



April 3, 2000

OPINION 2000-006

TO: Susan J.M. Bauman, Mayor
FROM: Eunice Gibson, City Attorney
SUBJECT: **Signs in Highways**

You have asked the City Attorney whether the City of Madison can amend its ordinances to permit local businesses to place sandwichboard advertising signs on public sidewalks. The ordinances currently prohibit street graphics in the public right-of-way and prohibit portable street graphics, including sandwichboard signs, in all but a few circumstances.¹ It is my opinion that such amendments would conflict with state law and so would be invalid.

Chapter 86, Stats. regulates the placement of signs within the limits of streets and highways. There is no definition of "sign" in the chapter or in the regulations promulgated by the Department of Transportation (DOT) to interpret and implement the sign provisions of Ch. 86, Stats. *WI Admin. Code Ch. Trans 200*. Consequently, the term "sign" should be given its common and approved meaning, unless it has acquired a technical meaning or one peculiar to the law. §990.01(1), Stats. "Sign" does not have a meaning that is technical or peculiar to the law, therefore, its common usage is appropriate. 27 Wis. Op. Atty. Gen. 808 (1938). One common

¹Section 31.04(6) Unsafe and Unlawful Street Graphics and Structures.

- (1) Public Right-of-Ways. No street graphic, advertisement, cabinet or obstruction, or any other object shall be placed upon, over, or in any public sidewalk, street, alley or public ground, or upon posts, trees or other supports in any public street or public ground, except that this section shall not be construed to prohibit the erection or placing of official traffic signs or other signs authorized by law or this ordinance, or of any other object specifically authorized by law of the State of Wisconsin or these ordinances.
- (2) Portable Street Graphics. Portable street graphics, other than the exceptions enumerated herein, shall be prohibited because they are generally more distracting and hazardous to pedestrian and traffic safety, less compatible with surrounding uses and graphics of lesser quality and more difficult to uniformly regulate than permanent street graphics, which are the preferred alternative.

(Exceptions include real estate signs on private property, when a parade or street use permit has been issued, or for a business opening on private property).

meaning of sign is "a display (as a lettered board or a configuration of neon tubing) used to identify or advertise a place of business or a product". Merriam-Webster's Collegiate Dictionary, 10th Ed. (1990). Support for the above usage of sign can be found in §84.30, Stats., which regulates outdoor advertising on interstate and other highways that are part of the federal-aid primary system (primary highways). "Sign" is defined as "any outdoor advertising sign, display, device, notice, figure, painting, drawing, message, placard, poster, billboard, or other thing, which is designed, intended, or used to advertise or inform, any part of the advertising or information contents of which is visible from any place on the main traveled way of any portion of an interstate highway or primary highway." §84.30(2)(j), Stats. In my opinion, a sandwichboard structure advertising a local business is a sign and subject to the provisions of Ch.86, Stats. that regulate signs.

A public sidewalk in the City of Madison falls within the "limits of any street or highway" regulated under §86.19(1), Stats. 42 Wis. Op. Atty. Gen. 219 (1985). Responding to a question from the Secretary of the Department of Transportation (DOT) regarding the authority of highway maintenance authorities to remove political and commercial advertising signs from the highway right-of-way, the Attorney General opined that the highway consists of the entire area between the established right-of-way limits. "Thus, the government's regulatory authority is not confined to the traveled portion of the roadway." Id. at 219. Furthermore, the definitions of "highway" and "sidewalk" in Chapter 340, Stats. apply to the sign provisions of Ch. 86, Stats and the regulations in WI Admin. Code Ch. Trans 200. *WI Admin. Code § Trans 200.015(1)*. These definitions put the sidewalks in the City of Madison "within the limits of any street or highway".² Because the sandwichboards at issue are signs, and the sidewalk is within the limits of a street or highway, §86.19, Stats. must be considered. The general rule is found in §86.19(1), which reads:

"Except as provided in sub. (1m), no sign shall be placed within the limits of any street or highway except such as are necessary for the guidance or warning of traffic or as provided

² §340.01(22):

"Highway means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purpose of vehicular travel. It includes those roads or driveways in the state, county, or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in s. 115.01(1), and in institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub.(46)."

§340.01(58):

"Sidewalk means that portion of a highway between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, constructed for the use of pedestrians."

by ss. 60.23(17m) and 66.046. The authorities charged with the maintenance of streets or highways shall cause the removal therefrom and the disposal of all other signs."

Subsection (1m) allows the DOT to place 100 signs that promote Wisconsin agricultural products near highways and in waysides. §86.19(1m), Stats. Towns, cities and villages may place neighborhood watch signs, the design of which has been approved by the DOT, within the limits of streets and highways under their jurisdiction (except interstate and defense highway). §§66.23, 66.046, Stats. The final exception to the general prohibition is for signs that are "necessary for the guidance or warning of traffic". §86.19(1), Stats.

The regulations promulgated by the DOT to interpret the sign provisions of Ch. 86, Stats. emphasize the general prohibition and also provide insight into the types of signs allowed for guidance or warning of traffic. The general rule of §86.19(1), Stats., is implemented through WI Admin. Code §Trans 200.04. It reads:

- "(1) No person may erect, cause to be erected, permit to be erected, or maintain any advertising, warning, route, guide, information or regulatory sign or signal within the limits of any highway except as authorized in Secs. Trans 200.02, 200.03, 200.05 or 200.06."

WI Admin. Code §Trans 200.02 permits traffic signs and signals deemed necessary to warn, guide, inform and regulate traffic, other signs expressly permitted by the statutes or these DOT regulations, and signs to warn the public of federal or state laws or local ordinances.³ Expressly permitted signs include neighborhood watch signs permitted under §60.23(17m), Stats., and §66.046, Stats. In addition, §86.196, Stats., authorizes local authorities to adopt ordinances to permit tourist-oriented directional signs. To qualify for a tourist oriented sign, a business must be outside of an urban area, and the business, service, or activity must be (i) of significant interest to the traveling public, such that 50% or more of its annual visitors or annual gross income is derived from customers residing outside the immediate area, and (ii) the business must be a gas,

³ Trans 200.02 Authority for the erection of signs.

- (1) The department of transportation or its authorized representatives in the case of the marked routes of state trunk highways, and local authorities with respect to highways under their exclusive jurisdiction, may place and maintain such traffic signs and signals as they deem necessary to warn, guide, inform, and regulate traffic, and also such signs and signals as are expressly permitted or required by the statutes or by these regulations, subject, however, to such limitations and restriction as are contained in the statutes and these regulations.
- (2) The department of transportation with respect to the state trunk highway system, and local authorities with respect to highways under their jurisdiction, may erect or permit any department of the federal, state, or local government to erect such standard signs as the department of transportation or local deem necessary to inform and warn the public of federal or state laws, local ordinances and lawful regulations by any such department.

food, lodging or camping service or be a tourist attraction. A sandwichboard sign advertising a local business of a type not specified in the regulations would not fit under any of the types of signs permitted under WI Admin. Code §Trans 200.02.

WI Admin. Code §Trans 200.03 allows guidance signs for resorts, hotels, county institutions, places of religious worship, places of public entertainment, etc. WI Admin. Code §Trans 200.05 permits warning signs for underground transmission lines, and WI Admin. Code §Trans 200.06, which interprets §86.195, Stats., permits specific information signs on certain highways.⁴ Not included, however, are any highways within cities, villages or towns. §86.195(2)(a), Stats. As is the case for WI Admin. Code §Trans 200.02, a sandwichboard sign advertising a local business would not be permitted under any of the exceptions set forth in WI Admin. Code §§Trans 200.03, 200.05, 200.06, and 200.08.

It has been suggested that the language of §86.19(3), Stats. contemplates a local government consenting to the placement of sandwichboard advertising signs in the right of way. That subsection reads:

"Any person who shall erect any sign on any public highway, or elsewhere in violation of any of the provisions of this section or the regulations of the department, or without the written consent of the department if the sign is to be erected on a state trunk highway, the county committee in the case of a county trunk highway, or the city council, village or town board in case of a street or highway maintained by a city, village or town, shall be fined not less than \$10 nor more than \$100, and for a second or subsequent violation shall be fined not less than \$10 nor more than \$500."

Subsection (3), however, cannot be read in isolation and must be harmonized with the other subsections of §86.19, Stats. As is clear from the discussion above, some signs are permitted within the limits of streets and highways. Permits or other consent are required, as well as specific requirements relating to location, spacing, etc. WI Admin. Code §Trans 200.06, 200.08, 200.09. Failure to obtain proper consent or erecting a prohibited or unsafe sign will subject a person to the forfeiture provisions of §86.19(3), Stats. This subsection, however, in no way

⁴ A "specific information sign" is defined as:

"A rectangular sign panel that displays:

1. One or more of the words "GAS", "FOOD", "LODGING" or "CAMPING";
2. Directional information; and
3. One or more business signs. WI Admin. Code §Trans 200.015(2)(n).

A "business sign" is defined as "a separately attached sign mounted on a specific information sign to show the brand, symbol, trademark or name, or combination of these, for a motorist service available on a crossroad at or near an interchange or an intersection. WI Admin. Code §Trans 200.015(2)(a).

suggests that a local government can give consent for a sign that is otherwise prohibited under §86.19(1), Stats.

Looking outside of Ch. 86, Stats. for express authority to permit sandwichboard signs on city sidewalks is no more successful. Section 66.045, Stats., authorizes local governments to regulate obstructions beyond the lot line or within a highway. The language of §66.045, Stats. seems to suggest that a local government could permit a sandwichboard advertising sign as an encroachment. Such an interpretation, however, conflicts with the prohibitory language of §86.19, Stats. When two statutes that deal with similar subject matter conflict, the more specific statute prevails. *Squillacote v. U.S.*, 739 F.2d 1208 (7th Cir. 1984), cert. denied, 105 S.Ct. 2021 (1985); *Gillen v. City of Neenah*, 209 Wis.2d 807, 822 (1998). Section 66.045, Stats. broadly applies to all manner of obstructions in the right-of-way, whereas §86.19, Stats. is specific to signs within the limits of highways. Consequently, the sign provisions of Ch. 86, Stats. prevail. A local government cannot permit a sign under §66.045, Stats. (or §10.31, MGO) that would otherwise be prohibited under the more specific provisions of §86.19, Stats.

The clear language of the above statutes and the regulations interpreting them are echoed in a number of Attorney General Opinions. When asked whether merchants may place advertising signs on fences along public highways in a way that would not obstruct the view from the road, the Attorney General determined that they were not allowed as they were not necessary for the guidance or warning of traffic. 16 Wis. Op. Atty. Gen. 160 (1927). A similar opinion was rendered regarding the fastening of campaign material to trees and posts within the highway right-of-way. 27 Wis. Op. Atty. Gen. 808 (1938). The Attorney General concluded that the signs were not for the guidance and warning of travelers but instead served to communicate information on political candidates to the traveling public. Id. at 810.

The legislature's intent that all public ways of the state be safe for travel is illustrated in several Attorney General opinions relating to the removal of prohibited signs. The Highway Commission queried the Attorney General on whether a county highway committee had the authority under § 86.19, Stats., to remove signs from streets in cities and villages that are part of the state trunk highway system. The Attorney General answered yes and noted that: "... the statute imposes on the highway committee the duty of removing signs other than are necessary for the guidance of the traveling public from the state and county trunk highways. The duty is imposed on town, village and city officers to remove such signs from all other roads and streets within their respective towns, villages and cities." 16 Wis. Op. Atty. Gen. 627, 628 (1927). This language leaves little doubt that the reach of the sign provisions of Ch. 86, Stats. extends to the City of Madison.

A later query from the DOT asked whether highway maintenance workers had authority to summarily remove "nontraffic signs, such as political and commercial advertising signs" from the highway right-of-way without having to face the possibility of theft charges. 42 Wis. Op. Atty. Gen. 219 (1985). The Attorney General responded that the maintenance workers could summarily

remove such signs and stated that "... in effect, the legislature has deemed unauthorized signs placed within the highway right-of-way to be public nuisances which even under the common law were subject to summary abatement." *Id.* at 220. Concern for public safety also underpins an Attorney General opinion that signs erected outside the highway right-of-way may nonetheless be subject to §86.19(2), Stats., which prohibits otherwise lawful advertising signs from being erected in any place or manner that endangers travel on the highways.⁵ 16 Wis. Op. Atty. Gen., 303, 305 (1927). More recently, in a challenge to the application of §86.19(3), Stats., the Court of Appeals found traffic safety to be "not only a substantial but a compelling state interest". *State v. Ovadal*, No. 99-2067 (Wis. Ct. App., March 14, 2000). The *Ovadal* court held that signs placed in the right-of-way, though done so as part of a lawful protest against abortion, were subject to §86.19(2), Stats. and could not be placed in such a way as to endanger public travel. *Id.* at 4.

In conclusion, some signs are permitted within the streets and highways of the state, even some advertising signs. The clear language of the statutes and regulations sets out what the permitted signs are. Sandwichboard advertising signs on the sidewalks of the City of Madison do not fall under any of the allowed signs. They are not traffic signs or signals. Nor are they necessary to warn, guide, inform, or regulate traffic. They are not expressly permitted anywhere in the statutes or regulations. They cannot be considered guidance signs for resorts, hotels, or county institutions, nor are they specific information signs, warning signs for underground transmission lines, or tourist-oriented business signs. All non-statutory precedent supports the language of the statutes and regulations. The legislature's intent that the public ways throughout the state remain safe is also reflected in the extensive requirements for those signs that are permitted under §89.19(1), Stats. *WI Admin. Code §§200.03, 200.05, 200.06, 200.08.*

It is a long established rule that a local ordinance must fail in the face of a logical conflict with a statutory provision. *Fox v. Racine*, 225 Wis. 542 (1937); *Welter v. City of Milwaukee*, 214 Wis. 2d 485, 491-92 (Ct. App. 1997). Amending the City of Madison ordinances to allow sandwichboard advertising signs in the public right-of-way would conflict with the sign provisions in Ch. 86, Stats., as well as the regulations in WI Admin. Code Ch. Trans 200 that interpret those provisions. Such amendments would therefore be invalid.

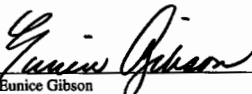
⁵ § 86.19(2), Stats.

The department shall prescribe regulations with respect to the erection for signs on public highways. Such regulations shall have the full force of law. No advertising sign shall use prominently any word, or combination of words, commonly used for the guidance or warning of travel, nor shall any advertising sign be erected or be permitted to remain in any place or manner so as to endanger travel on the highways, either by reason of causing an obstruction or otherwise.

Page 7
April 3, 2000

Eunice Gibson
City Attorney

EG:KCN:sob



Eunice Gibson
City Attorney

eg:kcn

cc: Mayor
City Clerk

SUMMARY: The City of Madison cannot amend its ordinances to permit sandwichboard advertising signs within the limits of any highway. Such signs are prohibited under state law, and a sign ordinance that conflicts with state law would be invalid.