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massDOT
Massachusetts Department of Transportation



By Certified Mail: 7020 2450 0002 0132 8291

September 20, 2023

Mr. Philip A. Strazzula III, Manager
Bay Colony Associates, LLC
800 Morrissey Blvd.
Boston, Massachusetts 02122

Dear Mr. Strazzula:

I am writing regarding the proposal from Bay Colony Associates (“BCA”) to convert an existing, two-sided static billboard, located at Boston Bowl which is adjacent to Interstate I-93 in Dorchester (the “Boston Bowl sign”), to a digital billboard. This letter will serve as notification of the following actions MassDOT will take:

1. Issuance of Permit - In accordance with the Superior Court Decision dated July 18, 2023¹, and the MassDOT Final Agency Decision, Appeal of Bay Colony Associates Regarding the Denial of Digital Sign Permits, Dated September 15, 2022, for permit numbers 2021D010 and 2021D011 (“Final Agency Decision”) ², MassDOT will issue a permit, upon the surrender of the Clear Channel permit and removal of the sign located at 65 Tenean Street.
2. Notice of Intent to Revoke Permit – If, or when the above referenced conditions are met for issuance of the permit, namely the Clear Channel permits are surrendered and the sign is removed at 65 Tenean Street, based on Decisions and the information that has been presented to us, MassDOT intends to immediately revoke the permit pursuant to 700 CMR § 3.09(2)(a)(c)(d) and (e). The basis for the revocation is because BCA certified that the Boston Bowl sign was beyond 300 feet of any public park, playground, cemetery, forest, reservation and / or any other scenic or recreation area. The Boston Bowl sign is however, within 300 feet of a DCR owned public park, playground, cemetery, forest, reservation and/or any other scenic or

¹ Bay Colony Associates, LLC v. MassDOT Office of Outdoor Advertising, Memorandum of Decision and Order on the Parties Cross Motions for Judgment on the Pleadings, Superior Court - C.A. No. 2284CV0234E, dated July 18, 2023 – ordered that OOA issue the electronic permits to Bay Colony in accordance with the Final Agency Decision and take action on any outstanding procedural matters related to the surrender of the Tenean Sign permits.

² Final Agency Decision – “Since the Director of OOA made his January 19, 2022, decision, circumstances have changed in a way that appears to render the issue presented in this appeal moot. While this matter was on appeal, OOA confirmed that it received a Notice of Surrender of Permits for the sign located at 65 Tenean Street that is sufficient to commence and ultimately effectuate the surrender of those permits. The surrender of those permits will resolve the spacing violation that currently exists with respect to the sign at 820 Morrissey Blvd., thereby removing its non-conforming status. Assuming no other issues of non-compliance have been identified, upon surrender of permits and removal of the sign located at 65 Tenean Street, there will no longer be any impediment to granting the permits to convert the static billboard at 820 Morrissey Blvd. to an electronic sign.”

recreational area that is available for public use in violation of 700 CMR § 3.07(6), and the Federal-State Agreement § 1(b).

Procedural History

By letter dated January 19, 2022, you were notified that the Boston Bowl sign is a “non-conforming” or “grandfathered” sign because it is within 500 feet of another, existing Clear Channel sign, and therefore could not be modified in any way that violates Massachusetts state regulations, the requirements of the federal Highway Beautification Act of 1965, codified at 23 U.S.C. § 131, and the federal-state agreement between Massachusetts and the federal Department of Transportation (the “Federal-State Agreement”).

For the reasons set forth in that January 19th letter, your proposal was denied because MassDOT’s Office of Outdoor Advertising determined that a change from a static or trivision sign to a digital sign would be an impermissible modification of the Boston Bowl sign. See Attachment 1.

On February 17, 2022, BCA appealed this denial. Administrative Law Judge Caldarelli (“ALJ”) conducted a hearing on May 3rd & 9th, 2022, and on September 15, 2022, issued a decision and remanded the matter to the OOA. In that decision, the ALJ ruled that:

- “(1) the sign located at 820 Morrissey Blvd. currently does not meet the 500-foot spacing requirement;
- (2) OOA’s inspection on April 29, 2021, identified no other violations pertaining to the sign;
- (3) the Owner of the sign at 65 Tenean Street has submitted a Notice of Surrender that is sufficient to commence and ultimately effectuate a Surrender of Permits #28115 and #28116; and
- (4) such surrender of permits and the removal of the sign located at 65 Tenean Street will resolve the spacing violation that currently prohibits conversion of the sign at 820 Morrissey Blvd. to digital.

DECISION

Upon the surrender of permits [and removal of the sign located at 65 Tenean Street] for the sign located at 65 Tenean Street and confirmation that the sign at 820 Morrissey Blvd. otherwise complies with the regulations for outdoor advertising, OOA should grant permits 2021D010 and 2021D011 to allow the conversion of the static sign at 820 Morrissey Blvd. to an electronic sign, in accordance with 700 C.M.R. § 3.17.

On or about July 27, 2022, following the hearing, and while the matter was pending before the ALJ, Clear Channel, the Owner of the sign at 65 Tenean Street, submitted a conditional Notice of Surrender of its permits for the billboards that are located within 500 feet of the Boston Bowl sign. As of the date of this letter, the Clear Channel billboards have not been removed.

In the course of the above referenced proceedings however, and after MassDOT sent the initial denial to BCA on January 19, 2022, MassDOT was made aware that the

Dorchester Shores Reservation ("Reservation") and recreation area, which is owned by the Department of Conservation and Recreation ("DCR") is located within 300 feet of the Boston Bowl sign. This is significant because both Massachusetts Regulations and the Federal State Agreement prohibit signs within 300 feet of State or other public parks, playgrounds, forests, reservations, and scenic areas. See 700 C.M.R. § 3.07 (6); and Federal State Agreement, Section 1(b), page 6.

During the period of remand to the OOA, on October 13, 2022, MassDOT received a letter from Thomas J. LaRosa, General Counsel, Department of Conservation and Recreation, which states that the "entire property, whether upland or flats was acquired under one deed without regard to any other purpose and is available for public use for recreation and enjoyment. DCR considers the entire property acquired by the MDC, and now managed by DCR, to be part of the Dorchester Shores Reservation and protected by Article 97 of the Amendments to the Massachusetts Constitution." See Attachment 2.

On October 14, 2022, MassDOT provided BCA an opportunity to respond to the October 13, 2022, letter from DCR. See Attachment 3. To date, MassDOT has not received a response from BCA.

In addition, MassDOT took the step of hiring Greenman-Pedersen, Inc., (GPI) an independent consultant, to conduct a survey of the distance between the Reservation and the Boston Bowl sign. On or about February 17, 2023, Greenman-Pedersen provided MassDOT with a certified, existing conditions plan for the relevant area surrounding the Boston Bowl sign. The certified existing conditions survey plan, dated February 10, 2023, showed that the closest point on the billboard was measured to be 263.1 feet from the eastern State Highway Layout line / DCR property line. See Attachment 4. Based on the DCR letter and GPI report, MassDOT sent another denial letter dated February 21, 2023. See Attachment 5.

On October 14, 2022, BCA filed a Complaint in the Suffolk County Superior Court pursuant to G.L. c. 30A §14, G.L. c. 231A and G.L. c. 249 §§4-5 seeking Declaratory Judgment, Injunctive Relief, a Writ of Mandamus and Certiorari Review. BCA requested that the OOA be ordered to grant the permit application. The OOA was represented by the Office of the Attorney General. Pursuant to the court rules, the issues were briefed by both parties and on the Superior Court heard argument on the issues. The Superior Court issued a final decision on July 18, 2023.

In that decision the Court ordered that the OOA issue the permits in accordance with the Final Agency Decision, but also referenced 700 CMR §3.03(2)(d) pursuant to which the OOA "Director reserves the right, after notice and opportunity for hearing, to revoke for cause any permit at any time. Without limitation, any violation of any provision of 700 [Code Mass. Regs. §]3.00, any violation of any permit or license, and any submission of false, misleading or deceptive information in any application or in response to any information request by the Director shall constitute grounds for revocation of any permit..."

Discussion

The Highway Beautification Act generally prohibits outdoor advertising within 660' of an interstate. 23 U.S.C. § 131(b). The statute and its implementing regulations, however, allow for outdoor advertising signs erected before the effective date (so-called "grandfathered" non-conforming signs), and subject to "effective control" of the state. See 23 U.S.C. § 131(c); 23 C.F.R. § 750.705(b) (providing authority for state-federal compact to set standards); id. § 750.707(c) ("grandfather clause"). To effectuate the Beautification Act, Massachusetts and the federal government entered into the Federal-State Agreement, which defines particular criteria for size, lighting, and spacing of newly constructed outdoor advertising signs within 660' of public highways. Because the Boston Bowl sign and the Clear Channel sign are both within 660' of I-93 and visible from I-93, they are subject to the Federal-State Agreement.

The Boston Bowl Sign Violates Spacing Restrictions in the Federal-State Agreement and Massachusetts Regulations and Is Therefore Non-Conforming

The Federal-State Agreement and Massachusetts regulations place restrictions on the spacing of signs in relation to other signs, and on the spacing of signs from State or other public parks, playgrounds, forests, reservations, and scenic areas. For signs adjacent to interstate highways, the signs must be spaced a minimum of 500 feet apart. See Federal-State Agreement § 2(a), and 700 CMR 3.07(15), 3.17(5)(f). Additionally, signs located within 300 feet of State or other public parks, playgrounds, forests, reservations, and scenic areas are prohibited. See 700 CMR §3.07 (6); and Federal State Agreement, Section 1(b), page 6. The Boston Bowl sign violates both federal and state spacing requirements because it is less than 500 feet from an existing Clear Channel Sign and less than 300 feet from the DCR owned Dorchester Shores Reservation and recreation area.

In determining the distance between the Boston Bowl sign and the Clear Channel sign, MassDOT utilized Federal Highway Administration guidance, and measured the spacing between from the nearest edge of the pavement between the points that are directly in line with the closest points of the signs on the same side of the highway. Measuring from the edge of the signs that are closest to the highway and drawing a straight line out perpendicular from each sign to the roadway pavement, it was determined that there is approximately 336 feet between the Boston Bowl and Clear Channel signs.

As it relates to the measurement from the Boston Bowl sign to the Reservation, GPI, took the existing state highway layout and reservation line and placed them on property and layout monuments and a straight-line measurement was taken from the billboard to a point perpendicular to the reservation line. The measurement shown in the existing conditions plan is a straight horizontal line "as the crow flies" measurement. This horizontal measurement is the standard form of measurement used in land surveying, real estate conveyances (i.e., deed descriptions, land court plans), and land use codes for zoning setbacks. GPI determined that the distance between the Boston Bowl sign and the Reservation was 263.1 feet.

The October 13, 2022, letter from DCR verified the findings of GPI and stated that the entire property acquired by the MDC, and now managed by DCR, is part of the Dorchester

Shores Reservation and protected by Article 97 of the Amendments to the Massachusetts Constitution.

Because the Boston Bowl sign does not comply with these regulatory spacing requirements, the Boston Bowl sign is classified as a non-conforming sign, and is therefore not eligible for conversion to digital.

Because the Boston Bowl Sign Is a Non-Conforming Sign, It Cannot Be Converted to a Digital Sign

Massachusetts state regulations specifically prohibit converting a non-conforming static sign into a digital sign: “Non-conforming and/or Grandfathered signs shall not be eligible for electronic sign conversion or permitting.” 700 CMR § 3.17(4).

The Boston Bowl sign may remain at its current location for the duration of its normal life subject to ordinary or customary maintenance, even though it does not comply with spacing requirements. Per the Beautification Act’s implementing regulations and Massachusetts state regulations, for the Boston Bowl sign to maintain its grandfathered status, “[t]he sign must remain substantially the same as it was on the effective date of the State law or regulations.” 23 C.F.R. § 750.707(d)(5); 700 C.M.R. § 3.15. Massachusetts’ billboard permitting regulations, allow “customary maintenance,” but do not allow a grandfathered sign to be modified “in any manner” that “prolongs the useful life of the sign,” including “[c]hanging the materials of a sign,” “[a]dding lighting to a sign,” or “[a]dding bracing . . . or other reinforcing devices which would prolong the useful life of a sign.” 700 C.M.R. § 3.01.

While “reasonable repair and maintenance” are allowed, a “substantial change” is not. 23 C.F.R. § 750.707(d)(5). The language of 700 CMR § 3.17(4) specifically prohibits the conversion of non-conforming signs to digital. The modification of the Boston Bowl sign from a static billboard to an electronic or digital billboard would constitute a “substantial change”—including through “[c]hanging the materials” and “[a]dding lighting,” 700 C.M.R. § 3.01—that would end the sign’s grandfathered status and would constitute an alteration not permitted under the Massachusetts-specific regulations and Federal regulations concerning maintenance of non-conforming billboards.

In accordance with the Superior Court Decision dated July 18, 2023³, and the MassDOT Final Agency Decision, MassDOT will issue a permit upon the surrender of the Clear Channel permit and removal of the sign located at 65 Tenean Street. If, or when the above referenced conditions are met for issuance of the permit, namely the Clear Channel permits are surrendered and the sign is removed at 65 Tenean Street, MassDOT intends to immediately revoke the permit pursuant to 700 CMR § 3.09(2)(a)(c)(d) and (e).⁴ Revocation

³ Bay Colony Associates, LLC v. MassDOT Office of Outdoor Advertising, Memorandum of Decision and Order on the Parties Cross Motions for Judgment on the Pleadings, Superior Court - C.A. No. 2284CV0234E, dated July 18, 2023 (“Superior Court Decision”) – ordered that OOA issue the electronic permits to Bay Colony in accordance with the Final Agency Decision and take action on any outstanding procedural matters related to the surrender of the Tenean Sign permits.

⁴ Superior Court Decision – FN 7 – The court notes that, pursuant to 700 Code Mass. Regs. §3.03(2)(d), “[t]he [OOA] Director reserves the right, after notice and opportunity for hearing, to revoke for cause any permit at

of the permit is necessary because the existing Boston Bowl sign is within 300 feet of the DCR owned Dorchester Shores Reservation and recreation area. A change of the existing Boston Bowl sign from a static or trivision sign to digital sign is as an impermissible modification of a non-conforming sign.

Request for a Hearing

In accordance with 700 CMR §3.09(2), the Director may, after providing 30 days' written notice and opportunity for hearing, revoke for cause any permit at any time. The grounds for MassDOT's intent to revoke the permit, if issued, are based on Decisions and information that has been presented to us and include:

Noncompliance with the requirements of 700 CMR §3.00, the Massachusetts General Laws, Federal Laws or the Federal State Agreement, or any permit or license issued by the Director;

Any action relating to signs or outdoor advertising that adversely impacts the public health, safety, welfare or the environment;

Any submission of false, misleading or deceptive information in any application or in response to any information request by the Director, or

Refusal of the permittee or licensee to provide information requested by the Director that is relevant to the issue of compliance with applicable law. See 700 CMR §3.09 (2)(a)(c)(d) and (e).

If a permit is revoked, the determination shall be final if the license or permit holder does not request a hearing within the time allowed after receipt of notification of revocation; or after a decision is rendered by a hearing officer or administrative law judge. See 700 CMR §3.09(4)(a)(b).

Any person who has been notified of a permit revocation may request an administrative hearing in accordance with the procedures set forth in 700 CMR §3.19. See 700 CMR §3.09(5).

Sincerely,



Timothy P. McCarthy
Director, MassDOT Office of Outdoor Advertising

Attachments

cc: Kelly Frey, Esq.

any time. Without limitation, any violation of any provision of 700 [Code Mass. Regs. §] 3.00, any violation of any provision of any permit or license, and any submission of false, misleading or deceptive information in any application or in response to any information request by the Director shall constitute grounds for revocation of any permit..."