FILED
OSAH
12/14/2021
Devin Hamilton, Legal Assistant

**IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

KEENAN MEDIA, LLC,	:	
Petitioner,	:	
	:	Docket No.:
v.	:	2202288-OSAH-DOT-OA-60-Howells
	:	
DEPARTMENT OF TRANSPORTATION,	:	
Respondent,	:	

INITIAL DECISION

This dispute involves the applications of Keenan Media, LLC ("Keenan") for outdoor advertising permits for two proposed signs. Prior to the hearing, the Georgia Department of Transportation ("GDOT") filed a motion for summary determination. GDOT's motion was granted in part and denied in part. The hearing was conducted on December 2, 2021, before the undersigned administrative law judge. Keenan was represented by G. Franklin Lemond, Jr., Esq. GDOT was represented by Pearson Cunningham, Esq. and Denise Weiner, Esq. For the reasons stated below, GDOT's decisions to deny the permits are **AFFIRMED.**

Findings of Fact

1.

Keenan applied for standard and multiple message sign permits for a sign to be located in Rockdale County, Georgia ("the Rockdale County Sign"). The proposed sign would be located along State Route 402 (I-20), specifically at latitude 33.6321 west and longitude 83.9732 north. (Petitioner's Response to GDOT's Statement of Material Facts, No. 2; Testimony of Walter Sanders; Ex. P-1.)

2.

The distance between the location of Keenan's proposed Rockdale County Sign and an existing permitted sign bearing Permit Number 1506 is 433+/- feet, when the distance is measured from points perpendicular to the closest points of the signs along the nearest edge of the pavement of I-20. (Testimony of Walter Sanders.)

3.

Keenan's proposed Rockdale County Sign and the existing sign bearing GDOT Permit Number 1506 are adjacent to and on the same side of Highway I-20. (Ex. P-1; Testimony of Aric Lane Keenan.)

4.

Aric Lane Keenan is a fifty percent owner of Keenan Media. He prepared the application for the Rockdale County Sign. He measured the distance between the existing sign bearing Permit Number 1506 and the location of Keenan's proposed sign. He reviewed the Georgia regulations regarding the spacing of outdoor advertising signs. In doing so, he interpreted the language regarding the nearest edge of the pavement to mean the nearest edge of pavement of the nearest street. Because Iris Drive lies between I-20 and the sign locations, Mr. Keenan measured the distance between the existing sign and his proposed Rockdale County Sign along the edge of Iris Drive.[1] When he made that measurement, he used some stakes, string, and a measuring wheel. According to his measurement, the signs would be more than 500 feet apart. No one on behalf of Keenan measured the distance along I-20.[2] (Testimony of Aric Lane Keenan.)

[1] Iris Drive is not a highway or a controlled route. It is a county road. (Testimony of Aric Lane Keenan; Testimony of Walter Sanders.)

[2] When James Hull Jr of Patrick and Associates, Inc. measured the distance between the existing signs and Petitioner's proposed Rockdale County Sign, he measured along the center line of Iris Drive. (Testimony of James Hull.)

5.

GDOT denied the applications for the Rockdale County Sign pursuant to O.C.G.A. § 32-6-75(a)(17), which prohibits an off-premises sign from being located within 500 feet of another off-premises sign. (Testimony of Walter Sanders.)

6.

Keenan also applied for standard and multiple message sign permits for a sign to be located in DeKalb County, Georgia ("the DeKalb County Sign"). The proposed sign would be located along State Route 407 (I-285), specifically at latitude 38.7801842 west and longitude 84.2427724 north. (Petitioner's Response to GDOT's Statement of Material Facts, No. 1.)

7.

The DeKalb County Sign would be located within approximately 173 feet of an interchange in an unincorporated area. (Petitioner's Response to GDOT's Statement of Material Facts, No. 5.)

8.

GDOT denied the applications for the DeKalb County Sign pursuant to O.C.G.A. § 32-6-75(a)(18), which prohibits an off-premises sign from being located within 500 feet of an interchange of an interstate highway in an unincorporated area. (Testimony of Walter Sanders.)

9.

There is an existing sign located in DeKalb County, within 500 feet of the same interchange as Keenan's proposed DeKalb County Sign, along State Route 407 (I-285). The existing sign bears GDOT Permit Number N7086 (formerly 03978) and was first permitted in 1977.[3] (Testimony of Walter Sanders.)

[3] At the time the existing sign was permitted, it appears that it was located in a blackout zone; however, it is not clear whether the sign was improperly permitted. There is a handwritten notation on the Field Check for the sign

10.

Walter Sanders is the Outdoor Advertising Manager for GDOT. He started in that position in March 2020. He was not employed with GDOT in 1977 and did not approve the permit for the sign bearing Permit Number N7086 (formerly 03978). Furthermore, Mr. Sanders would not approve a permit for a sign located in a block-out zone. Since his tenure at GDOT, he has not approved any outdoor advertising permits for signs located in a block-out zone, which includes 500 feet within an interchange of an interstate highway. (Testimony of Walter Sanders.)

11.

As a result of Keenan's application for the DeKalb County sign, it has come to Mr. Sanders' attention that the sign formerly bearing Permit Number 03978 is a non-conforming sign. On October 21, 2021, the permit for that sign was converted to non-conforming status and was renumbered as N7086. (Testimony of Walter Sanders.)

12.

GDOT receives $1.6 billion from the Federal Highway Association, pursuant to the Highway Beautification Act. GDOT could lose ten percent of those funds (around $160 million) if it fails to effectively regulate outdoor advertising. That is one reason why Mr. Sanders denies permits for outdoor advertising signs located within blackout zones. (Testimony of Walter Sanders.)

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stating, "S/F sign not to be visible from SR 407 [i.e., I-285]." If the sign was not visible from SR 407 (I-285), then it is unclear whether it would have been improper to permit the sign in 1977. It appears that the sign was to be directed to or facing SR 10, which is Memorial Drive. (See Field Check, Exhibit A, attached to Sanders' Second Aff.)

Conclusions of Law

1.

Petitioner is the applicant for permits to operate outdoor advertising signs. Therefore, Petitioner bears the burden of proof. See Ga. Comp. R. & Regs. 616-1-2-.07(1). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

2.

Outdoor advertising in Georgia is governed by the Georgia Outdoor Advertising Control Act ("the Act"), which is codified at §§ 32-6-70 through 32-6-97. The Georgia General Assembly has declared it to be the policy of the state to regulate outdoor advertising in areas adjacent to the interstate and primary highway systems within the state. O.C.G.A. § 32-6-70. It has also authorized GDOT "to promulgate rules and regulations governing the issuance and revocation of permits for the erection and maintenance of outdoor advertising" authorized by Georgia Code sections 32-6-72 and 32-6-73. O.C.G.A. § 32-6-90. The rules and regulations are to be consistent with the safety and welfare of the traveling public and the purposes of the federal Highway Beautification Act. Id.

3.

Georgia Code section 32-6-72(4) authorizes outdoor advertising signs which provide information in the specific interest of the traveling public in areas that are *zoned* commercial or industrial. O.C.G.A. § 32-6-72(4) (emphasis added).[4] Georgia Code Section 32-6-72(5) authorizes outdoor advertising signs which provide information in the specific interest of the

[4] Outdoor advertising signs which display information in the specific interest of the traveling public, and which do not relate to activities conducted on the premises are considered off-premises signs. See Ga. Comp. R. & Regs. 672-6-.03(1)(a)(1)(ii), (iii); Cf. Ga. Comp. R. & Regs. 672-6-.03(1)(a)(1)(ii), (iii) with Ga. Comp. R. & Regs. 672-6-.03(2)(b). Off-premises signs require a permit. Id. On premises or on-site signs are signs that advertise an activity taking place (e.g., the sale of goods or services) within one hundred (100) feet of the sign. Ga. Comp. R. & Regs. 672-6-.03(2)(b); Ga. Comp. R. & Regs. 672-6-.01(s); O.C.G.A. §§ 32-6-72(3), 32-6-73(3). On premises or on-site signs do not require a permit. Ga. Comp. R. & Regs. 672-6-.03(2)(b).

traveling public in *unzoned* commercial or industrial areas. O.C.G.A. § 32-6-72(5) (emphasis added). However, such signs are regulated by GDOT. Specifically, a permit is required for outdoor advertising signs located within 660 feet of the nearest edge of the right of way of controlled routes, in zoned and unzoned commercial or industrial areas, and which are visible from the main traveled way. Ga. Comp. R. & Regs. 672-6-.03(1)(a)(1)(ii), (iii).

4.

Notwithstanding, outdoor advertising signs may not be located within 500 feet of another outdoor advertising sign on the same side of the road. O.C.G.A. § 32-6-75(a)(17). Nor may outdoor advertising signs be located within 500 feet of an interchange in an unincorporated area. O.C.G.A. § 32-6-75(a)(18). Therefore, to be eligible for a permit, a proposed sign must meet, *inter alia*, zoning, location, and spacing requirements.

GDOT Correctly Denied Keenan's Permit Applications for the Proposed Rockdale County Sign

5.

The specific language of Code Section 32-6-75(a)(17) states as follows:

> (a) No sign authorized by paragraphs (4) through (6) of Code Section 32-6-72 and paragraph (4) of Code Section 32-6-73 shall be erected or maintained which:
>
> . . .
>
> (17) Is located adjacent to an **interstate highway** and which is within 500 feet of another sign on the same side of **the highway**; provided, however, that such sign may be located within 500 feet of another sign when the signs are separated by buildings or other obstructions so that only one sign face located within the 500 foot zone is visible from the interstate highway at any time[.]

O.C.G.A. § 32-6-75(a)(17) (emphasis added). The Act defines "interstate system" or "interstate highway" as "any road of the state highway system which is a portion of The Dwight D. Eisenhower System of Interstate and Defense Highways located within this state . . . ." O.C.G.A.

§ 32-6-71(9). Signs are considered "adjacent to" an interstate highway if they are within 660 feet of the highway. Turner Commc'ns Corp. v. Ga. Dep't of Transp., 139 Ga. App. 436, 437-38 (1976). Here, both the existing sign and Keenan's proposed sign are adjacent to and on the same side of I-20.

6.

Petitioner asserts that the space between the existing sign bearing GDOT Permit Number A1506 and its proposed Rockdale County Sign is 533 feet when measured along Iris Drive Southeast and therefore does not violate the 500-foot rule. Petitioner argues that Iris Drive Southeast is the nearest edge of the pavement to its proposed sign and thus is the correct location to measure the distance. Petitioner's argument is without merit.

7.

GDOT Rule 672-6-.05(1)(e)(3) describes how to conduct the measurements for its spacing requirements. It states, in pertinent part, as follows:

> (3) Spacing requirements. A sign may not be so located that when considered in light of any permit previously granted to the applicant or any other person, the spacing requirements, set forth in O.C.G.A. §§ 32-6-75[] and 32-6-76, would be violated. **The following methods of measurement will be used by the Department**:
>
> (i) Sign Spacing. The minimum distances between sign structures shall be measured along the **nearest edge of pavement between points directly opposite the closest points of the signs as applied to sign structures located on the same side of the highway**;
>
> . . .
>
> (iii) All spacing measurements shall be measured **perpendicular to and along the nearest edge of the pavement**[.]

Ga. Comp. R. & Regs. 672-6-.05(1)(e)(3) (emphasis added). GDOT asserts that the proper location to measure is the along the nearest edge of the pavement of the interstate highway adjacent to which the signs are located. GDOT is correct.

8.

As the Georgia Court of Appeals determined, the intent of the Act, when read together, "is to protect the public *traveling along the highway* from distractions, from aesthetic desecration and from nuisances all associated with the proliferation of signs in a concentrated area along the highway." Turner, 139 Ga. App. at 438. The court further noted that the requirement that signs are separated by 500 feet is "aimed at the impact on the traveling motorist – not at the literal distance between each sign." Id. Accordingly, the court held that the proper method to measure the distance "is from points along the edge of the interstate." Id. at 439.

9.

When the distance is measured correctly, Keenan's proposed Rockdale County Sign is located 433+/- from an existing permitted sign and therefore is spaced-out (i.e., it is not allowed because it is too close to another sign). O.C.G.A. § 32-6-75(a)(17). GDOT correctly denied Keenan's permit applications for the Rockdale County Sign.

GDOT Correctly Denied Keenan's Permit Applications for the Proposed DeKalb County Sign

10.

Keenan argues that GDOT's denial of its applications for the proposed DeKalb County Sign is a violation of its rights under the Equal Protection Clause of the United States Constitution. Specifically, Keenan asserts that although its proposed sign is located within 500 feet of an interchange (i.e., in a block-out zone), GDOT has allowed another sign to be located

within the same block-out zone and therefore GDOT has treated Keenan differently with no rational basis. For the reasons that follow, Keenan's argument is without merit.

11.

Georgia Code Section 32-6-75(a)(18) prohibits outdoor advertising signs adjacent to an interstate highway from being located within 500 feet of "an interchange, intersection at grade, or safety rest area" in an unincorporated area. O.C.G.A. § 32-6-75(a)(18). This prohibited area is referred to as the block-out zone. Keenan does not dispute that its proposed DeKalb County Sign is located within approximately 173 feet of an interchange in an unincorporated area. Rather, it asserts that GDOT has allowed another permitted sign to be located within the same block-out zone and therefore has violated its Equal Protection rights.

12.

The purpose of the Equal Protection Clause is "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (citations omitted). With this purpose in mind, the United States Supreme Court expressly recognized "class of one" equal protection claims in Willowbrook v. Olech. Id. To establish a "class of one" claim, the Court held, the claimant must demonstrate that he or she was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Id.; see Lewis v. Chatham Cty. Bd. of Comm'rs, 298 Ga. 73, 75 (2015) ("Whether it regards a class of one or a class of thousands, an equal protection challenge without similarly situated classes must fail.").

13.

Thus, to successfully assert a "class of one" equal protection claim, Keenan must demonstrate that GDOT intentionally treated it differently than the other allegedly similarly situated sign owner without any rational basis for doing so. See Willowbrook, 528 U.S. at 564. The two essential elements to the claim are: (1) intentional, differential treatment as compared to others similarly situated, and (2) no rational basis for the differential treatment. Griffin Indus. v. Irvin, 496 F.3d 1189, 1202 (11th Cir. 2007). Keenan has failed to establish either element.

14.

Keenan has failed to show that it was treated differently as compared to other similarly situated sign owners. To be similarly situated, the comparator must be "*prima facie* identical in all relevant respects." Campbell v. Rainbow City, 434 F.3d 1306, 1314 (11th Cir. 2006). Keenan alleges that the sign bearing GDOT Permit Number N7086 (formerly 03978) is similarly situated, but it is not. That sign was first permitted in 1977. At the time it was permitted, it is unclear whether it violated the outdoor advertising provisions. While it appears that it was located in a block-out zone, it is unclear if it was improper to issue the permit if the sign was not to be visible from SR 407 (I-285). The Georgia Code prohibits outdoor advertising signs located "within 660 feet of the nearest edge of the right of way and *visible* from the main traveled way of the interstate or primary highways," unless the sign fits into one of the allowed categories. O.C.G.A. § 32-6-72 (emphasis added). One of those categories is signs "about goods and services in the specific interest of the traveling public." Id. at 32-6-72(6). As mentioned above, a permit is required for outdoor advertising signs located within 660 feet of the nearest edge of the right of way of controlled routes, in zoned or unzoned commercial or industrial areas, and which are *visible* from the main traveled way. Ga. Comp. R. & Regs. 672-

6-.03(1)(a)(1)(ii), (iii) (emphasis added). Because GDOT is in the business of regulating signs that are visible from the main traveled way, it is likely that the prohibition of locating a sign adjacent to an interstate and within 500 feet of an interchange did not apply if the sign was not to be visible from I-285. See O.C.G.A. §§ 32-6-72, 32-6-75(18). If this analysis is accurate, the existing sign complied with the law at the time its permit was issued.

15.

On the other hand, Keenan applied for a permit for a sign located adjacent to I-285, in the block-out zone, and visible from the main traveled way. Thus, Keenan is not similarly situated to the sign owner who obtained their permit in 1977. See Stardust, 3007 LLC v. City of Brookhaven, 899 F.3d 1164, 1177 (11th Cir. 2018) ("Pink Pony had lawfully operated in its location for more than 20 years before the City enacted the Code, but Stardust first opened its doors after the Code was passed."). Furthermore, even if the existing sign was improperly permitted, Keenan has failed to show that a sign permitted forty-four years ago is *prima facie* identical in all respects to its proposed sign. See Campbell, 434 F.3d at 1314.

16.

Keenan also fails to establish the second element, *i.e.*, there is no rational basis for GDOT's differential treatment. Roma Outdoor Creations, Inc. v. City of Cumming, 599 F. Supp. 2d 1332, 1343 (N.D. Ga. 2009) ("[T]he burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis . . . .") (quoting Board of Trustees v. Garrett, 531 U.S. 356, 367 (2001)). Even if Keenan's comparator could be considered similarly situated, it is rational for GDOT to allow a legacy sign that was likely legally permitted at the time to remain, while at the same time prohibiting a new sign from being erected in violation of the Act. See Stardust, 3007 LLC, 899 F.3d at 1177 (holding rational basis

existed to treat a new establishment differently than an establishment that had been legally operating before the Code was enacted, when the new establishment was opened after the Code was enacted); see also Haves v. City of Miami, 52 F.3d 918, 922 (11th Cir. 1995) ("A state may legitimately use grandfather provisions to protect property owners' reliance interests.").

17.

Moreover, even if the permit for the existing sign was improperly issued in 1977, the "mistaken application of a law may constitute a rational basis" for differential treatment. Roma Outdoor Creations, 599 F. Supp. 2d at 1334 (citing Levin v. City of Palm Beach Gardens, 303 Fed. App'x 847, 851 (11th Cir. 2008)). In other words, there is a rational basis for denying a permit that does not comply with the law, even if the agency mistakenly granted a permit forty-four years ago. Equal protection does not require an agency to repeat a mistaken application of the law. Cernuda v. Neufeld, 307 Fed. App'x 427, 433-34 (2009)("[E]qual protection principles should not provide any basis for holding that an erroneous application of the law in an earlier case must be repeated in a later one.") (quoting Seven Star, Inc. v. United States, 873 F.2d 225, 227 (9th Cir. 1989)).

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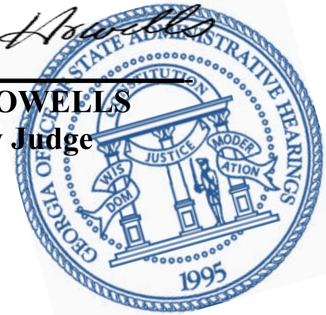
Keenan has failed to establish a class of one equal protection claim. Furthermore, Keenan's proposed DeKalb County Sign would be located within a block-out zone in violation of Georgia Code 32-6-75(a)(18). Therefore, GDOT correctly denied Keenan's permit applications for the DeKalb County Sign.

DECISION

For the foregoing reasons, GDOT's decisions to deny Keenan's permit applications for the Rockdale County Sign and the DeKalb County Sign are **AFFIRMED**.

SO ORDERED this 14th day of December, 2021.



STEPHANIE M. HOWELLS
Administrative Law Judge