11-1-2006

Lamar Advertising Co/Shoffner
INITIAL ORDER

This matter was heard on November 1, 2006, in Knoxville, Tennessee, before Bettye Springfield, Administrative Judge, assigned by the Secretary of State, and sitting for the Tennessee Department of Transportation. Marion Hilt, Staff Attorney, represented the Department of Transportation. The Respondents, Lamar Outdoor Advertising Company (“Lamar”) and D. F. Shoffner were represented by Gregory P. Isaacs of the Knox County bar.

This matter became ready for consideration on January 18, 2007 when the State filed Proposed Findings of Fact and Conclusions of Law.

The subject of this proceeding is the Respondents’ request for a hearing in response to the Department’s proposed action to have Lamar’s outdoor advertising structure declared illegal and have it removed from its present location. After consideration of the record in this matter, it is determined that the billboard was not constructed in compliance with the rules of the Department and should be removed, and permit number 47-0024 terminated. Further, the side by side poster panels on the back of the new steel structure is illegal and should also be removed.

This decision is based upon the following findings of fact and conclusions of law.
FINDINGS OF FACT

1. In 1972, National Advertising Company, Lamar’s legal predecessor in interest, submitted an outdoor advertising device application to the Highway Beautification Office of the Tennessee Department of Transportation (Department). On July 18, 1972, the device was permitted under Permit Number 47-0024.

2. The original device was located on Interstate 40, at mile marker 19.57, in Knox County, Tennessee, on property owned by D. F. Shoffner.

3. In a letter dated June 27, 2001, Jason Amonette, with Lamar Advertising, notified the Department that the sign permitted under Permit 47-0024 had been storm damaged and that Lamar would rebuild the sign structure.

4. During its inspection, the Department found remains of the wooden poles and wooden sign face of the original device at the site. The bases of the wooden poles were still in the ground.

5. James Fielden, supervisor of Highway Beautification, informed Lamar, by letter dated July 9, 2001, that the sign had been inspected and found to have storm damage and was completely down. This was a grandfathered non-conforming device, therefore, the letter further advised that the device may be “rebuilt to its previous height and size using like materials according to the Rules and Regulations for the control on outdoor advertising.”

6. The actual original sign structure was built with seven (7) wood poles and a wooden sign face. The application for the original sign indicated the device materials would be “combination.” The device was constructed using materials which included wood poles that were supported with steel sleeves or casings.

7. In determining if a storm damaged device is rebuilt “using like materials,” the Department considers the material beneath the covering of the sign face, not the sign covering. The Department considers only the materials that the original poles are made of, not any outside covering or support, in determining “like material” for the sign poles.
8. Subsequent to receiving the Department’s permission, Lamar removed the original billboard and rebuilt the sign. The rebuilt sign was erected on a steel monopole, with a metal face. According to Lamar, the sign was replaced using a “combination” of materials, including both wood and metal, therefore, it conformed with the original 1972 device application.

9. Lamar later placed a sign consisting of two metal panels on the back side of the pole. No permit was requested because the sign initially could not be viewed from the Interstate. However, the sign is now visible from the Interstate, and Lamar admits that the sign needs permit.

10. On July 26, 2001, Lamar received a Notice that the Department was terminating Permit 47-0024 because the sign had not been rebuilt with “like materials” and was considered to be a new sign that was built without a permit, and was also in violation of the spacing requirements.

CONCLUSIONS OF LAW

1. Department of Transportation Rule 1680-2-3-.04(2) provides:

   A non-conforming device or grandfathered non-conforming device will be allowed to be rebuilt in the case of natural disaster. Non-conforming and grandfathered non-conforming devices destroyed or damaged during a natural disaster may be rebuilt to their original height and size using like materials.

2. T.C.A. 54-21-103, Restrictions on outdoor advertising on interstate and primary highways, provides:

   - No outdoor advertising shall be erected or maintained within six hundred sixty feet (660’) of the nearest edge of the right-of-way and visible from the main traveled way of the interstate or primary highway systems in this state. [exceptions]

3. T.C.A. 54-21-104, Permits and tags –Fees, provides:
(a) Unless otherwise provided in this chapter, no person shall construct, erect, operate, use, maintain, or cause or permit to be constructed, erected, operated, used, or maintained, any outdoor advertising within six hundred sixty feet (660’) of the nearest edge of the right-of-way and visible from the main traveled way of the interstate or primary highway systems without first obtaining from the commissioner a permit and tag.

4. Rule 1680-2-3-.03(1)(a), Restrictions on Outdoor Advertising adjacent to Interstate and Primary Highway, provides in pertinent part:

(a) Outdoor advertising erected or maintained within 660 feet of the nearest edge of the right-of-way and visible from the main traveled way are subject to the following restrictions:

4. (i)(1) Spacing:

No two structures shall be spaced less than 1000 feet apart on the same side of the highway.

5. Application for New Outdoor Advertising Structures-

No person shall begin construction of a new outdoor advertising device without first obtaining a permit.

6. Permits (Existing Outdoor Advertising Structures):

Unless otherwise provided in these rules no person shall construct, erect, operate, use, maintain, or cause, or permit to be constructed, erected, operated, used or maintained, any outdoor advertising visible from the main traveled way of interstate or Primary Highway System without first obtaining from the Department a permit and tag authorizing the same.

5. The Department contends that Lamar did not rebuild its storm damaged sign using “like materials,” according to the Rules and Regulations for the control on outdoor advertising. The Department further contends that, because the sign was not rebuilt in conformity with the rules, it is a new sign that was built without a permit and is in violation of the spacing requirements. T.C.A. §54-21-104.

6. Lamar contends that the Department’s Rules and Regulations do not define the term “like materials.” Lamar argues that it replaced the storm damaged sign using a
“combination” of materials, including both wood and metal, which conform to its original 1972 application for the device and, therefore, it does not violate the Rules and Regulations of the Department. However, it is undisputed that the original sign was built with seven (7) wood poles and a wooden sign face, while the rebuilt sign was erected on a steel monopole, with a metal face.

7. In Lamar Outdoor Advertising Co. v. Department of Transportation, Chancery Court of Davidson County, Case No. 05-241-1, (March 22, 2006), The court addressed the issue of whether by replacing a storm damaged sign with a sign with poles made of steel rather than wood, Lamar violated Rule 1680-2-3-.04(2), finding:

The Court applies the rules of statutory construction to construe the second sentence of TDOT Rule 1680-2-2-.04(2) and its term “like materials.” The Court must give a statute’s words their natural and ordinary meaning “... without a forced or subtle interpretation...” The Court does not go further with rules of statutory construction because the meaning of “like materials” is clear. There need be no forced construction to limit or extend its meaning because the term is not vague. Steel is unlike wood. Wood was or is a plant; it is organic material. Metal is composed of matter other than a plant or animal; it is inorganic material. If the term “like materials” were carefully followed by a builder, wood would be replaced by wood. But even where liberally applied, a once living plant organism is unlike matter which has never been a plant or animal. The term “like materials” meets the test of common intelligence. Persons of common intelligence do not guess at its meaning or differ as to its application in the facts of this case. (Emphasis added.)

8. Lamar argues that its use of the steel monopole properly replaced the storm damaged sign using a “combination” of materials, of both wood and metal, which conform to its original 1972 application for the device. Lamar bases this argument on its claim that the original sign structure was a “combination” of materials because it was built with seven (7) wood poles that were supported with steel sleeves, and metal attachments on the face. However, the materials to be considered when determining whether “like materials” were used are the actual
material from which the device is constructed, i.e. the original poles and face, not the covering of the sign face or any outside sleeves to support the poles.

9. In the Department of Transportation v. Clear Channel and George and Katherine Morgan, Docket No. 22.01-015543J, (Initial Order entered November 18, 2004), the Administrative Judge rejected the argument that replacing wooden poles with a steel pole, where the billboard was coded as “combination,” was “like materials,” and held that the rebuilt sign was a new sign without a permit and illegal.

10. The Department carried its burden of proving by a preponderance of the evidence that Lamar rebuilt its damaged sign using different materials in violation of Rule 1680-2-3-.04(2). The rebuilt sign is a new sign, which requires a permit, therefore, the Department appropriately terminated Permit Number 47-0024. Lamar admits that the sign consisting of two metal panels placed on the back side of the pole does not have a permit. Because the rebuilt sign has not received a permit pursuant to T.C.A. §54-21-104, it is illegal and subject to immediate removal pursuant to T.C.A. §54-21-105.

11. Based on the foregoing, it is ORDERED that the rebuilt sign be removed, immediately, at the Respondents’ own expense.

This Initial Order entered and effective this 20th day of February, 2007.

________________________________
Charles C. Sullivan II, Director
Administrative Procedures Division