STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1486

In the Matter of the Removal of the
Franklin Outdoor Advertising Company Billboard Structure
Located Near Trunk Highway 371 North of County Road 46 in Morrison County.

Filed June 24, 2008
Affirmed
Kalitowski, Judge

Minnesota Department of Transportation
File No. 4-300-11584-2

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Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Harten, Judge.*

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

On certiorari appeal from the determination of the Minnesota Commissioner of Transportation (commissioner) that relator Franklin Outdoor Advertising Company's billboard is not permissible and must be removed, relator argues that Minn. Stat. § 173.16

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

(2006) is vague and ambiguous and that due process requires the commissioner to adopt relator's alternative construction of the statute. We affirm.

D E C I S I O N

Relator contends that the differing setback requirements in subdivisions 4(d) and 4(e) of Minn. Stat. § 173.16 make it vague and ambiguous. We disagree. We will reverse an agency decision following a contested-case hearing only if relator establishes that the commissioner's decision was:

> (a) In violation of constitutional provisions; or
> (b) In excess of the statutory authority or jurisdiction of the agency; or
> (c) Made upon unlawful procedure; or
> (d) Affected by other error of law; or
> (e) Unsupported by substantial evidence in view of the entire record as submitted; or
> (f) Arbitrary or capricious.

Minn. Stat. § 14.69 (2006); *see also Markwardt v. State Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977) (placing burden of proving one of the grounds listed in section 14.69 on the party appealing the agency decision).

On review, we will not disturb an agency's factual determinations so long as they are supported by substantial evidence in view of the record as a whole. *See, e.g., Skarhus v. Davanni's, Inc.*, 721 N.W.2d 340, 344 (Minn. 2006); *Minn. Power & Light Co. v. Minn. Pub. Utils. Comm'n*, 342 N.W.2d 324, 332 (Minn. 1983). But we retain authority to exercise independent judgment when reviewing questions of law. *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006); *Scheeler v. Sartell Water Controls, Inc.*, 730 N.W.2d 285, 287 (Minn. App. 2007). Accordingly, issues of statutory

interpretation are subject to de novo review. *Houston v. Int'l Data Transfer Corp.*, 645 N.W.2d 144, 149 (Minn. 2002).

Although we are not bound by an agency's proffered statutory interpretation, when the meaning of a statute is doubtful, we "give great weight to a construction placed upon it by the [agency] charged with its administration." *Mammenga v. State Dep't of Human Servs.*, 442 N.W.2d 786, 792 (Minn. 1989) (quotation omitted). We "defer to an agency's interpretation of its own statutes unless such interpretation is in conflict with the express purpose of the statute and the legislature's intent." *Carlson v. Augsburg College*, 604 N.W.2d 392, 394 (Minn. App. 2002); *see also Lolling v. Midwest Patrol*, 545 N.W.2d 372, 375 (Minn. 1996) (stating that an agency's statutory interpretation is "entitled to some weight when the statutory language is technical in nature and the agency's interpretation is one of longstanding application").

The commissioner is charged with enforcing both the federal Highway Beautification Act (HBA) and the Minnesota Outdoor Advertising Control Act (MOACA). *See* 23 U.S.C. § 131(a) (2006) (regulating the installation and maintenance of outdoor advertising signs in areas adjacent to the interstate and primary highway systems). The commissioner also has the authority to promulgate rules that govern the erection and maintenance of billboards within the state. Minn. Stat. § 173.185, subd. 2 (2006). Because the MOACA requires the commissioner to comply with federal law, rules, and regulations relating to billboard control, Minnesota's laws regarding outdoor advertising must be interpreted in conjunction with the federal laws they were enacted to implement. *See* Minn. Stat. § 173.185, subd. 1 (2006); 23 U.S.C. § 131(b) (2006). The

HBA requires the state to establish effective control over the advertising devices erected on both "interstate highways" and "primary highways." *See* Minn. Stat. § 173.02, subds. 20 and 22 (2006); 23 U.S.C. § 131(b). Because the eight-mile segment of roadway involved here is designated as a trunk highway pursuant to Minn. Stat. § 161.114, subd. 2 (2006), and part of the federal aid primary system, the parties agree that it qualifies as a "primary highway" under Minn. Stat. § 173.02, subd. 22. *See also* 23 U.S.C. 131(t).

Minn. Stat. § 160.08, subd. 1 (2006), authorizes the construction of "controlled-access highways for public use whenever the road authorities determine that traffic conditions, present or future, will justify such highways." Although the term "fully controlled-access freeway" is not defined by statute, the term "freeway" is defined in Minn. Stat. § 160.02, subd. 19 (2006), as "a divided, controlled-access highway with four or more lanes." Furthermore, the term "controlled-access highway" is defined as "any highway, street, or road, including streets within cities, over, from, or to which owners or occupants of abutting land or other persons have or are to have no right of access, or only a controlled right of the easement of access, light, air, or view." Minn. Stat. § 160.02, subd. 12 (2006).

Here, the parties stipulated that the segment of roadway where relator's billboard is located is built to the standards of a controlled-access freeway. But they disagree about whether this stretch of trunk highway 371 can simultaneously be both a "primary highway" and a "fully controlled-access freeway" for purposes of Minn. Stat. § 173.16 (2006). Subdivisions 4(d) and 4(e) of Minn. Stat. § 173.16 establish two different setback requirements for billboards based on the type of roadway involved:

> (d) On interstate highways or fully controlled-access freeways outside of incorporated cities, no advertising device may be located adjacent to or within 500 feet of an interchange, intersection at grade, or safety rest area. Said 500 feet shall be measured along such highway from the beginning or ending of pavement widening at the exit from or entrance to the main traveled way.
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> (e) On primary highways outside of incorporated cities, no advertising device may be located closer than 300 feet from the intersection of any primary highway at grade with another highway, or with a railroad; provided that advertising may be affixed to or located adjacent to a building at such intersection in such a manner as not to cause any greater obstruction of vision than that caused by the building itself.

Minn. Stat. § 173.16, subd. 4(d)-(e).

"A statute is ambiguous if it is reasonably susceptible to more than one interpretation." *State v. Beaulieu v. RSJ, Inc*., 552 N.W.2d 695, 701 (Minn. 1996). Relator argues that Minn. Stat. § 173.16, subd. 4(d)-(e), is vague and ambiguous because it contains differing setback provisions, contending that the terms "primary highway" and "fully controlled-access freeway" are mutually exclusive and that treating a roadway as both simultaneously results in a "logical absurdity" whereby a billboard 400 feet from an at-grade intersection could be simultaneously legal and illegal. We disagree.

The plain language of chapter 173 does not support relator's argument. Rather, the language in Minn. Stat. § 173.16 makes clear that the legislature intended two distinct setback requirements: 500 feet for billboards on fully controlled-access freeways and 300 feet for billboards in certain locations on primary highways. *See* Minn. Stat. § 173.16, subd. 4(d)-(e). Relator's argument that it is impossible to tell whether the 500-foot setback or the 300-foot setback applies to its billboard rests on its incorrect

assumption that the 300-foot setback applies universally to all "primary highways" under all circumstances. Yet the plain language of the statute states that the 300-foot setback applies only to "the intersection of any primary highway at grade with another highway, or with a railroad . . . ." Minn. Stat. § 173.16, subd. 4(e). Accordingly, this 300-foot setback does not apply to a grade-separated interchange, such as the interchange near the location of relator's billboard. *See id.* Conversely, the language in Minn. Stat. § 173.16, subd. 4(d), makes clear that the 500-foot setback does apply to interchanges on fully controlled-access freeways outside of incorporated cities, such as the interchange involved here. And interpreting subdivisions 4(d) and 4(e) as requiring two distinct setback requirements is further supported by Minn. R. 8810.1100, which explains that, even though billboards are not permitted within 500 feet of an interchange ramp or leg, a 300-foot setback requirement applies "where there are no ramps or legs." Minn. R. 8810.1100, subp. 2, 3 (2005).

Moreover, this construction of Minn. Stat. § 173.16 is consistent with the canon of statutory construction set forth in Minn. Stat. § 645.16 (2006), which states that "[e]very law shall be construed, if possible, to give effect to all its provisions." Here, the only way to give effect to both parts (d) and (e) of subdivision 4 is to construe them as requiring two distinct setback requirements: one for controlled-access highways and another for primary highways without controlled access. *See* Minn. Stat. § 173.16. And adopting relator's alternative construction of Minn. Stat. § 173.16 leads to an absurd result. Subdivision 4(d) requires a 500-foot setback from interchanges on both "interstate highways" and "fully controlled-access freeways." Minn. Stat. § 173.16, subd. 4(d). If

the term "fully controlled-access freeway" was not intended to apply to a "primary highway" built to the standard of a fully or partially controlled-access freeway, as relator suggests, the legislature would have had no reason to refer to anything other than interstate highways in this section of the statute. *See id.*

Furthermore, since the traffic flow on a controlled-access highway implicates more safety concerns than a primary highway without controlled access, it is consistent with the safety/general welfare purpose of both the MOACA and the HCB to require a more restrictive setback distance for signs abutting interchanges on controlled-access highways. *See* Minn. Stat. § 173.01 (2006). We reject relator's argument that correspondence between the Minnesota Department of Transportation (MNDOT) and the City of Little Falls shows that safety and "promoting the general welfare" were not MNDOT's primary reasons for seeking to remove relator's sign. A review of this correspondence reveals that it was relator, and not MNDOT, that initiated a conversation with the city about whether it would annex the area where relator's sign was located to allow relator to circumvent the statute's setback requirement.

Based on our review of the statutory language and legislative purpose behind Minn. Stat. § 173.16, we conclude that the differing setback requirements in subdivision 4 do not render Minn. Stat. § 173.16 ambiguous.

Relator contends that due process requires the commissioner to adopt its alternative construction of the statute, arguing that because Minn. Stat. § 173.16 includes criminal penalties, the rule of lenity creates a presumption that ambiguities in a criminal statute should be resolved in favor of the least restrictive alternative. *See United States v.*

Thompson/Center Arms Co., 504 U.S. 505, 517-18, 112 S. Ct. 2102, 2109-10 (1992). We note that this enforcement action by the commissioner has not included a criminal prosecution. And further, because we have determined that the setback provisions in Minn. Stat. § 173.16 are not ambiguous, we do not reach relator's due-process argument.

Alternatively, at oral argument appellant argued, for the first time on appeal, that neither subdivision 4(d) nor subdivision 4(e) applies to its billboard, and that Minn. Stat. §173.16, subd. 5(a) (2006), requires this court to defer to local zoning law in determining the permissibility of the billboard's location. Because this argument was not briefed, we consider it waived. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).

Affirmed.