

November 10, 2020

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

King County Courthouse
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REPORT AND DECISION

SUBJECT: Department of Local Services file no. **ENFR190763**

ICARUS HOLDINGS AND VLADEN MILOSAVLJEVIC
Code Enforcement Appeal

Location: [REDACTED] Woodinville

Appellants: Icarus Holdings, LLC and Vladen Milosavljevic
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FINDINGS AND CONCLUSIONS:

Overview

1. In response to a complaint about a sign code violation, Vladen Milosavljevic and his corporation, Icarus Holdings, LLC (Appellants), applied for a sign permit. The Department of Local Services (Department) initially determined that the sign was not legally nonconforming and requested more information. Ex. D8. Appellants did not

provide this, and the Department issued a notice and order, which Appellants timely challenged. Exs. D2 & D3.

2. We went to hearing on October 27. After hearing the witnesses' testimony, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, we find the sign *frame* grandfathered, but find that Appellants new sign *face* greatly exceeds the grandfathered square footage. Appellants will need to submit to the Department a supplemental proposal that reduces the sign face down to its historic size and proportions.

Testimony and Exhibits

3. Mr. Milosavljevic testified that he purchased the property with the sign in place in 2016. He took off the wood cladding from the underlying metal frame. From the metal's condition, he thought the frame was very old. He asserted he did not change the sign itself, only the wording on the sign, simply putting vinyl over what was previously there. He claimed the sign's square footage remained the same. He asserts the cladding made the sign seem shorter and wider. He thought the pictures were deceiving.
4. As to the sign frame, Ms. Whalen noted that it sits approximately 6 ½ feet from the right-of-way. *See* Ex. D6 at 001. She concluded that the frame itself was different, with a different foundation. *See* Ex. D6 at 002. As to the sign face, she estimated, using a software tool, that the sign face was approximately 7 ½ feet wide by 5 ½ tall, and that Mr. Milosavljevic's reconstructed sign face is the same 7 ½ feet wide, but now is approximately 14 feet tall.
5. Mike Bright testified that the sign has been there since at least 1970. He explained in (entertaining) detail exactly what he remembered there from his teenage days and why. He was clear that the sign always looked like it did, with the wooden borders (cladding).

Legal Standards

6. For signs in the Agricultural zone, one sign of up to 24 square feet may, with a permit, "identify non-residential uses or to advertise goods or services available," so long as it does not exceed six feet in height and is set back ten feet from the street right-of-way. KCC 21A.20.070. The sign area is calculated by "determining the total surface area of the sign as viewed from any single vantage point, excluding support structures." KCC 21A.20.050.A.
7. Unless directed to by law—and no special directive applies to today's case—the examiner does not grant substantial weight or otherwise accord deference to agency determinations. Exam. R. XV.F.3. For those matters or issues raised in an appeal statement to an enforcement action, the Department bears the burden of proof. KCC 20.22.080.G; Exam. R. XV.E.2.
8. However, in the legal nonconformance context, the burden is different. The owner bears the initial burden to show that the use existed prior to the contrary zoning ordinance in question and that the use was lawfully created. *King County, Dept. of Dev. & Envtl. Services v.*

King County, 177 Wn.2d 636, 643, 305 P.3d 240, 244 (2013). A use must have been lawfully established in order to later obtain legal nonconforming use status. KCC 21A.32.040. If a property owner establishes that the legal nonconforming use existed, the burden then shifts to the municipality to show that the owner abandoned or discontinued the use. *McMilian v. King County*, 161 Wn. App. 581, 591-92, 255 P.3d 739 (2011).¹

Analysis

9. Appellants assert, that the sign was originally built and constructed in accordance with all code requirements then in affect, without explaining the basis for this assertion. Even accepting Mr. Bright’s testimony—which we do—that the sign was there by 1970, Appellants point to no fact (such as a permit number) nor any law (such as version of the code in place, say, in 1969, that did not require a permit for that particular sign) that shows it was legally constructed. Mere passage of time does not transform an illegal use into a legal one. Normally, Appellants would not come close to meeting their burden of establishing a legal nonconforming.
10. However, Appellants have caught a break here because, as established in previous enforcement cases, permit records are very spotty prior to the early 1970s. So, while a complete absence of any record of permit activity for construction in that last few decades would—absent contrary evidence—prove that a project did not have a necessary permit, that is not true for something in place by 1970. Even if Appellants had put in the work, there would be no good way to determine whether a pre-1970 permit had been obtained or not.
11. Our state’s definitive nonconforming sign case is *Total Outdoor Corp. v. City of Seattle Dept. of Plan. & Dev.*, 187 Wn. App. 337, 348 P.3d 766 (2015). The key takeaway point, for our purposes is that, the court distinguishes—at dozens of points in the decision—between the sign face (sometimes referring to that as the “display surface”) and the sign frame that the face/display surface is attached to. *See, e.g.*, 187 Wn. App. at 347 (“As to the sign face attached to the sign frame, it is undisputed that...”). Face and frame are not the same thing. *See also* KCC 21A.20.050.A (in measuring total sign surface area, exclude support structures). We analyze both components here.
12. As to the sign frame, after reviewing both the testimony and the pictures, we find that Mr. Milosavljevic did not construct a new sign frame, but simply removed the wooden fascia from the existing metal support poles. We accept Mr. Bright’s testimony that the sign has been there since at least 1970 and looked about like it did up through 2018, with wooden cladding. Given the spottiness of pre-1970s permit records, we conclude that the sign frame was a legal nonconforming use. As the sign frame has not moved—except

¹ *Dept. of Dev. & Envtl. Services* appears to misstate the third phase of the nonconforming use analysis, stating that even after a landowner proves a lawfully established use, the landowner continues to bear the burden of proving non-abandonment. 177 Wn.2d at 643 (*citing* *McMilian v. King County*, 161 Wn. App. 581, 591, 255 P.3d 739 (2011)). To the contrary, *McMilian* held that “once the landowner establishes that the legal nonconforming use existed, the burden shifts to the municipality... to show that the owner abandoned or discontinued the use after the enactment of the relevant zoning ordinance.” 161 Wn. App. at 591-92.

for, with removal of the wood cladding, a few inches *away* from the street—the frame’s location is grandfathered against the ten-feet-from-street-right-of-way requirement.

13. However, we also find Mr. Milosavljevic greatly expanded the sign *face* in 2019. If Mr. Milosavljevic was asserting that he did not increase the sign face/display area, then he, and not a picture, was being deceptive.² Yes, there are photographic tricks, like wide-angle lens, that can change scope and proportion somewhat, but there is no evidence of any fancy photography here. Comparing the Google street map view from 2011 and 2019, the fence, building, road, and trees all have about the same height-to-width ratio from one photograph to the next. Ex. D7. The only thing dramatically different is that the sign face is much, much taller, relative to its width, in 2019 than in 2017.
14. We do not have fancy software tools, but we do have eyes to look at pictures, an old-school ruler to take rough measurements, and a few basic math skills. The historic sign face had a height-to-width ratio of about .50, meaning the sign face was only half as tall as it was wide. Ex. D11 at 005. Conversely, after Mr. Milosavljevic got through, the sign had a height-to-width ratio of about 2.125, meaning the new sign face is over twice as tall as it was wide. Ex. D5 at 002. Given that the sign face width’s movement was limited by the goalposts of the sign frame, Mr. Milosavljevic could not have changed the sign face’s width by more than the wooden cladding occupied. So, the width would be within a few inches of its historic girth. Even assuming our measurements are significantly off, he increased the sign face height by multiples. It is not even remotely true that Appellants have kept the original sign face dimensions.
15. Counsel asserted that we should assume the wood covered up some sign face, and thus the historic sign face was larger. That is incorrect. Beyond being mere speculation, it was directly undercut by Mr. Bright’s testimony that, in his recollection, the sign always had wooden borders. And in *Total Outdoor*, where there was ample proof that, prior to the owners’ 1981 reduction, the sign frame and sign face had been larger, the court prohibited the applicant from rebuilding the sign frame or the sign face to the larger, pre-1981 dimensions. *Total Outdoor Corp. v. City of Seattle Dept. of Plan. & Dev.*, 187 Wn. App. 337, 350-351, 348 P.3d 766 (2015).
16. While the code does allow certain square footage to be expanded by up to ten percent, KCC 21A.32.065.A.1, signs are not on the list, and Mr. Milosavljevic expanded the sign face square footage by triple digits, not by ten percent. Thus, Appellants will need to reduce the total sign face down to no larger than the dimensions of the white sign facing in the 2018 photos. Ex. D11 at 005. The display can remain larger than the 24 square feet the code would allow for new signs in the agricultural zone, but it cannot be larger than the square footage it occupied prior to 2019. The best evidence in our record is that the sign face was approximately 7 ½ feet wide by 5 ½ tall, or 41.25 square feet, although Ms. Whalen noted that this was estimated on-the-fly. During permit review, a more careful analysis of the precise dimensions of the historic sign face (meaning the white portion in the photos) might nudge the size slightly larger or slightly smaller. Appellants can divvy

² We repeatedly asked about the sign *face*, and Mr. Milosavljevic repeatedly stated that he just replaced, or covered over, what was there. We hope it was just a language barrier or us not framing the questions well or some other innocent explanation, and that he was not trying to mislead us. In any event, the visual evidence speaks, overwhelmingly, for itself.

up the resulting display area among their legal businesses as they see fit, but the total square footage of the sign face cannot exceed its 2018 dimensions.

17. The other code limit, that a sign can only be six feet tall, does not seem in play here. KCC 21A.20.070.B. While there is no estimate on how high the historic, white, sign face reached, judging from the fence and trees, it appears significantly taller than six feet. The top of the sign face Appellants will need to reconstruct cannot be any taller than the historic sign face's height (which would impermissibly expand the existing nonconformance, KCC 21A.32.055), but the historic sign face is grandfathered against the six-feet-from-the-ground limitation.
18. As to the content of the sign, we leave that to the resumed permitting process. In our 2019 decision, we entered findings about legal and illegal use, including some items that could be impacted by later adjustments.³ Some of that is apparently in the courts now, and we do not know the status. The Department's premise, that a sign cannot advertise nonlegal uses, is accurate. However, permitting staff—reviewing the revised permit application in light of the latest litigation developments—will be in a better position than we are today to analyze the *content* of the sign face. In addition, the issue may become moot, because in order to greatly reduce the sign face to match its historic surface area, and yet still be readable from the road, Appellants may need to choose between which businesses to advertise anyway. Thus, we limit our findings today to the size and dimensions of the sign face, not to its ultimate content.

DECISION:

1. We GRANT Appellants' appeal, in that there was a grandfathered sign face and sign frame. We DENY Appellants' appeal, in that they have improperly expanded the sign face way beyond its legal nonconforming dimensions.
2. By **December 10, 2020**, Appellants must either:
 - A. Submit an amended application showing the sign reduced to its historic square footage (approximately 41 square feet) and dimensions (approximately 7 ½ feet wide by 5 ½ feet and tall) of the white space visible in the pre-2019 photos, thereafter meet all deadlines for additional information requests, and then finalize the permit within 30 days of issuance; or
 - B. Remove the sign face entirely.
3. By **December 10, 2020**, Appellants must remove all other signs.
4. No penalties shall be assessed against Appellants or the subject property if the above deadlines are met. If not, the Department may issue penalties.

³ https://www.kingcounty.gov/~media/independent/hearing-examiner/documents/case-digest/appeals/code-enforcement/2019/2019%20feb/ENFR170503_IcarusHoldings_Milosavljevic.ashx?la=en.

ORDERED November 10, 2020.



David Spohr
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

King County Code 20.22.040 directs the Examiner to make the County’s final decision for this type of case. This decision shall be final and conclusive unless proceedings for review of the decision are timely and properly commenced in superior court. Appeals are governed by the Land Use Petition Act, Chapter 36.70C RCW.

MINUTES OF THE OCTOBER 27, 2020, HEARING IN THE APPEAL OF ICARUS HOLDINGS AND VLADEN MILOSAVLJEVIC, DEPARTMENT OF LOCAL SERVICES FILE NO. ENFR190763

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were LaDonna Whalen, Edward Weigelt, Vladen Milosavljevic, and Mike Bright. A verbatim recording of the hearing is available in the Hearing Examiner’s Office.

The following exhibits were offered and entered into the record by the Department:

Exhibit no. D1	Department of Local Services staff report to the Hearing Examiner
Exhibit no. D2	Notice and order, issued July 20, 2020
Exhibit no. D3	Appeal, received August 10, 2020
Exhibit no. D4	Codes cited in the notice and order
Exhibit no. D5	Photographs of subject property, dated 2018, 2019 & 2020
Exhibit no. D6	Aerial photographs of subject property, dated May 1, 2020
Exhibit no. D7	Google Street view of sign
Exhibit no. D8	Letter from Permitting regarding SIGN19-0030, dated December 13, 2019
Exhibit no. D9	Letter from Deputy Director Rowe, dated December 12, 2019
Exhibit no. D10	Letters regarding Adult Beverage license
Exhibit no. D11	Email correspondence with Appellant, dated December 10, 2019
Exhibit no. D12	Permit comments and record for SIGN19-0030
Exhibit no. D13	Letters from Fereshteh Dehkordi regarding use requirements

DS/lo

November 10, 2020

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CERTIFICATE OF SERVICE

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Code Enforcement Appeal

I, Lauren Olson, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **REPORT AND DECISION** to those listed on the attached page as follows:

EMAILED to all County staff listed as parties/interested persons and parties with e-mail addresses on record.

placed with the United States Postal Service, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

DATED November 10, 2020.



Lauren Olson
Legislative Secretary

Breazeal, Jeri

Department of Local Services

Bright, Mike

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Icarus Holdings, LLC

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Lux, Sheryl

Department of Local Services

Milosavljevic, Vladen

Icarus Holdings, LLC

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Weigelt, Edward Jr.

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Whalen, LaDonna

Department of Local Services