

**MINUTES OF THE MEETING
OF THE
LOUISVILLE METRO BOARD OF ZONING ADJUSTMENT**

OCTOBER 6, 2014

(Corrected on 11/26/14)

NEW BUSINESS

CASE NO. 14APPEAL1003

Request: Appeal of a Notice of Violation issued by the Department of Codes and Regulations concerning an off-premises sign.

Location: 490 East Witherspoon Street

Appellant: CBS Outdoor, LLC
David Watkins
1501 Lexington Road
Louisville, KY 40205

Owner: CENCO Industries, Inc.
Susan M. Bockoven, President
4606 Schuff Avenue
Louisville, KY 40213

Representatives: Wyatt, Tarrant & Combs, LLP
Byron Leet, Esq. & Deborah Bilitski, Esq.
500 W. Jefferson Street, Suite 2800
Louisville, KY 40202

Jurisdiction: Louisville Metro

COUNCIL DISTRICT 4—David Tandy
Staff Case Manager: Steve Hendrix, Planning Supervisor

(Related Case 14APPEAL1004 on properties located at 527 Franklin Street and 330 East Burnett Avenue).

Due to a conflict of interest, Member Bergmann recused himself and did not participate in the entire proceedings of this case.

Notice of this public hearing was posted on the property, and notices were sent by first class mail to those adjoining property owners whose names were supplied by the applicant.

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The staff report prepared for this case was incorporated into the record. The Board members received this report in advance of the hearing, and was available to any interested party prior to the public hearing. (The staff report is part of the case file maintained at Planning and Design Services offices located at 444 S. 5th Street).

On June 3, 2014, a Notice of Violation was issued to CBS Outdoor LLC concerning the LED image-changing off-premises sign. An Appeal was submitted on July 3, 2014.

On October 6, 2014, at a meeting of the Board, a hearing was held on the case. A drawing showing the premises affected and the existing and/or proposed construction was presented to each Board member.

Agency Testimony:

Steve Hendrix, Planning Supervisor, discussed the case summary, background and site context from the staff report. He said the sign went from a standard stationary billboard type sign to LED image-changing sign which is prohibited the Downtown Form District. The appellant also received a letter from the Commonwealth of Kentucky Transportation Cabinet on January 24, 2014, stating that the off-premise electronic advertising devices were prohibited. An electrical permit was issued on May 5, 2013, to upgrade service and panel to 200AMP for LED billboard signage by the Department of Codes and Regulations.

April Robbins, Code Enforcement Supervisor said the Form Districts were adopted in 2003; and the sign became non-conforming in 2009, when Chapter 4.3.12.F Permitted Uses with Special Standards was adopted by the Planning Commission on November 19, 2009 (Case No. 8503). She said the appellant received the electrical permit for the LED upgrade but that electrical inspectors are not responsible to ensure signage is in an appropriate zone classification. Ms. Robbins said the appellant did not indicate the change to LED on some of the applications.

The following spoke in opposition to this appeal:

Mark Davis, Attorney, 405 Swing Lane, Louisville, KY 40207.

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Summary of testimony of those in opposition

Mark Davis said he's a retired attorney for the City of Louisville and Jefferson County. He said he served on the board of Scenic Kentucky for 28 years; and said "dancing" billboards are not allowed because of the form district regulations. He said he is opposed to this appeal and asked the Board to uphold the regulations.

The following spoke neither for nor against the request:

No one.

Summary of testimony of those who spoke neither for nor against:

No one.

The following spoke in favor of the request:

Byron Leet, Attorney for the appellant, submitted Land Development Code (LDC) regulations into the record.

Deborah Bilitski, Attorney for the appellant.

Summary of testimony of those in favor:

Byron Leet, the applicant's attorney, said his client relied on the electrical permits to upgrade the billboards spending over ½ million dollars. He argued that there is no provision in the LDC that prohibits LED billboards, only indicating that they cannot be enlarged in area and height and no added moving parts. He said one of the billboards has actually been reduced in area and asked the Board to approve their appeal. He said Codes and Regulations should be "estopped" from citing his client; and also said that the "Honest Error Doctrine" would apply since they relied on an electrical permit to upgrade the billboard.

Rebuttal Ms. Robbins:

April Robbins said the billboards have changed from static paper to illuminated LED image-changing signage. She said she understands the financial aspect and reiterated that the electrical inspectors do not monitor the zoning or Land Development Code regulations. Ms. Robbins said when the appellant received a permit to move the billboard due to the Ohio River Bridges Project, there was no

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mention of changing the static billboard to LED image-changing signage on the application.

Rebuttal Mr. Davis:

Mr. Davis said the LED sign changes every 8 seconds or 10,800 changes per day which he considers to be a significant change or extension of the established non-conforming use.

Agency Testimony:

Emily Liu, Planning & Design's Director, said the appellant received a letter from the Commonwealth of Kentucky Transportation Cabinet, stating that the off-premise electronic outdoor advertising is in violation of Kentucky Law, 23 U.S.C. 131 et seq., and KRS Chapter 177 and regulations thereunder. Ms. Liu also explained when the appellant negotiated with the city to relocate the sign due to the Ohio River Bridges Project, they discussed changing it to LED image changing, and they were told no.

Chair Proffitt said the Board is responsible for overseeing the LDC, not state regulations; and that information could be considered "hearsay".

Rebuttal Mr. Leet:

Mr. Leet said there's nothing in the staff report noting that the appellant was told that they couldn't change the sign from static to LED image changing.

Deborah Bilitski, the appellant's attorney, said the relocation permit was granted and built as a static billboard. Her client then applied for the electrical permit to change it. Chair Proffitt asked why they didn't refer to the LDC before making this change. Ms. Bilitski said there's nothing in the LDC that restricts LED signage.

Deliberation:

Chair Proffitt said the Board should only consider the appeal as it relates to the Land Development Code and if the non-conforming use sign has been enlarged or extended beyond the scope and area that existed at the time the nonconformity began. The Board members discussed their thoughts regarding this where opinions varied.

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An audio/visual recording of the Board of Zoning Adjustment hearing related to this case is available in the Planning and Design Services offices. Please contact Customer Service staff to view the recording or to obtain a copy. The recording of this hearing will be found on the CD of the October 6, 2014 public hearing proceedings.

After the public hearing in open business session, a motion was made by Member Allendorf to approve the appeal; and was seconded by Member Liggin for discussion.

DISCUSSION:

There was more discussion whether the nonconforming use of the sign had been changed making it illegal.

The motion was proper with the following vote.

YES: Members Allendorf and Liggin.

NO: Members Proffitt, Fishman and Tharp.

NOT PRESENT FOR THIS CASE AND NOT VOTING: Member Jarboe and Bergmann.

ABSTAINING: No one.

The motion to approve the appeal failed.

On a motion by Member Fishman, seconded by Member Tharp, the following resolution was adopted:

WHEREAS, the Board finds from the file of this case, the staff report; the site plan; the PowerPoint presentations; the evidence, testimony and discussion at the public hearing that the applicant is requesting an Appeal of a Notice of Violation issued by the Department of Codes and Regulations concerning nonconforming signage on property located at 490 East Witherspoon Street; and

WHEREAS, the Board finds that this particular off-premise sign has three (3) faces and is located in the northeast corner of a parking lot for Louisville Slugger Field next to Witherspoon Street; and because the sign is south of the I-64 ramp

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to I-65, and west of I-65; the LED image changing sign faces the traffic going south on the I-64 ramp before connecting with south I-65; and

WHEREAS, the Board finds that the Form Districts were adopted in 2003, where the subject sign became nonconforming in 2009, when Chapter 4.3.12F-- Permitted Uses with Specific Standards was adopted by the Planning Commission on November 19, 2009 (Case No. 8503); and because this new regulation states that new outdoor advertising signs shall not be permitted within various form districts including the Downtown Form District, where the subject LED billboard sign exists; and because although an electrical permit was issued on May 5, 2013 to upgrade service and panel to 200AMP for LED billboard signage by the Department of Codes and Regulations, the electrical inspectors/permit writers are not responsible for monitoring compliance of the Land Development Code regulations or that such requests are in the appropriate zoning and form district classifications; and

WHEREAS, the Board finds that although nonconforming rights exist for the off-premises stationary sign—the LED image changing sign that changes advertisements every 8 seconds would be an extension/expansion of the nonconforming stationary billboard sign; and

RESOLVED, that the Louisville Metro Board of Zoning Adjustment does hereby **DENY** the appeal for Case No. 14APPEAL1003 on property located at 490 East Witherspoon Street.

YES: Members Proffitt, Fishman and Tharp.

NO: Member Allendorf.

NOT PRESENT FOR THIS CASE AND NOT VOTING: Members Jarboe and Bergmann.

ABSTAINING: Member Liggin.

NOTICE OF VIOLATION PROPER:

On a motion by Member Fishman, seconded by Member Tharp, the following resolution was adopted:

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RESOLVED, that the Louisville Metro Board of Zoning Adjustment finds that the Notice of Violation issued by the Department of Codes and Regulations was proper.

YES: Members Allendorf, Proffitt, Liggin, Fishman, and Tharp.

NO: No one.

NOT PRESENT FOR THIS CASE AND NOT VOTING: Members Jarboe and Bergmann.

ABSTAINING: No one.

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NEW BUSINESS

CASE NO. 14APPEAL1004

Request: Appeal of Notices of Violation issued by the Department of Codes & Regulations concerning off-premises signs.

Locations: 527 Franklin Street & 330 East Burnett Avenue

Appellant: CBS Outdoor, LLC
David Watkins
1501 Lexington Road
Louisville, KY 40205

Owner: Louisville Metro & the Commonwealth of Kentucky

Representative: Wyatt, Tarrant & Combs, LLP
Byron Leet, Esq. & Deborah Bilitski, Esq.
500 W. Jefferson Street, Suite 2800
Louisville, KY 40202

Jurisdiction: Louisville Metro

**COUNCIL DISTRICTS 4—David Tandy & 6—David James
Staff Case Manager: Steve Hendrix, Planning Supervisor**

(Related Case 14APPEAL1003 on property located at 490 East Witherspoon Street).

Due to a conflict of interest, Member Bergmann recused himself and did not participate in the entire proceedings of this case.

Notice of this public hearing was posted on the property, and notices were sent by first class mail to those adjoining property owners whose names were supplied by the applicant.

The staff report prepared for this case was incorporated into the record. The Board members received this report in advance of the hearing, and was available to any interested party prior to the public hearing. (The staff report is part of the

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case file maintained at Planning and Design Services offices located at 444 S. 5th Street).

On July 9, 2014, Notices of Violations were issued to CBS Outdoor LLC, concerning image-changing off-premises signs.

Appeals were filed on September 18, 2014.

On October 6, 2014, at a meeting of the Board, a hearing was held on the case. A drawing showing the premises affected and the existing and/or proposed construction was presented to each Board member.

Agency Testimony:

Steve Hendrix, Planning Supervisor, discussed the case summary, background and site context from the staff report. He said the signs went from standard, stationary billboard type signs to LED image-changing signs. He said the Board must determine if the image changing type signs are an extension of a nonconforming use beyond the scope of its operation; and if the Notice of Violation was proper.

April Robbins, Code Enforcement Supervisor, said the new LED signs are not the same as what previously existed and are, therefore, out of compliance with the Land Development Code.

The following spoke in opposition to this appeal:

Mark Davis, Attorney, 405 Swing Lane, Louisville, KY 40207.

Summary of testimony of those in opposition:

Mark Davis said he's a retired attorney for the City of Louisville and Jefferson County. He said he served on the board of Scenic Kentucky for 28 years; and said "dancing" billboards are not allowed because of the form district regulations. He said he is opposed to this appeal and asked the Board to uphold the regulations.

The following spoke neither for nor against the request:

No one.

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CASE NO. 14APPEAL1004

Summary of testimony of those who spoke neither for nor against:
No one.

The following spoke in favor of the appeal:

Byron Leet, Attorney for the appellant, submitted Land Development Code (LDC) regulations into the record.

Deborah Bilitski, Attorney for the appellant.

Summary of testimony of those in favor of the appeal:

Byron Leet, the appellant's attorney, argued that there is not a provision in the Land Development Code that prohibits LED signage. He said the LDC only indicates that signage cannot be enlarged in area and height and no added moving parts. Mr. Leet said his client received an electrical permit for one of their other signs located at 490 East Witherspoon Street (Related Case No. 14APPEAL1003) and is what they relied on to change the other two. He said Codes and Regulations should be "estopped" from citing his client; and also said that the "Honest Error Doctrine" would apply since they relied on an electrical permit to upgrade the billboard signage.

Rebuttal Ms. Robbins:

Ms. Robbins said the billboards have changed from static, paper to illuminated LED image-changing signage. She said she understands the financial aspect for the appellant, but that the signs are not in compliance with the Land Development Code.

Rebuttal Mr. Davis:

Mr. Davis said the LED signs change every 8 seconds or 10,800 changes per day which he considers to be a significant change/extension of the established nonconforming use.

Agency Testimony:

Emily Liu, Planning & Design's Director, said the appellant received a letter from the Commonwealth of Kentucky Transportation Cabinet, stating that the off-premise electronic outdoor advertising is in violation of Kentucky Law, 23 U.S.C. 131 et seq., and KRS Chapter 177 and regulations thereunder. Ms. Liu also

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explained when the appellant negotiated with the city to relocate a sign at 490 Witherspoon Street due to the Ohio River Bridges Project, they discussed changing it to LED image changing, and they were told no.

Chair Proffitt said the Board is responsible for overseeing the LDC, not state regulations; and that the other information could be considered "hearsay".

Rebuttal Mr. Leet:

Mr. Leet said there's nothing in the staff report noting that the appellant was told that they couldn't change the sign from static to LED image changing.

Deborah Bilitski, the appellant's attorney, added that there is nothing in the Land Development Code that restricts the use of LED signage; and that her client relied on receiving an electrical permit for one of their properties located at 490 East Witherspoon Street (Related Case No. 14APPEAL1003).

Deliberation:

Chair Proffitt said the Board should only consider the appeal as it relates to the Land Development Code and if the nonconforming use sign has been enlarge or extended beyond the scope and area that existed at the time the nonconformity began. The Board members discussed their thoughts regarding this where opinions varied.

An audio/visual recording of the Board of Zoning Adjustment hearing related to this case is available in the Planning and Design Services offices. Please contact Customer Service staff to view the recording or to obtain a copy. The recording of this hearing will be found on the CD of the October 6, 2014 public hearing proceedings.

After the public hearing in open business session, a motion was made by Member Allendorf to approve the appeal; and was seconded by Member Liggin for discussion.

DISCUSSION:

There was more discussion whether the nonconforming use of the sign had been changed making it illegal.

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The motion was proper with the following vote.

YES: Members Allendorf and Liggin.

NO: Members Proffitt, Fishman and Tharp.

**NOT PRESENT FOR THIS CASE AND NOT VOTING: Member Jarboe
and Bergmann.**

ABSTAINING: No one.

The motion to approve the appeal failed.

On a motion by Member Fishman, seconded by Member Tharp, the following resolution was adopted:

WHEREAS, the Board finds from the file of this case, the staff report, the site plan; the PowerPoint presentations; the evidence, testimony and discussion at the public hearing that the applicant is requesting an appeal of a Notice of Violation issued by the Department of Codes and Regulations concerning nonconforming signage on properties located at 527 Franklin Street and 330 East Burnett Avenue; and

WHEREAS, the Board finds that the pole is located in the southwest corner of the Extreme Park and contains two (2) off-premises signs, where the only one facing traffic going north on I-65 is LED with changing images; the other sign has a permanent face and externally illuminated; and

WHEREAS, the Board finds that the Form Districts were adopted in 2003, where the subject signs became nonconforming in 2009, when Chapter 4.3.12F-- Permitted Uses with Specific Standards was adopted by the Planning Commission on November 19, 2009, (Case No. 8503); and because this new regulation states that new outdoor advertising signs shall not be permitted within various form districts including the Downtown Form District; Traditional Neighborhood and Neighborhood Workplace, where the subject LED billboard signs exists; and because although an electrical permit was issued on May 5, 2013 for property located at 490 East Witherspoon (Related Case No. 14APPEAL1003) to upgrade service and panel to 200AMP for LED billboard signage by the Department of Codes and Regulations, the electrical inspectors

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are not responsible for monitoring compliance of the Land Development Code regulations or that such requests are in the appropriate zoning/form district classifications; and

WHEREAS, the Board finds that although nonconforming rights exist for the off-premises stationary signs—the LED image changing sign that changes advertisements every 8 seconds would be an extension/expansion of the nonconforming stationary paper billboard sign; and

RESOLVED, that the Louisville Metro Board of Zoning Adjustment does hereby **DENY** the Appeal for Case No. 14APPEAL1004 on properties located at 527 Franklin Street and 330 East Burnett Avenue.

YES: Members Proffitt, Fishman and Tharp.

NO: Member Allendorf.

NOT PRESENT FOR THIS CASE AND NOT VOTING: Members Jarboe and Bergmann.

ABSTAINING: Member Liggin.

NOTICE OF VIOLATION PROPER:

On a motion by Member Fishman, seconded by Member Tharp, the following resolution was adopted:

RESOLVED, that the Louisville Metro Board of Zoning Adjustment finds that the Notice of Violation issued by the Department of Codes and Regulations was proper.

YES: Members Allendorf, Proffitt, Liggin, Fishman, and Tharp.

NO: No one.

NOT PRESENT FOR THIS CASE AND NOT VOTING: Members Jarboe and Bergmann.

ABSTAINING: No one.

**CORRECTED MINUTES OF THE MEETING
OF THE
LOUISVILLE METRO BOARD OF ZONING ADJUSTMENT
IN CASE NOS. 14APPEAL1003 AND 14APPEAL1004**

CHAIRPERSON

SECRETARY

DATE