

TEXAS TRANSPORTATION COMMISSION

HILL County

MINUTE ORDER

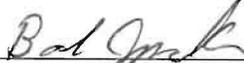
Page 1 of 1

WACO District

On March 26, 2009 the Texas Department of Transportation considered the staff's cancellation of Outdoor Advertising Permit Number 9613, held by Magic Media, Inc. Magic Media requested an administrative hearing and the matter was referred to the State Office of Administrative Hearings. The proposal for decision upheld the cancellation of the permit. Under the Administrative Procedure Act and the commission's rules, the matter is now appropriate for entry of a final order by the commission.

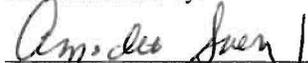
IT IS THEREFORE ORDERED that the commission issues the attached order in the case of Texas Department of Transportation v. Magic Media, Inc., Docket No. 601-08-4312, and directs the executive director to uphold the enforcement action against Magic Media, Inc.

Submitted and reviewed by:



General Counsel

Recommended by:



Executive Director

111760 MAR 26 09

Minute
Number

Date
Passed

SOAH DOCKET NO. 601-08-4312

TEXAS DEPARTMENT OF
TRANSPORTATION

V.

MAGIC MEDIA, INC.

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BEFORE THE
TEXAS TRANSPORTATION
COMMISSION

ORDER

Came on for consideration this 26th day of March, 2009, the above-styled and numbered cause.

After proper notice was given to the parties, this matter was heard by an Administrative Law Judge who made and filed a proposal for decision containing the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. By letter dated July 17, 2008, the Texas Department of Transportation (TxDOT) notified Magic Media, Inc., that Outdoor Advertising Sign Permit No. 9613, for a sign located on State Highway 22 near Hillsboro (the sign), was being cancelled as of that date.
2. Magic Media requested a hearing on the permit cancellation.
3. A Notice of Hearing dated August 19, 2008, was mailed to the parties via certified mail and regular mail. The Notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
4. On November 10, 2009, a hearing was held before Gary Elkins, an ALJ with the State Office of Administrative Hearings. Assistant Attorney General Renee Hollander represented TxDOT. Michael Burkepile, Magic Media's Real Estate Manager, appeared for Magic Media.
5. On November 19, 2008, TxDOT filed a Motion to Reopen Record, requesting that it be allowed to submit a closing brief with proposed findings of fact and conclusions of law. The request was granted, and the parties were given until December 12, 2008, to file closing briefs, on which date the record would again close. Upon receipt of the parties' closing briefs, the hearing closed.
6. Two of the sign's three poles were replaced between July 2007 and June 2008.

7. The sign did not have a permit plate attached to it when it was inspected by TxDOT in June 2008.

CONCLUSIONS OF LAW

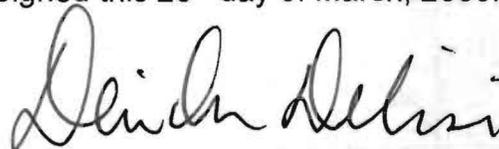
1. The Texas Department of Transportation has jurisdiction over this proceeding pursuant to TEX. TRANSP. CODE ANN. ch. 391.
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Notice of the hearing was provided as required by TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Replacing two poles on a three-pole sign is a substantial change that requires a new permit. 43 TEX. ADMIN. CODE § 21.143(c)(1)(H).
5. The director of right-of-way may cancel a permit when a sign structure does not have a permit plate attached. 43 TEX. ADMIN. CODE § 21.150(i)(11).
6. Based on the foregoing findings and conclusions, the cancellation of Outdoor Advertising Sign Permit No. 9613, issued to Magic Media, Inc., should be upheld.

The proposal for decision was properly served on all parties, who were given an opportunity to file exceptions and replies. No exceptions were filed.

After full and complete consideration of the proposal for decision, including the opinion, findings of fact, and conclusions of law of the Administrative Law Judge, the Texas Transportation Commission issues this Order. The findings of fact and conclusions of law of the Administrative Law Judge are adopted.

IT IS ORDERED that the department staff's cancellation of Outdoor Advertising Sign Permit Number 9613 is upheld.

Signed this 26th day of March, 2009.



Deirdre Delisi, Chair
Texas Transportation Commission



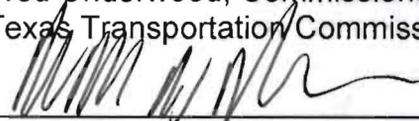
Ted Houghton, Commissioner
Texas Transportation Commission



Ned S. Holmes, Commissioner
Texas Transportation Commission



Fred Underwood, Commissioner
Texas Transportation Commission



William Meadows, Commissioner
Texas Transportation Commission

DOCKET NO. 601-08-4312

**TEXAS DEPARTMENT OF
TRANSPORTATION**

VS.

MAGIC MEDIA, INC.

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Magic Media, Inc. requested an administrative hearing after the Texas Department of Transportation (TxDOT) canceled one of its outdoor advertising sign permits upon concluding that Magic Media violated rules relating to the repair of a sign and maintenance of the sign's permit plate. Magic Media disagreed with both contentions. The Administrative Law Judge (ALJ) recommends that the cancellation of the sign permit be upheld.

I. PROCEDURAL HISTORY

By letter dated July 17, 2008, TxDOT notified Magic Media that Sign Permit No. 9613 was canceled. In response, Magic Media requested an administrative hearing to contest the decision. On November 10, 2009, a hearing was held before Gary Elkins, an ALJ with the State Office of Administrative Hearings. Assistant Attorney General Renee Hollander represented TxDOT. Michael Burkepile, Magic Media's Real Estate Manager, appeared for Magic Media. After the presentation of evidence on November 10, 2008, the hearing closed.

On November 19, 2008, TxDOT filed a Motion to Reopen Record, requesting that it be allowed to submit a closing brief with proposed findings of fact and conclusions of law. The request was granted, and the parties were given until December 12, 2008, to file closing briefs, on which date the record would again close. Upon receipt of the parties' closing briefs, the hearing closed.

II. JURISDICTION

Because neither party contested jurisdiction or notice of the hearing, these matters are addressed in the Findings of Fact and Conclusions and Law without discussion here.

III. DISCUSSION

A. Background

Magic Media is an outdoor advertising company that owns and maintains between 2500 and 3000 signs in Texas and several other states. The sign that is the subject of this proceeding is located on State Highway 22 near Hillsboro, and it is considered a non-conforming sign subject to limitations on the extent to which it can be maintained. On June 6, 2008, TxDOT discovered what it determined to be substantial changes to the sign that triggered the requirement of a new permit. As a result, TxDOT informed Magic Media by letter dated July 17, 2008, that the sign violated the department's rules relating to non-conforming signs, that the permit was being canceled as of the date of the letter, and that Magic Media could request a hearing to challenge the cancellation. Magic Media did so, which resulted in the hearing before the State Office of Administrative Hearings and this Proposal for Decision.

B. TxDOT's Evidence

Ervin Middlebrook, a right-of-way agent employed by TxDOT, testified that the sign was found to be in compliance in July 2007 based on a photograph taken at that time. An inspection in June 2008, however, revealed substantial alterations that exceeded changes allowed for non-conforming signs. The changes included the following:

- Two of the sign's three support poles had been replaced;
- The sign had a new face, new cross-bracing, and new skirting;
- Some of the sign's bracing had been removed; and
- The sign's permit plate was missing.

The significance of the changes, Mr. Middlebrook explained, is that the sign does not meet current commercial zoning requirements. As such, it is considered a non-conforming sign. In order to maintain a permit on a nonconforming sign, he testified, the permit holder is restricted in the amount and type of maintenance that may be performed on the sign. The permit holder is also required to ensure that the sign's permit plate remains properly attached, and in the event a plate is lost or stolen a replacement plate must be requested and a fee paid for its replacement. Mr. Middlebrook stated that once a permit is cancelled due to a violation of the rules for maintaining non-conforming signs, the issuance of another permit would require compliance with all current rules for conforming signs.

Mr. Middlebrook testified that each of the several changes to the sign discovered during TxDOT's June 2008 inspection, as well as the absence of the sign's permit plate, constituted grounds for cancelling the permit under TxDOT's rules, at 43 TEX. ADMIN. CODE (TAC) §21.143 and 150. Specifically, he noted that Magic Media exceeded the number of poles that could be replaced in a 12-month period—more than one-half—by replacing two of the sign's three poles. He added that the company also exceeded the repair cost limitations—no more than 60 percent of the cost to erect a new sign of the same type—when it replaced the poles, rebuilt the sign face, and added new skirting to the sign. Also violative of the rules prohibiting substantial change to nonconforming signs was Magic Media's replacement of what had been a "Scotchlite" sign face with a vinyl wrap.

C. Magic Media's Evidence

Michael Burkepile, Magic Media's Real Estate Manager, testified that his company had replaced only one of the sign's three poles—the one farthest from the road—during the period between inspections. Consequently, it had not violated the rules prohibiting the replacement of more than half of a sign's poles. He confirmed that the sign's face had been replaced, using the same materials. The sign's apron had also been replaced, but Mr. Burkepile emphasized that the rules allowed his company to do so. He also noted that the number of stringers on the back of the

sign had been reduced, and a toe board was added. Mr. Burkepile emphasized that Magic Media's repair of the face was not subject to the "60 percent rule."

In regard to TxDOT's allegation that replacement of the sign's Scotchlite face with a vinyl wrap also constituted a violation, Mr. Burkepile asserted that all sign companies are placing vinyl wraps on non-conforming signs. Thus, they, too, must be violating their permits.

Mr. Burkepile acknowledged that the sign's permit plate was missing, but he commented that, in the past, TxDOT would notify permitholders of missing plates, thereby enabling them to request a replacement without risking cancellation of their permit.

D. Analysis and Conclusion

The permit's cancellation should be upheld. Neither party quantified either the cost of repairs made to the sign during the period between July 2007 and June 2008 or the cost of erecting a new sign of the same type. As a result, while it appears the repair and replacement costs incurred by Magic Media would have exceeded the 60-percent repair ceiling for non-conforming signs, the matter ultimately is left to speculation.

However, because of other circumstances, a conclusion on the 60-percent issue is not crucial to a decision in this case. The replacement of two of the sign's three poles during a 12-month period constituted a substantial, prohibited change to the sign that warranted cancellation of the sign's permit. Likewise, the director of right-of-way was warranted in cancelling the permit based on the absence of the permit plate when the sign was inspected in June 2008.

Despite Mr. Burkepile's assertion that only the support pole farthest from the highway had been replaced, a comparison of the July 2008 photograph with the one taken in July 2007 reveals a newer, larger pole on the other end—the left end—of the sign. This conclusion is apparent from a comparison of the new pole and old pole's diameters in relation to the center pole. Also evident is

the existence of disturbed soil around the new pole. Thus, Magic Media exceeded the maximum limit on allowed pole replacement within a 12-month period, which amounted to a substantial change that requires a new permit under 43 TAC § 21.143(c)(1)(H).

The absence of the sign's permit plate—one of the reasons the director of right-of-way may cancel a permit under 43 TAC § 21.150(i)(11), and a reason he did so in this case—was undisputed.

Based on Magic Media's replacement of two of the sign's three poles, together with the missing permit plate, the director of right-of-way acted within his authority in cancelling the permit, and the cancellation should be upheld.

IV. FINDINGS OF FACT

1. By letter dated July 17, 2008, the Texas Department of Transportation (TxDOT) notified Magic Media, Inc., that Outdoor Advertising Sign Permit No. 9613, for a sign located on State Highway 22 near Hillsboro (the sign), was being cancelled as of that date.
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7. The sign did not have a permit plate attached to it when it was inspected by TxDOT in June 2008.

V. CONCLUSIONS OF LAW

1. The Texas Department of Transportation has jurisdiction over this proceeding pursuant to TEX. TRANSP. CODE ANN. ch. 391.
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
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5. The director of right-of-way may cancel a permit when a sign structure does not have a permit plate attached. 43 TEX. ADMIN. CODE § 21.150(i)(11).
6. Based on the foregoing findings and conclusions, the cancellation of Outdoor Advertising Sign Permit No. 9613, issued to Magic Media, Inc., should be upheld.

Signed February 10, 2009.



GARY W. ELKINS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS