COURT OF APPEALS
DECISION
DATED AND FILED

February 6, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1188 **Cir. Ct. No. 2012CV452**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

LAMAR CENTRAL OUTDOOR, LLC,

PETITIONER-RESPONDENT,

V.

STATE OF WISCONSIN DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-APPELLANT,

STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION,

NECESSARY PARTY-APPELLANT.

APPEAL from an order of the circuit court for Columbia County: ALAN J. WHITE, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 SHERMAN, J. The Wisconsin Department of Transportation appeals an order of the circuit court reversing a Division of Hearings and Appeals

(DHA) decision that an outdoor sign owned by Lamar Outdoor Advertising lost its legal non-conforming status and must be removed pursuant to WIS. ADMIN. CODE § TRANS 201.09 (Feb. 2013). We affirm.

BACKGROUND

¶2 The facts are taken from the summary judgment submissions before the DHA and are not in dispute. Lamar owns a sign located along Interstate Highway 39/90/94 in the Town of Dekorra in Columbia County. The sign was in existence prior to March 18, 1972, which was the effective date of WIS. STAT. § 84.30 (2011-12),[1] which generally prohibits construction of signs along state or interstate highways subject to specified exceptions but honors categories of pre-existing nonconforming signs, and was, at that time of § 84.30's effective date, a legal, nonconforming use. *See* 1971Wis. Laws, ch. 197. In a DOT record dated April 1974, the sign is depicted as a rectangular, single face sign that was taller than it was wide, supported by two wooden posts.

¶3 In November 2010, the DOT issued an order directing Lamar to remove the sign on the grounds that subsequent modifications to the sign face and its support structure rendered the sign noncompliant with WIS. STAT. § 84.30 and WIS. ADMIN. CODE § TRANS 201.10 (Feb. 2013), and the sign had therefore lost its legal nonconforming status. The DOT asserted that the sign had been modified as follows:

> (1) The configuration of the sign face has been changed from being taller than wider (sixteen feet tall by eight feet wide and fifteen

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

feet tall by ten feet wide at various times) to being wider than tall (eighteen feet wide by eight feet tall);

(2) The original two wooden post support structure was enlarged by adding a third wooden post;

(3) The height above ground level of the sign face has varied; and

(4) An apron was added to the sign structure.[2]

¶4 Lamar requested a hearing before the DHA to review the removal order. The DHA granted a motion by the DOT for summary judgment. The DHA determined that installation of the third post constituted a substantial change for purposes of WIS. ADMIN. CODE § TRANS 201.10(2)(e), but that the other modifications specified by the DOT did not. The DHA concluded that because the installation of the third support post constituted a substantial change to the sign, the sign no longer remained substantially the same and had therefore lost its legal, nonconforming status and was subject to removal pursuant to § TRANS 201.09.

¶5 Lamar sought judicial review of the DHA's decision with the circuit court. The circuit court reversed the DHA's decision. The court stated that the "only dispute" in the matter is whether the addition of the third wooden post, alone, constituted a "substantial change[]" for purposes of WIS. ADMIN. CODE § TRANS 201.10(2)(e). The court concluded that it did not, and remanded the proceeding to the DHA. The DOT appeals.

[2] Lamar does not dispute that after the effective date of WIS. STAT. § 84.30, the changes identified by the DOT were made to the sign.

We also note that although DOT asserted that the current sign face is substantially wider than the prior configuration, the dispute here does not involve whether the sign face was altered.

DISCUSSION

¶6 The DOT contends that the circuit court erred in reversing the DHA's decision that installation of a third wooden post, alone, resulted in the sign's loss of its lawful nonconforming status. Before we address this issue, we first address our standard of review on appeal.

A. Standard of Review

¶7 On appeal, we review the administrative agency's decision, not that of the circuit court. ***Trott v. DHFS***, 2001 WI App 68, ¶4, 242 Wis. 2d 397, 626 N.W.2d 48. We will uphold an agency's factual findings if they are supported by credible evidence. ***Krahenbuhl v. Wisconsin Dentistry Examining Bd.***, 2006 WI App 73, ¶18, 292 Wis. 2d 154, 713 N.W.2d 152. Ordinarily, our review of the application and interpretation of a statute de novo. ***MercyCare Ins. Co. v. Wisconsin Comm'r of Ins.***, 2010 WI 87, ¶26, 328 Wis. 2d 110, 786 N.W.2d 785. However, an appellate court may afford varying degrees of deference—great weight, due weight and no deference—to an administrative agency's interpretation or application of a statute that the agency is charged with administering. ***DaimlerChrysler Servs. N. Am. LLC v. DOR***, 2006 WI App 265, ¶¶6-9, 298 Wis. 2d 119, 726 N.W.2d 312.

¶8 The DOT argues that great weight deference is appropriate to the DHA's legal conclusions or, at a minimum, due weight deference. However, we need not decide what level of deference, if any, would be appropriate here. Our decision would be the same regardless of the level of deference because the DHA's application and interpretation of WIS. ADMIN. CODE § TRANS 201.10(2)(e) in this case was not reasonable.

B. Sign's Nonconforming Status

¶9 WISCONSIN STAT. § 84.30, which took effect on March 18, 1972, governs the regulation of outdoor advertising. *See* 1971Wis. Laws, ch. 197. Under § 84.30, the construction of signs along state or interstate highways is generally prohibited, subject to certain specified exceptions and requirements. *See* § 84.30(3) and (4); *see also* ***Lamar Central Outdoor, LLC v. DOT***, 2008 WI App 187, ¶20, 315 Wis. 2d 190, 762 N.W.2d 745.

¶10 For signs existing prior to the effective date of WIS. STAT. § 84.30, § 84.30(5) "recognizes categories of nonconforming signs that may continue to exist for certain periods of time or upon certain conditions." ***Lamar Central Outdoor, LLC***, 315 Wis. 2d 190, ¶20. Section 84.30(5)(bm) provides that signs in existence prior to the effective date of § 84.30 are lawful and not subject to removal if the sign continues to exist with customary maintenance, regardless of any changes to advertising messages. However, § 84.30(5)(bm) further provides that if a lawful nonconforming sign is "enlarge[d], replace[d] or relocate[d]," or if additional signs are erected, the sign loses its lawful nonconforming status and is subject to removal. WISCONSIN ADMIN. CODE § TRANS 201.10(2), which specifies in more detail those changes that result in a loss of the sign's lawful nonconforming status, provides in pertinent part:

> The sign must remain substantially the same as it was on the effective date of the state law, and may not be enlarged. Reasonable repair and maintenance of the sign, including a change of advertising message, is not a change which would terminate nonconforming rights. Customary maintenance ceases and a substantial change occurs if repairs or maintenance, excluding message changes, on a sign exceeds 50% of the replacement costs of the sign.

Section TRANS 201.10(2)(e).

¶11 The DOT contends that the DHA properly concluded that Lamar's sign lost its lawful nonconforming status because the installation of the third wooden post constituted a "substantial change" contrary to WIS. ADMIN. CODE § TRANS 201.10(2)(e).

¶12 In determining whether Lamar's sign lost its legal nonconforming status, the DHA characterized the sole issue as whether the installation of the third wooden post constituted a substantial change for purposes of WIS. ADMIN. CODE § TRANS 201.10(2)(e). In concluding that installation of the additional wooden post did constitute a substantial change, the DHA relied on a circuit court case in which the circuit court, on summary judgment, determined that two nonconforming signs no longer complied with § TRANS 201.10(2)(e) after their original wooden support structures were replaced with steel support structures. *See* ***Schmitz v. DOT***, 1997CV159 (Nov. 2, 1998). The DHA determined that the court's reasoning in ***Schmitz*** was persuasive and "followed [it] to maintain a consistent application of the sign law."

¶13 We conclude that the DHA's reliance on the ***Schmitz*** decision was misplaced. In ***Schmitz,*** the court ruled that "[t]he change from wooden supports to metal supports violates [WIS. ADMIN. CODE § TRANS 201.10(2)(e)'s]" requirement that the signs remain substantially the same as they were on the effective date of WIS. STAT. § 84.30. However, the court did not explain why and this case does not concern the replacement of wooden supports with steal supports, but instead the installation of one additional wood support. Furthermore, the court in ***Schmitz*** determined that in addition to violating the requirement that the signs stay substantially the same, the evidence before it reflected that the replacement of the support systems, if they constituted "repair and maintenance," exceeded in cost

more than fifty percent of the sign's replacement value. The evidence does not reflect the same here.

¶14 In the present case, we fail to see on the record before us how any evidence that installation of the third support post constituted anything other than maintenance and repair. There is no evidence in the record that the additional post is used to enlarge or expand the sign. Thus, the additional post does not greatly affect the look or appearance of the sign and was, from all that we can glean from the record, added to stabilize the sign structure, a maintenance and repair function.

¶15 Having concluded that the addition of the third support post was maintenance and repair, and there being no evidence presented, nor any assertion by the DOT, that the cost of installing the third wooden support post cost more than fifty percent of the replacement value of the sign, we conclude that the DHA erred in granting summary judgment in favor of the DOT. Accordingly, we affirm, albeit on different grounds, the circuit court's reversal of the DHA's summary judgment decision.

CONCLUSION

¶16 For the reasons discussed above, we affirm.

By the Court.—Order affirmed.

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