OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

FAIRWAY FUNDING, LLC, & BERNARD CLYATT, **Petitioners,**	:	Docket No.: OSAH-DOT-OA-1446204-137-Walker
and	:	Docket No.: OSAH-DOT-OA-1446205-137-Walker
FAIRWAY FUNDING, LLC, & SOLOMON NIXON, **Petitioners,**	:	
v.	:	
DEPARTMENT OF TRANSPORTION, **Respondent.**[1]	:	

FINAL DECISION

I. Introduction

Petitioners appeal Respondent's adverse actions. A hearing was held in this matter before the undersigned Administrative Law Judge. Adam Webb, Esq. represented Petitioners, and Ken Thompson, Esq., appeared for Respondent, Department of Transportation (also "the Department").[2] For the following reasons, Respondent's action is **AFFIRMED.**

[1] According to the parties, these two cases were styled at the outset as two cases joined together but the parties did not move to consolidate them for hearing or decision. (T-7). The undersigned determines that these cases involve common issues of law or fact and orders them consolidated pursuant to GA. COMP. R. & REGS. r. 616-1-2-.12.

[2] The parties submitted post-hearing filings on August 26, 2014. Due to a physical move by the Office of State Administrative hearings, and the technological difficulties caused thereby, the undersigned finds that a brief extension of time for the issuance of this decision pursuant to GA. COMP. R. & REGS. rr. 616-1-2-.06; 616-1-2-.27 is warranted. *See also* O.C.G.A. § 50-13-41(c).

II. Findings of Fact

1.

Petitioners Bernard Clyatt and Solomon Nixon each own property in Tifton, Georgia (also "the leased property"). (Transcript at 107; 110; 112 (hereinafter "T-")). Mr. Clyatt and Mr. Nixon lease their properties to Petitioner, Fairway Funding, LLC (also "Fairway"). One side of the leased property abuts Interstate 75 and there is a residential neighborhood on the other side of the property. (T-73; 91-92; Exhibit R-3).

2.

Fairway is an outdoor advertising company that owns over 20,000 outdoor advertising signs, or billboards, throughout the country. (T-104-105). On February 21, 2014, Fairway owned two outdoor advertising signs, holding Department permit numbers N2331 and N2354, on the leased property. (T-42; Exhibits R-1; R-2). The signs were nonconforming signs erected prior to April 6, 1967. (T-43; Exhibits R-1; R-2). Nonconforming signs are signs that were lawfully erected when built, but no longer are in conformance with the law. (T-67-68).

3.

Russell Kvistad is the Department's outdoor regional coordinator for Tift County, Georgia, where the signs are located. (T-71-72). On February 21, 2014, a Friday, a tornado moved through the area. (T-72; Exhibit P-4).[3] Mr. Kvistad learned that several outdoor advertising signs had been blown down by the storm. (T-72). Concerned that the sign debris might pose a safety hazard, on the morning after the tornado, February 22, 2014, Mr. Kvistad traveled to the leased property to assess the impact of the tornado. (T-72-73).

4.

The signs at issue in these proceedings are illuminated and rest upon wooden structures. (T-107; 110). As a result of the tornado, the faces of the signs were no longer attached to the poles and were incapable of displaying advertising messages. (T-75; Exhibits R-6; 7; 11; 15; 16). Mr. Kvistad observed that the signs' lighting materials had fallen off, and debris was scattered on the ground. All four of the original wooden signposts on sign N2354 were destroyed and ultimately

[3] According to the National Weather Report, the area experienced winds of 80-85 miles per hour and a brief tornado. (Exhibit P-4).

replaced, and four out of five poles on the second sign, N2331, were also destroyed and needed to be fully replaced. (T-75; 78; 80-81; 85; Exhibit R-5).

5.

Under department regulations a nonconforming sign may continue as long as it is not destroyed. *See* GA. COMP. R. & REGS. r. 672-6-.05(1)(f)1.(vi). According to GA. COMP. R. & REGS. r. 672-6-.01(i), a sign is "destroyed" if it is useless for its intended purpose due to factors other than vandalism or other criminal or tortious act. The regulation also provides that any sign suffering damage in excess of normal wear may be repaired after notifying the Department in writing of the extent of the damage, the reason the damage is in excess of normal wear, and providing a description of the repair work to be undertaken. Pursuant to the regulation, the Department must issue a written notice authorizing the repair work. GA. COMP. R. & REGS. r. 672-6-.05(1)(f)1.(vi)

6.

Terry Harkins is the general manager of Fairway's southeast division. (T-104). His division operates 2400 signs for Fairway. (T-104). When Mr. Harkins learned about the tornado, he determined that damaged signs posed a safety hazard and should be "repaired immediately." (T-115). On the same day as the tornado, Friday, February 21, 2014, Mr. Harkins directed repair crews to begin working on the signs. (T-117). Mr. Harkins acknowledged that Fairway did not contact the Department to seek permission for the work, maintaining that "when there were storm damaged signs like that with material on the ground that it's unsafe, [Fairway] would always go out and repair the signs." (T-117). Fairway could have addressed the safety hazards posed by the debris without repairing the signs. (T-149).

7.

When he arrived at the leased property on the day after the tornado, Mr. Kvistad found that Fairway crews were already repairing the signs. (T-73). Mr. Kvistad told the repair crews to cease their work, and the crews stopped repairing the signs. (T-74).

8.

Beth Perkins is the Department's outdoor advertising manager. (T-41). After Mr. Kvistad visited the site, he contacted Ms. Perkins to tell her about the damage to the signs. Based on his description, Ms. Perkins did not think that the work being done by Fairway was routine maintenance. (T-53-55). She believed that, pursuant to the Department's regulations, the signs had been destroyed. (T-47).

9.

On February 22, 2014, Ms. Perkins sent an email to Bart Holt, Fairway's real estate manager for the southeast division about the damage to the signs. (T-138; Exhibit P-9). Mr. Holt lives in Georgia and roughly half of the signs he is responsible for are located in Georgia. (T-145). In her email, Ms. Perkins cautioned Mr. Holt that "the Department must approve sign revisions and that no nonconforming boards can be rebuilt." (Exhibit P-9).

10.

Despite Mr. Kvistad's and Ms. Perkin's communications, the crews concluded their work, including reattaching the signs' faces to the wooden posts, on Sunday, February 23, 2014. (T-119). Pictures taken at the site demonstrated that the signs had "nearly all new posts." (T-49). Both Mr. Harkins and Mr. Holt testified that they believed Fairway had the right to repair the signs, given that the tornado was an "act of God" beyond anyone's control. (T-135; 143).

11.

Mr. Holt responded to Ms. Perkins's email on Monday, February 24, 2014, after Fairway's crews had fully repaired the signs. Mr. Holt claimed that he was unaware of the extent of the damage and "[i]f it was greater than the 50%, please forward pictures and the citations and we [will] deal with it." (Exhibit P-9). Ms. Perkins sent Mr. Holt pictures that Mr. Kvistad had taken of the damaged signs. (T-141).

12.

When Mr. Kvistad returned to the area on Monday, February 24, 2014, he observed that the signs had been fully repaired and were displaying advertisements. (T-74-75; Exhibits R-9; 10; 21).

13.

On March 3, 2014, Ms. Perkins sent all of the Petitioners notices regarding the signs. Referencing O.C.G.A. § 32-6-70 *et. seq.* and GA. COMP. R. & REGS. r. 672-6-.05(1)(f)1 (iv)(v)(vi), the letters stated that the signs had been "completely destroyed" and were "completely re-erected on February 22, 2014 without notification or authorization by the Department." (Exhibits R-3; 4). The letters requested that Fairway remove each of the "non-conforming sign[s] within thirty (30) days upon receipt of this letter" and warned that if Fairway failed to remove each sign it would "become illegal and the Department will institute proceedings to have the sign removed." The letter also informed Petitioner that they could

request an administrative hearing to review the Department's determination. The Department did not and has not offered Petitioners any compensation for removing the signs. (T-143-144).

14.

On March 5, 2014, Petitioners responded to Ms. Perkin's letters. Maintaining that "[g]iven the extent of the damage to the signs, Fairway believed it was necessary to immediately rectify the situation for public safety reasons," Petitioners asserted that its' right to repair the signs was "well established under Georgia law." (Exhibit P-10). Fairway's letter also requested that per GA. COMP. R. & REGS. r. 672-6-.05(1)(f)(vi)(a), "please accept this letter as Fairway's request to repair the tornado damage to the signs associated with permit numbers N2354 and N2331." (Exhibit P-10). Fairway's request did not include a description of the damage, an assessment of what repairs were needed, or provide a description of the repair work to be undertaken. (Exhibit P-10). As of the date of the hearing, the Department had not responded to Petitioners' request. (T-142).

15.

On March 28, 2014, Petitioners filed a request for hearing with the Office of State Administrative Hearings. (Exhibit ALJ-1). The request for hearing was "to review the March 3, 2014[,] decision of the Department which alleged that Fairway illegally repaired a non-conforming sign that was damaged by a tornado." (Exhibit ALJ-1).

III. Conclusions of Law

1.

In 1965 Congress adopted the Highway Beautification Act, (hereinafter the "HBA"), explicitly finding that "erection and maintenance of outdoor advertising signs . . . should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. § 131.

2.

Notwithstanding the passage of the HBA, federal regulations provide that states may adopt "grandfather clauses" for billboard structures lawfully erected before the adoption of laws and regulations applicable to new signs. 23 C.F.R. § 750.707(c). A "grandfather clause" permits

pre-existing billboard structures to remain in place even though they do not conform to current size, lighting or spacing requirements. *Id; see also* O.C.G.A. § 32-6-71(12) (defining nonconforming sign as a sign "lawfully erected but which does not comply with state law or state regulations due to changes in state law or changes in rules and regulations since the date of erection of the sign").

3.

A nonconforming sign may only continue to remain "at its particular location for the duration of its normal life subject to customary maintenance." 23 C.F.R. § 750.707(c). Thus, it must "remain substantially the same as it was on the effective date" of the current state law or regulation. 23 C.F.R. § 750.707(d)(5). Pursuant to federal regulations, re-erection of destroyed, abandoned or discontinued nonconforming signs specifically is prohibited except in instances of vandalism or other criminal or tortious acts. 23 C.F.R. § 750.707(d)(6). The regulations provide that each state develop its own criteria for determining when a sign has been destroyed, abandoned or discontinued, and "when customary maintenance ceases and a substantial change has occurred which would terminate nonconforming rights." 23 C.F.R. § 750.707(d)(5); d(6). In Georgia, the General Assembly has designated the regulation of outdoor advertising to the Department of Transportation. O.C.G.A. § 32-6-90*; see also Walker v. DOT*, 279 Ga. App. 287, 293 (2006) (the control of outdoor advertising has been delegated "in no uncertain terms" to the Georgia Department of Transportation).

4.

On February 21, 2014, prior to the tornado, the signs at issue in this proceeding were permitted, nonconforming signs. Following the tornado, the Department concluded that the signs had been destroyed. Petitioners challenge the Department's determination.

5.

GA. COMP. R. & REGS. r. 672-6-.01(i) defines destroy or destroyed as follows:

> An act which renders the sign useless for its intended purpose, though it may not literally demolish or annihilate the sign. A sign is destroyed when it is no longer in existence due to factors other than vandalism or other criminal or tortuous [sic] act. A sign is destroyed when sixty percent (60%) or more of the upright supports of a sign structure are physically damaged such that normal repair practices would call for: in the case of wooden or metal I-beam sign structures, replacement of the broken supports; or in the case of metal sign structures, replacement of at least thirty percent (30%) of the length above ground of each broken, bent or twisted support.

6.

Given that the evidence demonstrated that all four of the original wooden signposts on sign N2354 were destroyed and ultimately replaced, and four out of five poles on the second sign, N2331, also needed to be fully replaced, both signs were destroyed as defined by the regulation. Moreover, as the faces of the signs were no longer attached to the signposts and thus not visible to display advertising messages to the general public, the tornado rendered the signs useless for their intended purpose.

7.

Pursuant to GA. COMP. R. & REGS. r. 672-6-.05(f)(vi), a nonconforming sign may only "continue as long as it is not abandoned, destroyed, discontinued, or purchased by any governmental agency." The signs in question were destroyed. Accordingly, they could not "continue," and their nonconforming rights were terminated as contemplated under the HBA. Thus, the nonconforming signs erected by Fairway following the tornado no longer hold permits and are illegal as defined by O.C.G.A. § 32-6-71(6)(F).[4]

8.

Although Petitioners argue that they were justified in rebuilding the destroyed signs because the tornado was an "act of God," GA. COMP. R. & REGS. r. 672-6-.05(f)1.(vi) is consistent with 23 C.F.R. § 750.707(d)(6), which only permits the re-erection of a destroyed sign in the instance of vandalism or other criminal or tortious acts.[5] Under 23 C.F.R. § 750.707(i), the Federal

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[4] Notwithstanding that the signs were destroyed, GA. COMP. R. & REGS. r. 672-6-.05(1)(f)1.(iv) specifies an alternative basis for the permits' expiration, providing in relevant part:

> Routine maintenance may be performed, but the sign must remain substantially the same as it was on the effective date of the State law or regulations which rendered the sign nonconforming . . . re-erection of a fallen or damaged face, or rebuilding or replacement of the foundation or poles are not routine maintenance and shall be considered a substantial change.

Given that the faces of signs had fallen, and the poles replaced, the signs were not "substantially the same" as required by 23 C.F.R. § 750.707(d)(5).

[5] When the HBA Regulations were promulgated in 1975, including acts of God as an exception under 23 C.F.R. § 750.707(d)(6) was specifically rejected:

> Comments were made with regard to §750.707(d)(6) that the exceptions allowed should also include acts of God as they too constitute events beyond the sign owners' control. No change has been made . . . non-conforming uses are terminated by natural attrition in the normal course of events. **Thus, a non-**

Highway Administration (hereinafter "FHWA") has the authority to determine the reasonableness of the criteria of destruction set by a state. In so doing, the FHWA has noted that "[t]he intent of allowing nonconforming signs to remain in place, has been with the view that if such signs are not purchased, they would eventually be eliminated through natural causes. If a sign is 'destroyed' it would cease to exist and therefore lose its nonconforming status and not be allowed to be re-erected." Memorandum from Susan Lauffer, Director of Real Estate Services for the Fed. Highway Admin., to James St. John, Florida Division Administrator (July 20, 1999) (on file with the Nat'l Alliance of Highway Beautification Agencies) (stating that 23 C.F.R. §750.707(d)(6) prohibits the reconstruction of nonconforming billboards destroyed under state law); *see also,* Memorandum from Susan Lauffer, Director of Real Estate Services for the Fed. Highway Admin., to Bobby Blackmon, Tennessee Division Administrator, (March 10, 2005) (on file with the Nat'l Alliance of Highway Beautification Agencies) (reiterating that 23 C.F.R. § 750.707(d)(6) prohibits the reconstruction of nonconforming billboards destroyed pursuant to natural disasters).

9.

Even if Petitioners' assertion that the signs were not destroyed, but only damaged in excess of normal wear was correct, they would not prevail. GA. COMP. R. & REGS. r. 672-6-.05(f)1.(vi) states in relevant part as follows:

Any sign suffering damage in excess of normal wear and tear may be repaired after:

(A) notifying the Department in writing of the extent of the damage, the reason the damage is in excess of normal wear, and providing a description of the repair work to be undertaken; and

(B) receiving written notice from the Department authorizing the repair work as described above. If said work authorization is granted, it shall be mailed to the applicant within 30 days of receipt of the information described in (1) above.

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conforming sign destroyed or substantially damaged by an act of God is terminated because it would need to be rebuilt or a new sign would have to be erected in its place. New signs, or substantially new signs, must be located in conforming areas. To allow new signs to be erected in a non-conforming area only to be later acquired by the State would unduly burden the taxpayers with an unwarranted cost. 40 Fed. Reg. 42.843 (Sept. 16, 1975) (emphasis added).

10.

Petitioners did not comply with GA. COMP. R. & REGS. r. 672-6-.05(f)1.(vi). Although Petitioners suggest that their March 5, 2014, letters to the Department should be construed as the proper notice required under GA. COMP. R. & REGS. r. 672-6-.05(f)1.(vi), these letters do not satisfy the regulation's requirements. Petitioners failed to detail the extent of the damage, the reason the damage was taken in excess of normal wear, and did not provide a description of the repair work to be undertaken. Most importantly, Petitioners had already completed all of the repair work **prior** to March 5, 2014, and thus could not have received written notice from the Department authorizing the repair, as provided by the regulation.

11.

Finally, Petitioners rely on *State v. Hartrampf,* 273 Ga. 522 (2001). In *Hartrampf,* the Court found a Cobb County sign ordinance to be in violation of O.C.G.A. § 32-6-83, which applies to municipal corporations and counties and provides as follows:

> Any municipal corporation or county is authorized to acquire by purchase, gift or condemnation and to pay just compensation for any property rights in outdoor advertising signs, displays and devices which were lawfully erected but which do not conform with the provisions of any lawful ordinance, regulation, or resolution due to changed conditions beyond the control of the sign owner. No municipal corporation or county shall remove or cause to be removed any such nonconforming outdoor advertising sign, display, or device without paying just compensation . . . .

Relying on the language in O.C.G.A. § 32-6-83, providing that no county could remove a nonconforming device without paying just compensation, the *Hartrampf* Court ruled that the ordinance effecting removal of a sign without compensation conflicted with the specific provisions of the state statute.

12.

In contrast, O.C.G.A. § 32-6-82 specifically applies to the Department and reads as follows:

> The department is authorized to acquire by purchase, gift, or condemnation and to pay just compensation for any property rights in outdoor advertising signs, displays, and devices which were lawfully erected in compliance with the applicable laws in effect at the time of erection but which do not conform to this part or which fail to comply with this part due to changed conditions beyond the control of the sign owner. The department shall be limited to an expenditure of $5 million for the state's portion of just compensation. The department shall be prohibited from playing more than 25 percent of any award for just compensation.

Unlike O.C.G.A. § 32-6-83, O.C.G.A. § 32-6-82 does not forbid the Department from removing or causing to be removed "any such nonconforming outdoor advertising sign, display or device without paying just compensation." As it was the portion of O.C.G.A. § 32-6-83 that prohibits effecting a sign's removal without compensation that the *Hartrampf* court found determinative, a clause not included in O.C.G.A. § 32-6-82, *Hartrampf* is inapplicable to this proceeding. *Cf. South Dakota v. Volpe*, 353 F. Supp. 335, 340 (D.S.D. 1973) ("Congress never intended to [subordinate] the [HBA]'s stated purpose to arbitrary actions taken by the individual State legislatures").

IV. Decision

In this case the signs holding Department permit numbers N2331 and N2354 were destroyed by a tornado and thus their nonconforming rights terminated. The newly constructed signs were constructed in violation of GA. COMP. R. & REGS. r. 672-6-.05(f)1.(vi) and are illegal signs erected without lawful permits. *See* O.C.G.A. 32-6-71(6). The Department's instruction to remove the signs is **AFFIRMED** and Petitioner's appeal is **DENIED.** [6]

SO ORDERED, this 30 **day of** September **, 2014.**

RONIT WALKER
Administrative Law Judge

[6] Petitioners have asserted multiple constitutional objections to the Petitioner's adverse determination. Although resolution of these constitutional challenges is beyond the purview of this administrative tribunal, these challenges are preserved for the record. *Ga. Bd. of Dentistry v. Pence*, 223 Ga. App. 603 (1996); *Ga. Real Estate Comm'n v. Burnette*, 243 Ga. 516 (1979).