensed by the City for advertising sign construction. The memorandum stated in its entirety:

Based on a recent court decision, a permit will now be required for changing or replacing any advertising sign panel within the City of Saint Paul. It was determined that we were incorrect when we did not require a building permit for the replacement of sign panels damaged during a wind storm. The only type of work allowed without a permit is for changing the advertising content placed on the panels of a billboard.^[48]

The City's March 9, 2000, notice did not mention § 33.03 of the St. Paul Legislative Code or clarify whether the notice altered the fact that § 33.03(a) did not require a permit for repairs costing \$300 or less.^[49] Moreover, no amendments were made to City ordinances to render them consistent with the March 9, 2000, memorandum.^[50]

28. The City issued the March 9, 2000, notice in response to a court case^[51] that held the City had misinterpreted St. Paul Legislative Code § 66.405^[52] as not requiring a permit when the panels of a billboard are changed or replaced as a result of storm damage.^[53]

29. At some point between March 9 and May 18, 2000, the Pierce Butler sign sustained damage in a storm. The sign panel became partially detached from the sign frame.^[54]

30. DeLite contracted with Liftec Sign and Crane Company to repair the Pierce Butler sign. Liftec repaired the sign by rehangng the sign panel and securing it to the post in its proper position. No sign boards were replaced. Liftec submitted a bill for services totaling \$185. The billboard's advertising content was not changed during the repair.^[55] DeLite did not obtain a permit to have Liftec make these repairs.^[56]

31. By letter dated May 18, 2000, the City notified DeLite that its repair to the Pierce Butler sign necessitated a permit in accordance with the March 9, 2000, notice as DeLite had "replace[d] the sign face panel."^[57] The City included the failure to obtain a permit for the Pierce Butler sign repair in the November 29, 2000, notice of violation to DeLite.^[58]

Procedural Findings

32. On November 29, 2000, the City sent DeLite a Notice of Violation in regard to the Vandalia sign and the failure to obtain a permit in conjunction with repairs to the Pierce Butler sign (discussed below). The Notice of Violation requested that DeLite inform the City by December 8, 2000, whether it disputed the facts as set forth in the Notice of Violation and wished to have an evidentiary hearing before an Administrative Law Judge.^[59]

33. By letter dated December 7, 2000, DeLite notified the City that it disagreed with the City's characterization of the facts relating to the two signs and stated its belief that the Vandalia sign was constructed in conformity with applicable City regulations in effect at the time and no permit was necessary with respect to the Pierce Butler sign.^[60]

34. By letter dated January 3, 2001, the City notified DeLite that a hearing would be held on January 30, 2001, to consider whether adverse action should be taken against its sign contractor's license based upon the alleged height violation and improper failure to remove the Vandalia sign and the failure to obtain a permit with respect to the repair of the Pierce Butler sign.^[61]

35. By Order of Administrative Law Judge George A. Beck dated January 25, 2001, the hearing in this matter was continued to March 8, 2001, in order to allow the Licensee to apply to Federal Court for an Order staying the administrative proceeding.^[62] Because the Federal Court hearing on the Licensee's motion for a restraining order and injunction staying the City's enforcement proceedings did not occur until March 6, 2001, the parties agreed that the hearing should be continued to April, 2001. By Order dated March 9, 2001, the Federal Court denied the motion for preliminary injunction. The hearing proceeded on April 24, 2001.^[63]

Based upon the foregoing findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The St. Paul City Council and the Administrative Law Judge have jurisdiction in this matter pursuant to § 310.05 of the St. Paul Legislative Code. and Minn. Stat. § 14.55.

2. Proper notice of the hearing was timely given. All relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter is properly before the Administrative Law Judge.

3. The City bears the burden in this matter of proving by a preponderance of the evidence that violations have occurred and adverse action against the Licensee's business license is warranted.

4. St. Paul Legislative Code § 310.06(b)(6)(a) authorizes the City Council to take adverse action against licensees if the licensee "has violated, or performed any act which is a violation of, any of the provisions of these chapters or of any statute, ordinance or regulation reasonably related to the licensed activity, regardless of whether criminal charges have or have not been brought in connection therewith."

5. St. Paul Legislative Code § 33.03 (a) provides in pertinent part as follows:

Permits--When required. (a) *Building and general construction.* Permits for building or general construction are not required for repairs for maintenance only or for minor alterations provided they are not required under Section 106 of the 1997 Uniform Building Code as adopted by the Minnesota State Building Code, this chapter or other pertinent provisions of the Saint Paul Legislative Code, and provided the cost of such repairs and minor alterations does not exceed the present market value of three hundred dollars (\$300.00).

6. St. Paul Legislative Code § 66.201 provides that “[n]o person shall place, erect or maintain a sign, nor shall a lessee or owner permit property under his control to be used for such a sign, which does not conform to the following requirements and without first obtaining the requisite permit for such sign.” Section 66.404 provides in pertinent part that applications for signs must be submitted to the zoning administrator. Section 66.405 sets forth exemptions to the permit requirement, including “[t]he changing of the display surface on a painted or printed sign only [T]his exemption shall apply only to poster replacement and/or on-site changes involving sign painting elsewhere than directly on a building.”

7. St. Paul Legislative Code § 66.301 provides in pertinent part: as follows:

Intent. It is recognized that signs exist within the zoning districts which were lawful before this chapter was enacted, which would be prohibited, regulated or restricted under the terms of this chapter or *future amendments*. It is the intent of this chapter that nonconforming signs shall not be enlarged upon, expanded or extended, nor be used as grounds for adding other signs or uses prohibited elsewhere in the same district. It is further the intent of this chapter to permit legal nonconforming signs existing on the effective date of this chapter, *or amendments thereto*, to continue as legal nonconforming signs. . . .

(Emphasis added.)

8. At the time the Vandalia sign was approved and built, Section 66.214(b) of the St. Paul Legislative Code provided, in pertinent part, that the “height of advertising signs shall be regulated according to the functional classification of the street along which the signs are placed” The maximum height for all functional street classifications specified in the ordinance was 37 ½ feet.

9. At the time the Vandalia sign was approved and built, Section 66.214(g) of the St. Paul Legislative Code provided in its entirety: “The height of advertising signs may be measured from grade or surface of the roadway, whichever is higher.” The ordinance did not state that the applicable roadway was the roadway from which the sign was intended to be read.

10. Section 66.214(g) of the St. Paul Legislative Code was amended in June of 1997 to state that “[s]urface of the roadway shall be the main bed of the roadway, from which the sign is intended to be read, at the location of the sign” and that “[t]he height shall not be measured from any entrance or exit ramps associated with the roadway.” These amendments may not properly be retroactively applied to the Vandalia sign.

11. Section 66.407 of the St. Paul Legislative Code authorizes inspections and reinspections of signs by the zoning administrator; indicates that footing inspections may be required by the zoning administrator; provides that signs containing electrical wiring shall be subject to the electrical code; and provides that “[t]he zoning administrator may order the removal of any sign that is not maintained in accordance with provisions of this chapter, provided he has sent a letter specifying the grounds for removal to the permittee giving the latter ten (10) days in which to appear before the zoning administrator to show cause why the sign could not be removed.”

12. DeLite (as Midwest’s successor in interest) did not violate St. Paul Legislative Code § 66.214(g) as it existed prior to the June 1997 amendment by measuring the height of the Vandalia sign from the surface of the exit ramp. The ordinance was ambiguous concerning the roadway from which the measurement should be made, and the City did not prove by a preponderance of the evidence that it had a longstanding practice that sign height could not be measured from an exit ramp.

13. DeLite is not collaterally estopped, by virtue of Midwest’s inaction, from contesting the City’s violation notices regarding the Vandalia sign or its proposal to take adverse action against DeLite’s license based in part upon alleged ordinance violations relating to the Vandalia sign.

14. Because DeLite did not violate the terms of its permit or St. Paul Legislative Code § 66.214(g), its failure to remove the Vandalia billboard is not a violation of St. Paul Legislative Code § 66.407. Further, no adverse action is warranted under St. Paul Legislative Code § 310.06 (b)(6)(a).

15. DeLite did not violate any provision of the St. Paul Legislative Code when it repaired the Pierce Butler sign without a permit, since the total cost of the repair was only \$185.

16. Because DeLite’s failure to obtain a permit prior to reattaching the sign panels was consistent with St. Paul Legislative Code § 33.03 (a) and did not violate St. Paul Legislative Code §§ 66.201, 66.404 and 66.405 or any other Code provision, no adverse action is warranted against DeLite’s license under St. Paul Legislative Code § 310.06 (b)(6)(a).

17. These Conclusions are reached for the reasons discussed in the attached Memorandum, which is hereby incorporated by reference in these Conclusions.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the City Council not take adverse action against the business license held by DeLite Outdoor Advertising, Inc., with respect to the Vandalia and/or Pierce Butler signs.

Dated: June 6, 2001.

BARBARA L. NEILSON
Administrative Law Judge

NOTICE

The City Council is respectfully requested to send its final decision to the Administrative Law Judge by first class mail.

Reported: Tape Recorded (no transcript prepared).

MEMORANDUM

The City contends that adverse action should be taken against DeLite's sign contractor's license on the grounds that (1) the Vandalia billboard was built in violation of the permit and height restrictions contained in the St. Paul Legislative Code and DeLite has failed to remove the sign despite orders to do so in violation of St. Paul Legislative Code §66.407(d), and (2) DeLite's repair of a sign face on the Pierce Butler billboard without first obtaining a permit constituted a violation of sections 66.201, 66.404, and 66.405 of the St. Paul Legislative Code and was also done after all licensed sign companies had been advised that such permits were necessary. The City thus contends that adverse action against DeLite's license is warranted under St. Paul Legislative Code 310.06(b)(6)(a). Specifically, the City urges that DeLite's license be suspended until the Vandalia sign is removed and it applies for a permit regarding the Pierce Butler sign.

Vandalia Sign

As a threshold matter, the City contends that DeLite is foreclosed from arguing that the Vandalia sign does not violate the permit and height restrictions because its predecessor in interest, Midwest Outdoor Advertising, did not appeal in a timely fashion the City's determination that the sign was built illegally. In this regard, the City asserts that its April 28, 1997, letter to Midwest stated that the determination that the sign was built illegally could be appealed to the Planning Commission pursuant to St. Paul Legislative Code § 66.408. That Code

provision specifies that any person affected by a decision of the zoning administrator may appeal the decision to the planning commission within thirty calendar days of the decision. Midwest did not appeal the determination that the Vandalia sign was not in conformity with the permit and ordinance requirements and also did not appeal the City Council's later denial of a variance to replace the Vandalia sign with a different sign.

The Administrative Law Judge is not persuaded by the City's argument. First, the April 28, 1997, letter sent to Midwest by LIEP (City Ex. 5) did not clearly and unequivocally announce that the City had made a determination regarding the sign that was immediately subject to appeal. Instead, while noting that the sign was too tall, the letter proceeded to notify Midwest of the variance procedure and simply stated that “[a]ny decision we make regarding the sign ordinance is subject to an appeal before the Planning Commission as specified in Section 66.408” (emphasis added). The letter did not include any further discussion of the time limits for filing an appeal. Thus, it appears from a fair reading of the letter that LIEP was simply informing Midwest that any decision the City *ultimately* made regarding the sign would be subject to appeal. Accordingly, the letter did not properly trigger the running of an appeal period for Midwest.

Moreover, even if the April 28, 1997, letter could be viewed as an administrative ruling that was subject to appeal, the doctrine of collateral estoppel does not properly apply here. It is well-established that a party is collaterally estopped from challenging a prior administrative agency decision if: (1) the issue to be precluded is identical to the issue raised in a prior agency adjudication; (2) the issue was necessary to the agency adjudication and properly before the agency; (3) the agency determination was a final adjudication subject to judicial review; (3) the estopped party was a party or in privity with a party to the prior agency determination; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.^[64] The most important factor influencing whether the agency decision is entitled to collateral estoppel effect is whether the agency acted in a judicial or quasi-judicial capacity.^[65]

While the arguments raised by the City against Midwest with respect to the Vandalia sign are identical to those presented in the current adverse licensing action against DeLite, none of the other collateral estoppel elements are met in this case. There was no prior agency “adjudication” or final judgment on the merits; DeLite was not a party in 1997 or in privity with Midwest at that time; and DeLite has never previously been given a full and fair opportunity to be heard on the issue. Under these circumstances, it would violate due process principles if DeLite were precluded from challenging the underlying basis for the City's current adverse licensing action. In addition, the fact that the City waited two years before issuing a Notice of Violation to Midwest and also met with DeLite and permitted DeLite to make proposals to the City to resolve the matter before issuing a Notice of Violation to DeLite supports the view that the City did

not act as though either Midwest or DeLite were estopped from contesting the City's notices or were otherwise foreclosed from mounting any challenge to the City's position that the sign violated the permit or ordinances. Thus, it was appropriate to allow DeLite to present evidence in this proceeding that the Vandalia sign did not, in actuality, violate the permit or City ordinances.

With respect to the Vandalia sign, it is necessary to consider which ordinance to apply—the ordinance in effect at the time the permit to build the Vandalia sign was issued and the sign was built, or the later amended ordinance that the City asserts merely codified a long-standing interpretation of the existing ordinance by zoning staff. The ordinance in effect at the time that the Vandalia sign was approved and built merely provided that “[t]he height of advertising signs may be measured from grade or surface of the roadway, whichever is higher.” In the context of the present situation, where a sign is located near a freeway *and* an exit ramp, this ordinance language is unclear concerning which of these roadways is to serve as the point from which the height must be measured. The amendment to the ordinance in June, 1997, explicitly stated that “[s]urface of the roadway shall be the main bed of the roadway, from which the sign is intended to be read, at the location of the sign” and that “[t]he height shall not be measured from any entrance or exit ramps associated with the roadway.” However, it is evident under Section 66.301 of the St. Paul Legislative Code that this amendment may not properly be retroactively applied to the Vandalia sign. Section 66.301 declares that it is the intent of the zoning chapter “to permit legal nonconforming signs existing on the effective date of this chapter, *or amendments thereto*, to continue as legal nonconforming signs. . . .”^[66]

Because it is not appropriate to apply the amendment, the issue becomes whether the prior version of the ordinance was interpreted in a long-standing and consistent way to require measurement from the roadway from which the sign was intended to be read rather than from an exit ramp. An agency's interpretation of a statute or ordinance is entitled to some deference when “(1) the statutory language is technical in nature, and (2) the agency's interpretation is one of long-standing application.”^[67] Mr. Hardwick merely testified that the ordinance was amended to clarify the City's position and what it had been doing, and further stated that this was not the first time the height ordinance had been interpreted in this fashion and nothing done by the City here was inconsistent with prior interpretations. This evidence does not, in the view of the Administrative Law Judge, rise to the level of proof of a longstanding and consistent past practice on the part of the City. The fact that the City inspectors apparently approved the Vandalia sign on two occasions during its construction undermines the City's assertion that it has consistently interpreted the ordinance to require comparison with the roadway from which the sign is meant to be viewed.

It is also significant that the City apparently has not consistently or uniformly applied its interpretation of the height ordinance to other sign contractors. For example, the City did not refute evidence offered by DeLite at

the hearing showing that the Infinity outdoor sign located to the west of DeLite's Vandalia sign is over 80 feet tall from base to top of the sign and over 65 feet tall from the surface of the roadway of the I-94 entrance ramp to the top of the sign.^[68] There is no evidence that the City has requested that the Infinity sign be removed or that the City has taken any adverse action against Infinity's license even though this sign reflects a more egregious violation of the City's height ordinance than the Vandalia sign owned by DeLite. Thus, there was no persuasive evidence presented at the hearing demonstrating that the City had a long-standing practice prior to the 1997 amendment of requiring that the "surface of the roadway" from which the height must be measured be only the roadway from which the sign is intended to be read or that the City required that entrance and exit ramps be excluded from consideration.^[69]

Pursuant to *Frank's Nursery Sales, Inc. v. City of Roseville*,^[70] where a zoning ordinance is ambiguous, weight must be given "to the interpretation that, while still within the confines of the term, is least restrictive upon the rights of the property owner to use his land as he wishes." Construing the ordinance in favor of the property owner, consistent with the *Frank's Nursery* case, the Administrative Law Judge concludes that the sign should be allowed under the ordinance if the top of the sign is 37.5 feet or less from the surface of the I-94 exit ramp, and should be allowed under the permit if the top of the sign is 37 feet or less from the surface of the exit ramp. Because the most recent survey established that the top of the sign is 36.3 feet above the surface of the exit ramp, the Administrative Law Judge concludes that the Vandalia sign conforms to both the permit and the ordinance that was then in effect.

Pierce Butler Sign

With respect to the Pierce Butler sign, the City emphasizes that it sent all sign contractors a memorandum in March, 2000, informing them that, in accordance with a recent court decision, permits would now be required for "changing or replacing any advertising panel within the City of Saint Paul" and that "[t]he only type of work allowed without a permit is for changing the advertising content placed on the panels of a billboard." The City further contends that the provisions of the St. Paul Legislative Code relating to signs require permits to be obtained for the type of work performed on the Pierce Butler sign, and thus argues that the building permit exception for repairs of less than \$300 does not apply. The City asserts that section 66.201 provides that "[n]o person shall . . . maintain a sign . . . without first obtaining the requisite permit" and emphasizes that section 66.405, which specifies exemptions to the permit requirement, only exempts the changing of the display surface on a painted or printed sign. Because the repairs to the Pierce Butler sign did not involve only a change of display surface, the City contends that a permit was, in fact, required.

The Administrative Law Judge is unable to conclude that St. Paul Legislative Code §§ 66.201 and 66.405 clearly require that a permit be obtained

before reattaching a sign panel. Section 66.201 merely provides that “[n]o person shall place, erect or maintain a sign . . . which does not conform to the following requirements and without first obtaining the requisite permit *for such sign.*”^[71] There is no contention that DeLite did not obtain the appropriate initial permit for the Pierce Butler sign. This provision does not address the need to obtain a permit for maintenance or repair. Moreover, section 66.201(3) requires that “[a]ll signs which are unsafe and/or unsightly shall be repaired or removed” but is silent concerning the need to obtain any permit to make a repair, thereby giving rise to an argument that DeLite had an obligation to repair the sign once it became damaged. Finally, although section 66.405(1) arguably could be construed to require that a permit be obtained for all work on signs that does not involve the changing of the display surface or “poster replacement,” it is far from clear on this point. As noted by Judge Monahan in the District Court decision that led to the issuance of the March, 2000, memorandum by the City, it appears that “the distinction made by [section 66.405(1)] is between changing the advertising content to be placed on the panels of a billboard and changing or replacing the panels themselves. The first is permitted without a permit. The second constitutes a renovation of the billboard and requires a permit.” Because DeLite did not change or replace the sign panels but merely reattached the existing undamaged sign panel to the sign support structure, it is understandable that DeLite would not believe it was necessary under Chapter 66 of the Code to obtain a permit.

In addition, the March, 2000, memorandum did not clearly require DeLite to obtain a permit for the type of work performed with respect to the Pierce Butler sign. The March 9, 2000, memorandum initially stated that permits were necessary for “changing or replacing any advertising sign panel”—a situation that was not involved with respect to the Pierce Butler sign. Although the memorandum thereafter stated that the only type of work for which a permit would not be required was for “changing advertising content placed on the panels of a billboard,” it did not make any reference to the exception for repairs costing less than \$300 made in section 33.03(a) of the St. Paul Legislative Code or state that section 33.03(a) would be revised to be consistent with the memorandum. Under these circumstances, it was not unreasonable or clearly inappropriate for DeLite’s to assume that its \$185 repair to the Pierce Butler sign did not require a building permit. Under these circumstances, the Administrative Law Judge concludes that DeLite’s failure to obtain a permit did not violate City ordinances and should not be relied upon as a basis for adverse action against DeLite’s business license.

Accordingly, the Administrative Law Judge recommends that no adverse action be taken against DeLite’s Billboard and Sign license.

B.L.N.

-
- [1] City Ex. 1.
- [2] City Exs. 9, 10; DeLite Exs. 13, 14; Testimony of Remes.
- [3] City Ex. 2; DeLite Ex 1.
- [4] Testimony of Remes.
- [5] Testimony of Remes, Hardwick.
- [6] City Exs. 3, 4; DeLite Ex. 2 ; Testimony of Hardwick, Remes.
- [7] Prior version of St. Paul Leg. Code § 66.214 (g).
- [8] Prior version of St. Paul Leg. Code § 66.214 (b).
- [9] Testimony of Hardwick.
- [10] Testimony of Remes.
- [11] The most recent survey was conducted on February 4, 2000. See DeLite Ex. 20.
- [12] DeLite Ex 20; *cf.* Remes testimony and City Ex. 5, both of which stated height from the base of the sign was 58 feet, and City and DeLite Exs. 3, which suggest that the height from the base of sign was 52.47 feet and the height from surface of the exit ramp was 29.36 feet.
- [13] Testimony of Remes.
- [14] Testimony of Hardwick.
- [15] City Ex. 3 at 3; DeLite Ex. 3.
- [16] Prior version of St. Paul Leg. Code § 66.214(g).
- [17] City Ex. 5.
- [18] Testimony of Remes, Hardwick.
- [19] DeLite Ex 7; Testimony of Hardwick.
- [20] City Ex. 7, p. 3.
- [21] City Ex 6.
- [22] St. Paul Leg. Code § 66.214 (b), (d).
- [23] Remes testimony.
- [24] City Ex. 7, p. 8; DeLite Exs. 8, p. 6, and 9.
- [25] *Id.* at p. 9.
- [26] City Ex 8.
- [27] Remes testimony; see also City Ex. 5.
- [28] DeLite Ex. 11.
- [29] City Ex. 9; DeLite Exs. 13-14.
- [30] City Ex. 10.
- [31] DeLite Ex. 16.
- [32] Peter Coyle of Larkin, Hoffman, Daly & Lindgren, Ltd.
- [33] Coyle testimony; City Ex. 14.
- [34] Coyle testimony.
- [35] *Id.*
- [36] City Ex. 14.
- [37] *Id.*; DeLite Ex. 18.
- [38] Testimony of Coyle.
- [39] City Ex. 11.
- [40] City Ex. 12.
- [41] City Ex. 13.
- [42] DeLite Ex. 21.
- [43] DeLite Ex 24.
- [44] Radermacher testimony.
- [45] DeLite Ex. 25; Testimony of Radermacher.
- [46] DeLite Ex. 26.
- [47] Radermacher testimony.
- [48] City Ex. 15.
- [49] *Id.*
- [50] Testimony of Lane.
- [51] City Ex. 17 (*Scenic Minnesota v. City of Saint Paul*, No. C4-98-10951 (Second Judicial District, Judge M. Michael Monahan, Oct. 20, 1999)).

^[52] Section 66.405 provides in pertinent part: “Exemptions. The following signs shall not require a permit. These exemptions shall not be construed as relieving the owner of the sign from the responsibility of its erection and maintenance, and its compliance with the provisions of this chapter or any other law or ordinance regulating the same. (1) The changing of the display surface on a painted or printed sign only ...”

^[53] Testimony of Lane.

^[54] City Exs. 18A, 18B, 18C.

^[55] Stipulation of parties; Radermacher testimony; City Exs. 19A, 19B.

^[56] Testimony of Lane.

^[57] City Ex. 16.

^[58] City Ex. 20.

^[59] City Ex. 20.

^[60] City Ex. 21.

^[61] City Ex. 22.

^[62] City Ex. 23.

^[63] City Ex. 24.

^[64] *Graham v. Special School District No. 1*, 472 N.W.2d 114, 116 (Minn. 1991).

^[65] *AFSCME Council 96 v. Arrowhead Regional Corrections Bd.*, 356 N.W.2d 295 (Minn. 1984).

^[66] (Emphasis added.) It is also consistent with general principles of statutory construction that a law should not be construed to be retroactive “unless clearly and manifestly so intended by the legislature.” Minn. Stat. § 645.21.

^[67] *Hibbing Education Association v. Public Employment Relations Board*, 369 N.W.2d 527, 529 (Minn. 1985).

^[68] In addition, the permit issued for the Infinity sign approved construction of a sign “50 feet above average grade” despite any reference to “average grade” in the ordinance.

^[69] The Administrative Law Judge is not persuaded that the exclusion of exit and entrance ramps in another portion of the zoning ordinance (section 66.214(b), relating to spacing of signs) or the mention in that ordinance that spacing of signs is determined in part by the classification of the street from which the sign is intended to be read is sufficient to justify the same interpretation of the height ordinance.

^[70] 295 N.W.2d 604, 608 (Minn. 1980).

^[71] (Emphasis added).