11-1-2006

J.B. & Betty Ruth Whaley/Lamar Advertising Co.

Follow this and additional works at: http://trace.tennessee.edu/utk_lawopinions

Part of the Administrative Law Commons

This Initial Order by the Administrative Judges of the Administrative Procedures Division, Tennessee Department of State, is a public document made available by the College of Law Library, and the Tennessee Department of State, Administrative Procedures Division. For more information about this public document, please contact administrative.procedures@tn.gov
BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF TRANSPORTATION

IN THE MATTER OF:

J.B. & Betty Ruth Whaley/Lamar Advertising Co.

DOCKET NO: 22.01-073286J

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 Petitioners, Lamar Outdoor Advertising Company (“Lamar”) and J. B. and Betty Ruth Whaley were represented by Gregory P. Isaacs of the Knox County bar.

This matter became ready for consideration on March 23, 2007 when the Petitioners filed Proposed Findings of Fact and Conclusions of Law.

The subject of this proceeding is the Department’s proposed action to have a Lamar 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 Numbers 78-1104 and 78-1105 terminated. This decision is based upon the following findings of fact and conclusions of law.
**FINDINGS OF FACT**

1. In 1991, Crown Outdoor 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 April 12, 1991, the back to back device was permitted under Permit Numbers 78-1104 and 78-1105.

2. The original device was located on State Route 35, at Log mile marker 21.10, in Sevier County, Tennessee, on property owned by J. B. and Betty Ruth Whaley.

3. In a letter dated November 1, 2001, Jason Amonette, with Lamar Advertising, notified the Department that the sign permitted under Permit 78-1104 and 78-1105 had been storm damaged and that Lamar would rebuild the sign structure.

4. During its inspection, the Department found the storm-damaged device to be completely down, with the remains on the ground, and the bases of the wooden poles were still in the ground.

5. Roger Hodge, Highway Beautification technician, informed Lamar, by letter dated July 9, 2001, that the sign had been inspected and found to have storm damage. 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 Hodge letter further stated that, “Since this structure is located on a Scenic Route (78-35-21.10 NB RT), this structure may be rebuilt under 54-17-205. Existing outdoor advising structures.--(a) All outdoor advertising structures issued a permit prior to April 27, 1982, shall be valid. (b) These structures shall be able to be maintained, repaired, reconstructed, or constructed according to the original application for the outdoor advertising permit.”

7. James Fielden, supervisor of Highway Beautification, sent a second letter to Lamar on December 7, 2001, with the above paragraph from the November 9, 2001 letter deleted.

8. The application for the original sign indicated the device materials would be “combination.” The original sign structure was built with four (4) wood poles and a wooden
sign face. The wood poles used to construct the original device were supported with materials that included steel sleeves or casings.

9. Both the Hodge and Fielden letters stated that the device may be rebuilt to its previous height and size using like materials.

10. In both letters, the Department advised Lamar that, “this structure was constructed of wooden poles. Therefore, the structure can only be reconstructed with wooden poles.”

11. Lamar removed the original billboard and rebuilt the sign using 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 1991 device application.

12. Lamar completed reconstruction of the damaged sign by November 28, 2001, prior to receiving the December 2001 letter from James Fielden.

13. On January 15, 2002, Lamar was sent Notice indicating that the sign was illegal as it was in violation of Tennessee statutes and Department rules, and that it was rebuilt without a permit, and must be removed.

**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. 54-17-108, Advertising . . . prohibited on scenic highways:

   (a) Whenever a road or highway has been designated part of the system, it is unlawful for any person to construct, use, operate or maintain any advertising structure . . . within two thousand feet (2,000’) of any road or
highway which is a designated part of the system and which is located either outside the corporate limits of any city or town or at any place within a “tourist resort county” as defined in 42-1-301.

3. T.C.A. 54-17-205, Existing outdoor advertising structures, provides:

(a) All outdoor advertising structures issued a permit prior to April 27, 1982, shall be valid.
(b) These structures shall be able to be maintained, repaired, reconstructed, or constructed according to the original application for the outdoor advertising permit.

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.

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 of Transportation gave the Petitioners written permission to rebuild under both T.C.A. 54-17-205 and the Department’s Rules and Regulations for the control of outdoor advertising, and that neither requires a new permit for the
reconstruction of a storm damaged sign. Lamar further argues that it replaced the storm-damaged sign using like materials, a “combination” of wood and metal, or in the alternative it was rebuilt pursuant to T.C.A. 54-17-205, which includes no restrictions as to “like materials.”

7. First, as to the Petitioners’ argument that the sign was rebuilt pursuant to T.C.A. 54-17-205, subsection (a) of this provision specifically states that all “outdoor advertising structures issued a permit prior to April 27, 1982, shall be valid.” This device was permitted under Permit Numbers 78-1104 and 78-1105 on April 12, 1991. Therefore, T.C.A. 54-17-205 is not applicable to the sign in this instance.

8. The Petitioners’ contention that somehow T.C.A. 54-17-205, subsection (b) allows the sign to be rebuilt with no restrictions as to “like materials,” is misplaced. The reference in this section that, “[t]hese structures shall be able to be maintained, repaired, reconstructed, or constructed according to the original application,” refers to those structures that were “issued a permit prior to April 27, 1982,” and does not apply to devices permitted in 1991 as is the case here.

9. Furthermore, it is undisputed that the original sign was built with four (4) wood poles and a wooden sign face, while the rebuilt sign was erected on a steel monopole, with a metal face. In light of these facts, Petitioners’ argument that the sign was rebuilt using like materials must also fail because Lamar changed the combination of materials.

10. 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.)

11. 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.

12. 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.

13. 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 sign is illegal and must be removed.

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

This Initial Order entered and effective this 22nd day of May, 2007.

________________________________
Charles C. Sullivan II, Director
Administrative Procedures Division