IN THE COURT OF APPEALS OF IOWA

No. 7-274 / 96-0660

000301

U.S. OUTDOOR ADVERTISING COMPANY,

Appellant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,

Appellee.

FILED
AUG 22 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Petitioner appeals from the district court's ruling on judicial review affirming respondent's decision to cancel petitioner's advertising permit for a billboard near an interstate highway. **AFFIRMED.**

Bruce H. Stoltze of Brick, Gentry, Bowers, Swartz, Stoltze, Schuling & Levis, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Mark Hunacek, Assistant Attorney General, for appellee.

Considered by Sackett, P.J., Huitink, J., and Hayden, S.J.*

*Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

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HAYDEN, S.J.

U.S. Outdoor Advertising Company (U.S. Outdoor) owns and maintains billboards in thirty-nine states. U.S. Outdoor uses the signs to display advertising for its customers. Use of billboards is regulated by the Iowa Department of Transportation (DOT). DOT canceled U.S. Outdoor's permit to maintain a billboard near Interstate 80 in Dallas County. DOT alleged U.S. Outdoor had demolished, removed, and reconstructed the billboard in violation of statutes and administrative regulations. U.S. Outdoor exhausted its administrative remedies, which were unsuccessful, and filed a petition for judicial review. The district court affirmed DOT's decision to cancel the permit. U.S. Outdoor appeals. We affirm.

In 1967, Western Outdoor Advertising Company (Western Outdoor) applied for a permit to construct a billboard. DOT issued the permit, and Western Outdoor built the billboard that year on leased land. The completed billboard consisted of nine large wood poles to which horizontal and vertical braces were attached. The braces supported plywood panels to display the advertising message.

In 1972, the legislature enacted the Billboard Control Act, Iowa Code sections 306C.10 through 306C.24. The Act provided, in part, no advertising device could be constructed or reconstructed beyond the adjacent area of any interstate highway if it was visible from the highway. Iowa Code § 306C.12 (1995). The adjacent area is the area "contiguous to and within six hundred sixty feet" of the edge of a highway

right of way. Iowa Code § 306C.10(1). Western Outdoor constructed its billboard in an area beyond the adjacent area. However, the billboard was visible from Interstate 80. This brought Iowa Code section 306C.12 (1995) into play and it prohibited reconstruction of the sign.

In late 1994 and early 1995, an agent of U.S. Outdoor contacted Lance Stumbo, an advertising control agent in the right of way section of DOT. Numerous contacts followed, through which the agent sought information on rules and regulations affecting the billboard. On January 11, 1995, U.S. Outdoor purchased the billboard from Western Outdoor.

The landowner expressed safety concerns to U.S. Outdoor because the billboard was leaning and posed a danger to his cattle. U.S. Outdoor was also concerned for the safety of persons changing displays on the sign. U.S. Outdoor hired a crew to make repairs and instructed it not to make repairs exceeding sixty percent of the billboard's replacement cost. *See* Iowa Code § 306C.10(15) (defining reconstruction as any repair to the extent of sixty percent or more of the structure's replacement cost).

Prompted by the numerous contacts by U.S. Outdoor, Stumbo went to the area and took photographs of the billboard. He discovered work had been done on the billboard. He testified it had been demolished and rebuilt with new materials approximately seventy feet east of its original location. Stumbo described the new

green lumber, which had been treated to resist the elements, and contrasted it with the gray, weathered lumber that had supported the structure for almost thirty years. He described photos showing piles of old lumber, including the nine support posts, framing materials, and part of the face panel. Stumbo also highlighted the new materials used to construct the billboard, and identified in photographs the old materials stacked at the edge of a field.

On April 4, 1995, DOT notified U.S. Outdoor its permit was canceled because the sign had been demolished, removed, and reconstructed. U.S. Outdoor appealed to the Iowa Department of Inspections and Appeals. Leonard Brusby, the owner of U.S. Outdoor, testified it would cost $15,000 to replace this sign. He also testified his company paid the repair crew between $2500 and $3000. The Administrative Law Judge (ALJ) upheld the cancellation. The ALJ found Brusby's figures were not credible in light of new materials present in the rebuilt billboard. The district court affirmed for the same reason.

We review an agency's decision for errors of law. Iowa R. App. P. 4; *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 271 (Iowa 1995). Our review is limited to determining whether the district court correctly applied the law. *Miedema v. Dial Corp.*, 551 N.W.2d 309, 310 (Iowa 1996). In making this determination, we apply the standards of Iowa Code section 17A.19(8) to determine

whether our conclusions are the same as the district court. *Glowacki v. Iowa Bd. of Medical Examiners*, 516 N.W.2d 881, 884 (Iowa 1994).

Because chapter 17A delegates fact finding to administrative agencies, we defer to an agency's findings of fact if supported by substantial evidence. *Id.* Evidence is substantial if a reasonable mind would accept it as adequate to reach the agency's conclusion. *Terwilliger*, 529 N.W.2d at 271. Substantial evidence is not lacking merely because we could draw inconsistent conclusions from the same evidence. *Id.*

We hold substantial evidence supports DOT's finding cost of the work done on the billboard exceeded sixty percent of the billboard's replacement cost. The photos and testimony reveal nine new posts were sunk into the ground, and a framework of new lumber was attached to them. The crew installed new lights, conduit, and an electrical junction box. Piles of the old, weathered lumber remained at the edge of the field. These included the main support posts, framework lumber, and a section of the sign face.

The photos, taken from multiple angles and revealing all sides of the structure, show this is a new billboard. Therefore, by definition, the money U.S. Outdoor paid the crew for its work constituted replacement cost of the billboard, or at least an amount greater than sixty percent of that cost. Substantial evidence supports the agency's and the ALJ's finding and we affirm the district court on this issue.

U.S. Outdoor argues DOT's definition of "modification" impermissibly enlarged the statutory definition of reconstruction. Because we have ruled substantial evidence supports the agency's decision under the statutory definition, we need not reach this issue. In any event, U.S. Outdoor waived this argument by not filing a rule 179(b) motion after the district court declined to rule on this issue. *See Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995) (holding a party raising an issue on appeal must have filed a rule 179(b) motion when the trial court does not rule on an issue properly raised).

Costs on appeal are taxed to appellant U.S. Outdoor Advertising Company.

AFFIRMED.

Huitink, J., concurs; Sackett, P.J., specially concurs.

SACKETT, J. (concurring specially)

I concur with the majority. The standard of review we hold demands that I support the majority's decision to affirm. Yet, the result of the case makes little sense. U.S. Outdoor Advertising repaired an aging sign that presented a danger to landowners and persons working on the sign. Having done so, they lose their billboard permit. Had they not done so, the sign could have remained.