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Arrested by Police Power

by OAAA Association Counsel Allen Smith

Adams Outdoor Advert. Ltd. P'ship v. City of Madison, 38 N.W.3d 622 (Wis. Ct. App. 2026), is an example of the government abusing its powers to fit its narrative. Adams had lawfully converted its billboard in the Town of Madison (not to be confused with the City of Madison) to a digital display in 2006. In 2022, the City of Madison attached the portion of the Town of Madison where the billboard is located. Following attachment, the billboard became subject to the City's sign ordinances, which prohibit digital billboards, and the City's zoning administrator directed Adams to remove the billboard because it violated the City's digital sign ban. We detail what transpired below. As you will see, this case is not over and needs to be monitored closely by our industry.

Adams originally constructed the billboard at issue in 1999 in the Town of Madison. In 2006, Adams converted the sign to a digital billboard, as allowed by the Town of Madison's ordinances. The conversion prompted a dispute with Dane County, where the sign is located, because the County's ordinances prohibited electronic signs. The dispute was ultimately resolved through a settlement in which the County agreed that the sign is "legal and nonconforming" and may remain "indefinitely and hereafter."

In 2022, the City of Madison absorbed the part of the Town of Madison where the sign is located through a process known as attachment, and the billboard became subject to the City's sign regulations, which prohibit digital billboards. In September 2023, the City's zoning administrator sent Adams an "Official Notice" that its digital billboard violated the digital sign ban. Adams appealed the zoning administrator's decision to the City's Urban Design Commission ("UDC") pursuant to the City code. Adams claimed "vested and lawful nonconforming rights" to operate the digital sign under Wis. Stat. § 62.23(7)(h), arguing that the sign was lawful when it was built and converted, became legal nonconforming when the City later attached the portion of the Town where the sign is located, and that Adams

could not be forced to discontinue the digital display without “just Compensation.”

This is where the City’s attempt to circumvent the zoning laws comes to light. The City claimed that the nonconforming rights statute did not apply because the City was not regulating the signs “as a zoning use” but rather through its “non-zoning police power.” The City also argued that the UDC lacked the authority to review the propriety of the zoning administrator’s decision, claiming that the UDC’s review was limited to whether the sign is a digital sign and whether it violates the City’s sign code. The UDC upheld the zoning administrator’s decision, finding that the sign was a digital sign in violation of the City ordinance.

Adams sought certiorari review of the UDC’s decision in the Dane County Circuit Court, which affirmed the UDC’s decision based on the City’s limited review argument. Adams then appealed to the Wisconsin Court of Appeals, which issued its decision on June 11, 2026, affirming the UDC’s decision. The opinion immediately identifies the crux of the dispute: whether the City’s ban is a zoning ordinance and whether the billboard is a legal nonconforming structure under the state statute. The court began its analysis of whether the digital sign ban is a zoning ordinance by citing *Zwiefelhofer v. Town of Cooks Valley*, 809 N.W.2d 362 (Wis. 2012), in which the Wisconsin Supreme Court noted the “similarity and potential overlap between zoning ordinances and non-zoning police power ordinances.” The court added that the “line distinguishing general police power regulation from zoning ordinances is far from clear.” The court then applied the *Zwiefelhofer* framework to determine whether the City’s ban exhibited “characteristics that are traditionally associated with zoning ordinances.” Those characteristics are:

- (1) zoning ordinances typically divide a geographic area into multiple zones or districts;
- (2) within the established districts or zones, certain uses are typically allowed as of right and certain uses are prohibited;
- (3) zoning ordinances are traditionally aimed at directly controlling where a use takes place as opposed to how it takes place;
- (4) traditionally classifying uses in general

Terms, zoning ordinances attempt to comprehensively address all possible uses in the geographic area; (5) zoning ordinances traditionally make a fixed, forward-looking determination regarding what uses will be permitted as opposed to case-by-case determinations; and (6) traditional zoning ordinances allow certain landowners whose land use was legal prior to the adoption of the zoning ordinance to maintain their land use despite its failure to conform to the ordinance.

The Court of Appeals first considered the ban on its own: “If we consider the digital sign ban in isolation, the Zwiefelhofer framework does not support a conclusion that it must be treated as a zoning ordinance.” The court reasoned that the digital sign ban does not divide the City “into multiple zones or districts” because it is a citywide ban. Even when the court “zooms out,” as it put it, and considered the digital sign ban in the context of the entire sign control ordinance, the court still found that the digital ban does not exhibit enough of the characteristics traditionally associated with zoning, and it affirmed the UDC’s decision. As the court explained, “simply because an ordinance could be validly enacted as a zoning ordinance does not mean that zoning is necessarily the only avenue available for a local government to enact the regulation.” The court concluded, “In sum, although we think it is likely the City could have passed the sign control ordinance as a zoning ordinance, we are not persuaded that it had to do so.” Because the court determined the ban is not a zoning ordinance, it held that the nonconforming-use statute did not protect Adams’ sign.

Adams has filed a compelling Petition for Review with the Wisconsin Supreme Court, noting that “legal nonconforming uses receive special protection under Wisconsin law from municipal interference” and citing the Wisconsin legal nonconforming use statute. The Petition calls out the maneuver for what it truly is: “The Court of Appeals erred in giving local governments near-unfettered ability to circumvent state protections and destroy legal nonconforming uses by merely avoiding the ‘zoning’ label.” The Petition further argues that the Court of Appeals’ decision “hamstrings the judiciary’s prerogative to protect landowners’ statutory rights and curb municipal abuses of their regulatory authority.”

The Petition counters the Court of Appeals' Zwiefelhofer analysis, arguing that the "sign ordinance regulates permanent billboards by district, location, height, size, use, and digital-display capability" and explains why the ban bears the hallmarks of zoning under Zwiefelhofer. Adams argues that the "citywide nature of the digital-sign ban does not remove it from zoning. . . . A rule does not cease to be zoning merely because it applies across all districts. The relevant question is whether the ordinance, considered as part of the City's land-use regulatory scheme, regulates structures and land under the City's zoning power." The Petition also explains that Madison's sign ordinance "is not merely licensing an occupation or regulating day-to-day operations. It regulates the structures themselves: their location, dimensions, display characteristics, alteration, and continued use. That is the essence of zoning." As of last check, the Wisconsin Supreme Court has not acted on the Petition for Review. We will continue to monitor this case and provide updates.

I visited with Rich Zecchino, General Counsel for Adams, whom I have known for years, and he confirmed that, because this case is a direct certiorari review of the administrative decision, Adams could not raise just compensation claims in this proceeding, but that, should Adams lose, it would bring a separate action for just compensation. Interestingly, I also recently visited with Eric Rubin, my predecessor and longtime OAAA counsel, who pointed out that the industry has seen this move before. In *Ackerley Commc'ns v. Seattle*, 602 P.2d 1177 (Wash. 1979), the Washington Supreme Court upheld Seattle's use of its police power to require the removal of Ackerley's signs without payment of just compensation. In the early 1980s, the Federal Highway Administration advised Washington that the result violated the Highway Beautification Act, which requires the payment of just compensation when the government requires the removal of lawfully erected signs along federal-aid highways, and that the State was in danger of losing 10 percent of its federal highway funds. According to a footnote in a later Colorado Supreme Court decision, *Fort Collins v. Root Outdoor Advert., Inc.*, 788 P.2d 149 (Colo. 1990), the State of Washington and Ackerley subsequently reached a settlement agreement "which protected the state's federal funds."

Interesting how history repeats itself. Stay tuned.



Out of Home Advertising Association of America

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Washington, D.C.!**

Please consider attending the next Legal Seminar at the InterContinental Washington D.C. – The Wharf. The reception will be Wednesday evening, November 11, and the Seminar will be on Thursday, November 12. The program features a lineup of top attorneys, members of the judiciary, and legislative officials from across the nation. This biennial meeting of in-house and private-practice industry attorneys is a fantastic opportunity to stay informed on the latest legal issues facing the industry. This is also a time to meet your professional colleagues from across the country and share information. If you have not already registered for this event, please do! Here is the link for registration and more information about the event:

(OAAA- please insert link to register here)

I hope to see everyone there!

Sincerely, Allen

This Legal Report is not intended to provide legal advice concerning any specific matter but is a general legal discussion regarding this topic. Further, I would like to thank my partner, Lauren Beverly, for her assistance and contributions to this article.