

**The Control of Outdoor Advertising Signs:
Several North Carolina Cases and Recent Legislation**

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Amortization of Nonconforming Off-Premises Signs

One recent change in North Carolina law could have a pronounced affect on the removal of nonconforming off-premises outdoor advertising signs under a local zoning ordinance. North Carolina Session Laws 2003-432 (H 754), which became effective August 19, 2003, establishes a moratorium on the adoption of amortization provisions by local governments affecting these signs. The act prohibits a local government from enacting, extending, or expanding any ordinance regulations that would amortize off-premise outdoor advertising displays (billboards). The act applies to any ordinance action the local government might otherwise take between August 19, 2003 (the effective date of the act) and December 31, 2004. Although the act does not expressly say so, the act may be read to allow amortization periods in local ordinances to continue to run if they were established prior to August 19, 2003. Also, local governments may enforce sign regulations against owners of illegal signs that remain after an existing amortization period has been completed.

S.L. 2003-432 (H 754) also directs the North Carolina Revenue Laws Study Committee to study local government ordinances amortizing off-premises outdoor advertising and report its findings and any recommended legislation to the 2004 session of the North Carolina General Assembly when it convenes.

Several North Carolina Cases Involving Sign Permit Revocation

Eastern Outdoor, Inc. v. Board of Adjustment of Johnston County

The case of Eastern Outdoor, Inc. v. Board of Adjustment of Johnston County, 150 N.C. App. 516, 564 S.E.2d 78 (2002), is noteworthy because it upholds the revocation of a land-use (zoning) permit issued in error. The decision from the North Carolina Court of Appeals comes as a 2 to 1 decision with a strong dissent.

In December 1999 the county planning department issued two permits to Eastern Outdoor to erect outdoor advertising signs on two parcels along North Carolina Highway 42 in Johnston County that were zoned AR/R-40. The company then obtained building permits for the two structures, completed construction of one of the two permitted structures, and purchased materials and had them delivered to the site for the structure permitted by the other permit. In February 2000 the director revoked the permits on grounds that the zoning district did not permit outdoor advertising. The company appealed the revocation to the board of adjustment, which upheld the decision of the planning director. That decision was upheld by a superior court judge and by the Court of Appeals.

The majority of the Court of the Appeals pointed to the language of G.S. 153A-362, which provides in part that “(a) permit mistakenly issued in violation of an applicable State or local law or local ordinances or regulation also may be revoked.” The court concluded that the AR/R-40 district clearly did not permit outdoor advertising signs. According to the court, “(t) he fact that petitioner made a substantial investment in the property does not give it the right to violate an existing ordinance.” In upholding the revocation the board of adjustment committed no error of law.

The dissent, however, painted a different picture. According to the dissenting judge, the planning director did not issue the permits under a mistake of law, but rather according to a consistent and long-standing interpretation of the ordinance. Apparently the county had interpreted the ordinance to allow billboards in this district since the adoption of the ordinance eight years earlier. According to the dissent, the county had revoked the permits after a new interpretation of the ordinance and applied it retroactively only to permits issued within twelve months prior to the new interpretation. Apparently four outdoor advertising permits had been issued within twelve months prior to the new interpretation. Two of these permits were the subjects of this case and two others had expired. According to the dissent, requiring only the petitioner to comply with the new reading of the ordinance was arbitrary and capricious since the outdoor advertising company had materially changed its position in reliance on the issuance of the permits.

Capital Outdoor, Inc. v. Tolson

A second outdoor advertising permit revocation case is Capital Outdoor, Inc. v. Tolson, __ N.C. App. __, 582 S.E.2d 717 (2003). A group of sign companies challenged a North Carolina Department of Transportation (NCDOT) regulation limiting the height of certain signs to fifty (50) feet, measured vertically from the adjacent edge of the pavement of the main traveled way. The rule became effective in December 1990, but, for reasons that are unclear, the rule was not enforced by NCDOT until 1998. After 1998 the department began to take inventories of signs and revoked the permits for all billboards found to exceed this 50-foot limitation, including those owned by the plaintiffs.

The principal argument that the sign companies made was that the permit revocations were inequitable, invoking a doctrine known as laches. Laches can serve as a defense to an enforcement action if there is an unreasonable delay that has worked to the disadvantage or injury of the party against whom the enforcement action is taken, because the party relied reasonably upon assurances that his behavior was permissible. In this case, however, there was no claim that NCDOT gave the sign companies any assurances that their signs complied with the regulation. The court refused to accept the assertion that NCDOT was obligated to notify the sign companies earlier that they were in violation. Also, the sign companies failed to prove that they had suffered damages or were put to significant disadvantage by the delay. The North Carolina Court of Appeals rejected the laches defense and ordered the sign companies to comply.

Cain v. North Carolina Department of Transportation

A third permit revocation case involved a violation of state outdoor advertising control regulations. The permit revocation was upheld in Cain v. North Carolina Department of Transportation, 149 N.C. App. 365, 560 S.E.2d 584 (2002). Cain's permit for an outdoor advertising structure (billboard) was revoked by the North Carolina Department of Transportation (NCDOT) district highway engineer. There was evidence that the billboard owner (Cain) impermissibly removed trees, shrubs, and other vegetation from the Interstate 95 right-of-way in Harnett County adjacent to Cain's site, apparently to enhance the visibility of his billboard. NCDOT regulations expressly authorize permit revocation for this reason.

North Carolina Cases Involving State Outdoor Advertising Rules and Local Zoning

Lamar Outdoor Advertising v. City of Hendersonville Zoning Board of Adjustment

The case of Lamar Outdoor Advertising v. City of Hendersonville Zoning Board of Adjustment, 155 N.C. App. 516, 573 S.E.2d 637 (2002), is important for two reasons. First, it establishes that North Carolina's Outdoor Advertising Control Act (and regulations adopted under it) do not constitute a complete and integrated regulatory scheme so as to preempt the local zoning ordinance provisions governing nonconforming outdoor advertising signs located along major federal highways. Second, it establishes that a zoning administrator and a board of adjustment need not render an interpretation that favors the applicant if the evidence the applicant presents is incomplete or unreliable, and it may do so in the absence of any rebuttal evidence.

Lamar Outdoor owned a billboard constructed in 1981 that was located within the federally regulated corridor that extends 660 feet from the edge of a federal primary highway. The sign was nonconforming under the town's zoning regulations. The Hendersonville zoning ordinance provided that for a nonconforming billboard to be repaired the cost of repairs could not exceed 60 % of the replacement cost of a sign of comparable quality. After a windstorm damaged the sign, Lamar submitted a written request for a permit to make the repairs. The zoning administrator denied the permit on grounds that the information tended to show that the estimated cost would exceed 60%. Lamar appealed to the board of adjustment and superior court, both of which affirmed the zoning administrator's decision.

The North Carolina Court of Appeals also affirmed. Lamar pointed out that the city had presented no evidence that would contradict or rebut the testimony of one of its witnesses at the board of adjustment hearing that its repair costs would be sufficiently low. However, the board of adjustment concluded that it had not heard complete, accurate, and credible evidence of the replacement cost of the billboard." Apparently the repair cost figure that Lamar presented to the board was lower than the repair cost figure when the permit application was first made. Lamar lowered the labor cost estimate by \$560. In addition, Lamar's own witness at the board meeting conceded that the cost to rebuild omitted several essential components including the cost of certain lighting parts, the costs of certain electrical wiring, and the labor costs associated with installation. The Court of Appeals concluded, "A true cost of repair was not put into evidence." Lamar did not carry its burden of proof.

Lamar also argued that North Carolina's Outdoor Advertising Act (G.S. 136-126 to - 140.1) preempted the city's zoning regulations affecting the repair and reconstruction of nonconforming billboards. However, the court determined that the act did not necessarily demonstrate an intention to supersede local authority, pointing in part to a state rule providing that a conforming sign, in order to be rebuilt, must "not conflict with any applicable state, federal or local rules, regulations or ordinances." 19A NCAC 2E .0225(b)(2) (April 2002).

Morris Communications Corp. v. Board of Adjustment of Gastonia

Compare Lamar Advertising with the more recent case of Morris Communications Corp. v. Board of Adjustment of Gastonia, __ N.C. App. __, 583 S.E.2d 419 (2003). In the latter case the Court of Appeals reversed a decision of the board of adjustment upholding an interpretation that a nonconforming outdoor advertising sign could not be reconstructed. The billboard involved, as in the Hendersonville case, was located within a federal corridor that is subject to NCDOT regulation. Local zoning requirements had made the sign nonconforming. When Fairway took down the sign-face panel and attempted to replace it with a new sign-face panel, Gastonia denied the permit. The Gastonia ordinance prohibited a nonconforming "sign structure" from being replaced or "taken down," except to bring the sign into full compliance with the ordinance.

The Court of Appeals conceded that Lamar Advertising had concluded that the Outdoor Advertising Control Act did not generally preempt local regulation of outdoor advertising. However, the court ruled that the Gastonia regulations did prohibit something state regulations expressly permitted. State billboard regulations 19A NCAC 2E .0225(c)(3) (2003) expressly permit the "(r)epair and replacement of a structural member, including a pole, stringer, or panel, with like material." Because the Gastonia ordinance prohibited the replacement of a structural member that the state regulation expressly permitted, the state regulations preempted (superseded) and thus invalidated the zoning regulations. Thus Gastonia's ordinance provision was unenforceable.

It is noteworthy that Morris Communications case made no mention of the state regulation quoted in Lamar Advertising that states that a conforming sign, in order to be rebuilt must "not conflict with any applicable state, federal or local rules, regulations or ordinances." 19A NCAC 2E .0225(b)(2) (April 2002).