

City of South Bend

BOARD OF ZONING APPEALS

AGENDA

Monday, February 6, 2023 - 4:00 p.m.

County-City Building

Fourth-Floor Council Chambers

www.tinyurl.com/sbbza

PUBLIC HEARING:

- Location:** 2621 MISHAWAKA AVE BZA#0169-23
Owner: JJB HOMES LLC
Requested Action:
Variance(s): 1) from the required 1 streetscape tree for every 30' of street frontage to none;
and 2) from the required 1 shrub for every 5' of facade foundation landscaping to none
Special Exception: Restaurant
Zoning: UF Urban Neighborhood Flex
- Location:** 322 HILL ST BZA#0154-23
Requested Action: An Administrative Appeal by Lamar Advertising Company for 1) The issuance of a violation for failure to obtain an improvement location permit; and 2) The issuance of a violation for the location, erection, or maintenance of any sign not specifically permitted by this Ordinance for the sign located at 322 Hill St
Zoning: NC Neighborhood Center
- Location:** 322 LAUREL ST BZA#0155-23
Requested Action: An Administrative Appeal by Lamar Advertising Company for 1) The issuance of a violation for failure to obtain an improvement location permit; and 2) The issuance of a violation for the location, erection, or maintenance of any sign not specifically permitted by this Ordinance for the sign located at 322 Laurel St
Zoning: NC Neighborhood Center
- Location:** 416 S WILLIAM ST BZA#0156-23
Requested Action: An Administrative Appeal by Lamar Advertising Company for 1) The issuance of a violation for failure to obtain an improvement location permit; and 2) The issuance of a violation for the location, erection, or maintenance of any sign not specifically permitted by this Ordinance for the sign located at 416 S William St
Zoning: NC Neighborhood Center
- Location:** 429 MAIN ST BZA#0157-23
Requested Action: An Administrative Appeal by Lamar Advertising Company for 1) The issuance of a violation for failure to obtain an improvement location permit; and 2) The issuance of a violation for the location, erection, or maintenance of any sign not specifically permitted by this Ordinance for the sign located at 429 Main St
Zoning: NC Neighborhood Center
- Location:** 509 MAIN ST BZA#0158-23
Requested Action: An Administrative Appeal by Lamar Advertising Company for 1) The issuance of a violation for failure to obtain an improvement location permit; and 2) The issuance

City of South Bend **BOARD OF ZONING APPEALS**

of a violation for the location, erection, or maintenance of any sign not specifically permitted by this Ordinance for the sign located at 509 Main St

Zoning: NC Neighborhood Center

7. **Location:** 510 LINCOLNWAY BZA#0159-23
Requested Action: An Administrative Appeal by Lamar Advertising Company for 1) The issuance of a violation for failure to obtain an improvement location permit; and 2) The issuance of a violation for the location, erection, or maintenance of any sign not specifically permitted by this Ordinance for the sign located at 510 Lincolnway
Zoning: NC Neighborhood Center
8. **Location:** 1138 MISHAWAKA AVE BZA#0160-23
Requested Action: An Administrative Appeal by Lamar Advertising Company for 1) The issuance of a violation for failure to obtain an improvement location permit; and 2) The issuance of a violation for the location, erection, or maintenance of any sign not specifically permitted by this Ordinance for the sign located at 1138 Mishawaka Ave
Zoning: NC Neighborhood Center
9. **Location:** 1415 LINCOLNWAY BZA#0161-23
Requested Action: An Administrative Appeal by Lamar Advertising Company for 1) The issuance of a violation for failure to obtain an improvement location permit; and 2) The issuance of a violation for the location, erection, or maintenance of any sign not specifically permitted by this Ordinance for the sign located at 1415 Lincolnway
Zoning: NC Neighborhood Center
10. **Location:** 3003 LINCOLNWAY BZA#0163-23
Requested Action: An Administrative Appeal by Lamar Advertising Company for 1) The issuance of a violation for failure to obtain an improvement location permit; and 2) The issuance of a violation for the location, erection, or maintenance of any sign not specifically permitted by this Ordinance for the sign located at 3003 Lincolnway
Zoning: NC Neighborhood Center
11. **Location:** 2401 WESTERN AVE BZA#0164-23
Requested Action: An Administrative Appeal by Lamar Advertising Company for 1) The issuance of a violation for failure to obtain an improvement location permit; and 2) The issuance of a violation for the location, erection, or maintenance of any sign not specifically permitted by this Ordinance for the sign located at 2401 Western Ave
Zoning: NC Neighborhood Center

ITEMS NOT REQUIRING A PUBLIC HEARING:

1. Findings of Fact – January 3, 2023
2. Minutes – January 3, 2023
3. Other Business
4. Adjournment

NOTICE FOR HEARING AND SIGN IMPAIRED PERSONS

Auxiliary Aid or other services may be available upon request at no charge. Please give reasonable advance request when possible.

Property Information

Location: 2621 MISHAWAKA AVE
Owner: JJB HOMES LLC

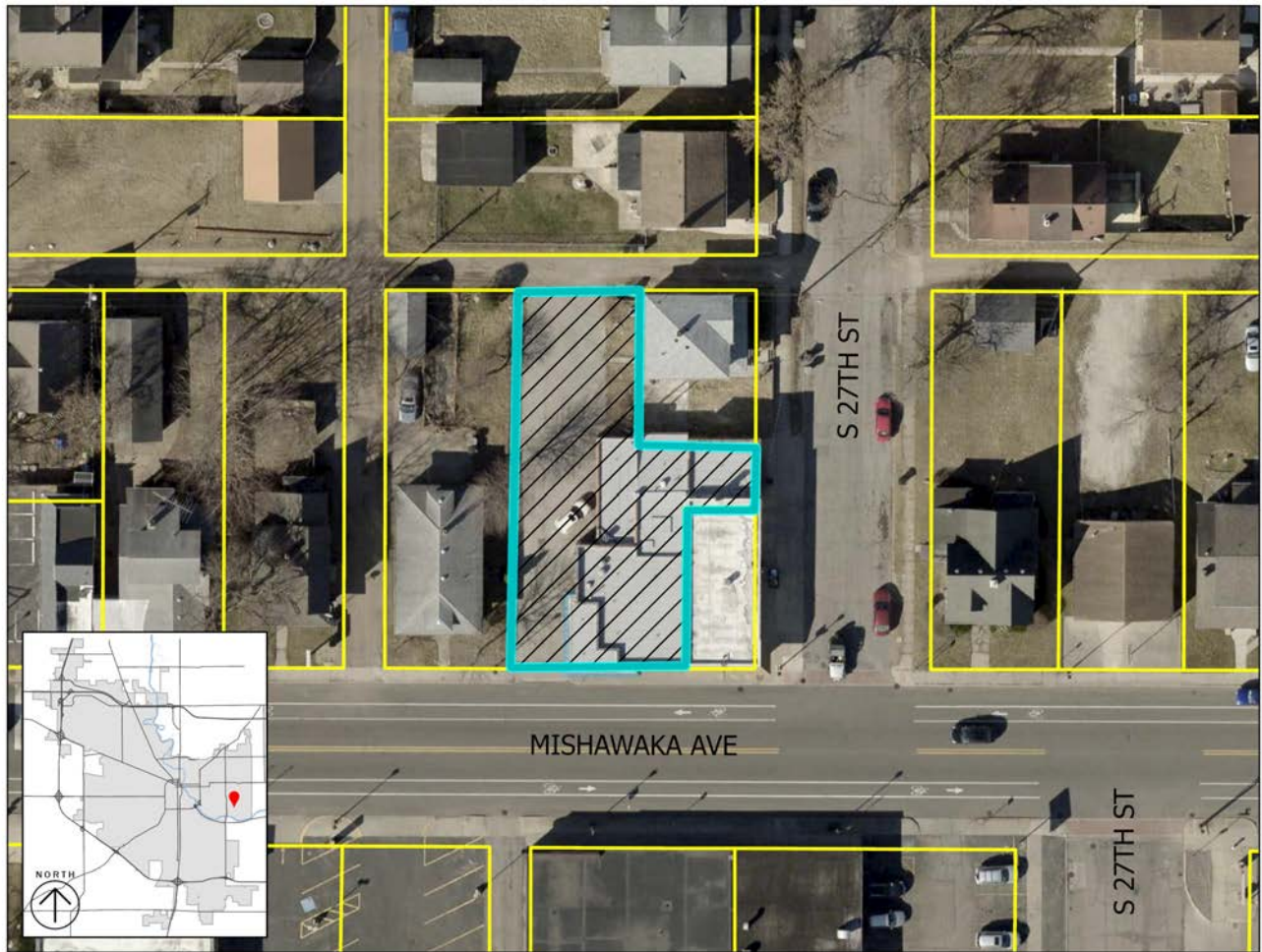
Project Summary

Establish a restaurant

Requested Action

Special Exception: Restaurant
Variance(s): 1) from the required 1 streetscape tree for every 30' of street frontage to none
2) from the required 1 shrub for every 5' of facade foundation landscaping to none

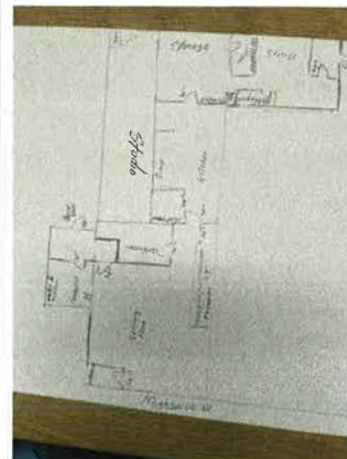
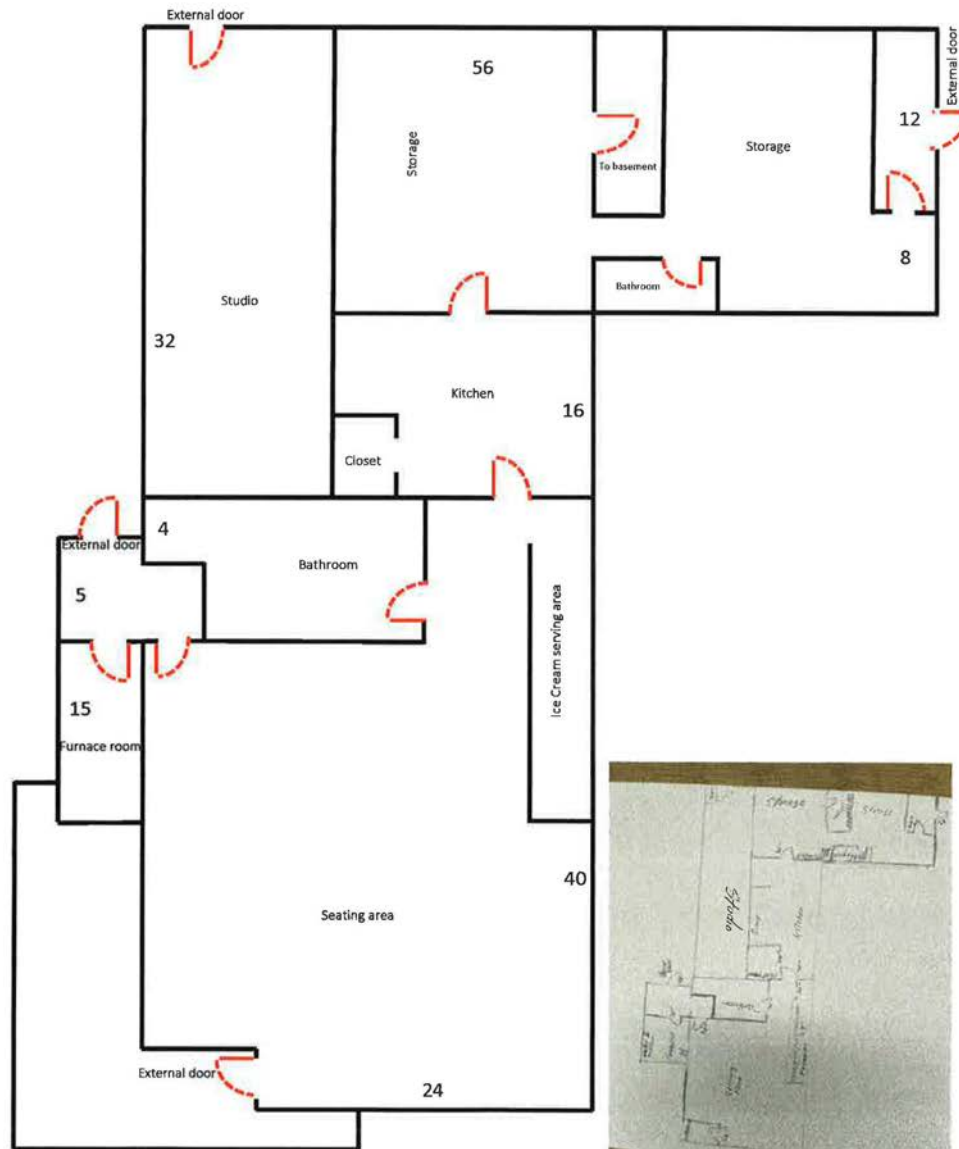
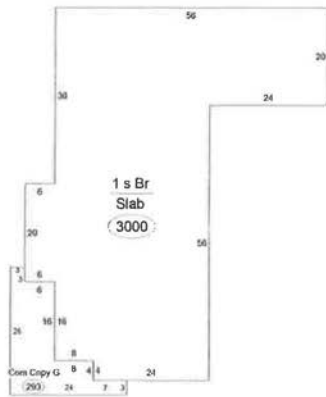
Site Location



Staff Recommendation

Based on the information provided prior to the public hearing, the Staff recommends the Board send the Special Exception to the Common Council with a favorable recommendation. The Staff recommends the Board approve the variances as presented.

Proposed Site Plan



Criteria for Decision Making: Special Exception

A Special Exception may only be granted upon making a written determination, based upon the evidence presented at a public hearing, that:

(1) The proposed use will not be injurious to the public health, safety, comfort, community moral standards, convenience or general welfare;

The proposed use is appropriate for the location and should not be injurious to the public health, safety, or general welfare of the community.

(2) The proposed use will not injure or adversely affect the use of the adjacent area or property values therein;

The proposed use would be in a building that was previously a veterinary clinic along a commercial corridor, so it should not adversely impact the use or value of adjacent properties. Reinvesting in the existing building should improve the site.

(3) The proposed use will be consistent with the character of the district in which it is located and the land uses authorized therein;

The site is located along a commercial corridor with a mix of commercial and residential uses. The proposed use is consistent with the character of the UF Urban Flex District and the Mishawaka Ave Corridor.

(4) The proposed use is compatible with the recommendations of the Comprehensive Plan.

City Plan (2006) (Objective ED2) recommends the city "Retain existing businesses and recruit new ones to the city." Allowing a restaurant use on this site will help recruit a new business to the city in an appropriately located area.

Criteria for Decision Making: Variance(s)

State statutes and the Zoning Ordinance require that certain standards must be met before a variance can be approved. The standards and their justifications are as follows:

(1) The approval will not be injurious to the public health, safety, morals and general welfare of the community

The approval should not be injurious to the public health, safety or general welfare of the community. The area was developed in an Urban manner pushing the buildings closer to the property line. Installation of the code compliant landscaping may reduce the sidewalk to a width that is not ADA compliant.

(2) The use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner

The use and value of the area adjacent should not be affected in a substantially adverse manner, The site has existed without foundation landscaping or streetscape trees since it was constructed. There will be no change that would affect the use or value of adjacent properties.

(3) The strict application of the terms of this Chapter would result in practical difficulties in the use of the property

The strict application of the terms of this Chapter would result in practical difficulties in the use of the property because the building was developed on the property line and there is no established tree lawn so the building would have to be demolished and relocated on the property.

(4) The variance granted is the minimum necessary

The variance requested is the minimum necessary because there is no space between the building and ROW line to install landscaping safely.

(5) The variance does not correct a hardship cause by a former or current owner of the property

The variance granted does not correct a hardship caused by a former or current owner because the ROW lines are not determined by the property owners.

Analysis & Recommendation

Analysis: The site had been used as a veterinary clinic for many years. Allowing the use to be reestablish on the commercial corridor will allow a vacant building to be rehabilitated into an active business. The area was developed in an Urban manner pushing the buildings closer to the property line, installation of code compliant landscaping reduces ADA compliance and safety of pedestrian traffic.

Staff Recommendation: Based on the information provided prior to the public hearing, the Staff recommends the Board send the Special Exception to the Common Council with a favorable recommendation. The Staff recommends the Board approve the variances as presented.

memo

To: Board of Zoning Appeals
From: Angela M. Smith
CC: Tom Panowicz
Date: January 27, 2023
Re: Administrative Appeal for 322 Hill Street

Background:

Off-premise advertising signs, typically referred to as billboards, are regulated under Article 10: Signs, of the South Bend Zoning Ordinance. While the development standards for off-premise signs are different from on-premise, Section 21-10.01 General Provisions apply to both classifications of signs. The intent of Article 10 includes the following:

- (1) Encourage the effective use of signs as a means of communication;
- (2) Encourage signs which, by their design, are integrated with and harmonious to the buildings and sites which they occupy;
- (3) Eliminate excessive and confusing sign displays;
- (4) Maintain and improve the appearance of the City as an attractive place in which to live and conduct business;
- (5) Safeguard and enhance property values by minimizing the possible adverse effects of signs on nearby properties;
- (6) Protect public and private investment in buildings and open spaces; and
- (7) Eliminate potential hazards to motorists and pedestrians resulting from signs.

Based on the intent and general impact of this sign type, off-premise signs have been limited to the C Commercial and I Industrial Districts in the City. Any sign within a district other than C or I is considered legal non-conforming, provided it otherwise meets the requirements for a legal non-conforming use. Legal non-conforming signs are regulated by Section 21-13.01(i).

On Sunday, July 17, 2022, a City Staff person noticed an off-premise sign being modified. The photo was sent to my attention on July 18th.



Photos sent July 17, 2022 – 208 Sample

On July 19th, I notified my contact from Lamar, Terry O’Brien, that this type of work would require a permit and provided details, as described more fully below. On July 20th, I witnessed additional work on a nearby site. A meeting was immediately set between the City and Lamar on July 21st, 2022. Despite repeated requests from the City, Lamar did not provide a full list of sites modified. However, Staff was able to identify and document several locations. Over the next couple months, a series of communications and meetings occurred. In September, when no further progress was being made, the Staff began the formal enforcement process.

Section 21-10.01(c)(1) states, “All sign types described in this section, except those listed as exempt require a permit.” Section 21-10.01(c)(2) states: “Painting, cleaning, refacing, or other normal maintenance and repair of a sign does not require a sign permit, **provided that no change is made to any structural component of the sign.**” [emphasis added]

The South Bend Zoning Ordinance offers the following definition:

Structure. Anything constructed or erected, the use of which requires location on the ground, or attachment to something having a fixed location on the ground. Among other things, structures include buildings, mobile homes, fences, walls, parking areas, loading areas, towers, antenna, and signs.

Component is not defined, however, Section 21-02.01(a) states that “Words not defined in this Ordinance are interpreted in accord with their usual dictionary meaning and customary usage.” The Zoning Administrator is the individual responsible for making those interpretations. It is not at the discretion of the property owner or petitioner. The

Merriam Webster Dictionary defines component as: “a constituent (constituent: serving the form, compose, or make up a unit or whole) part.”

Example of sign in process – 510 Lincolnway West (source: Google)

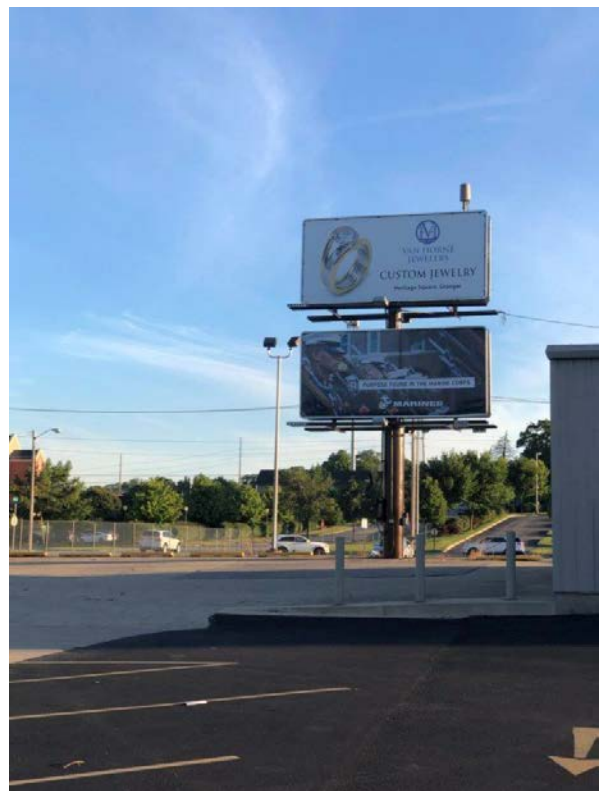


Note: During this process, Section 20-84 Parking on sidewalk, alley or parkway was violated. This is not covered by the South Bend Zoning Ordinance, but illustrates lack of due diligence in municipal requirements.

It is the Staff's position that the work performed on the various locations included a change to a structural component of the sign. Thus, a sign permit is required prior to any work being completed on the signs. The advertising copy, whether vinyl or paper, cannot be displayed or supported without the panel behind them to help distribute wind load and hold the advertising face in place. The Ordinance allows the advertising face (the vinyl that displays the message) to be replaced as a face change without requiring a permit, but the work performed by Lamar including changing the advertising face and the structural component to which it is attached. The change can be seen in the removal of the white frame and back support panel and the installation of a new support panel with rounded corners to hold the advertising copy.



Before – August, 2019



After – August, 2022

Based on the information outlined above and the photographic evidence of a change to the structural component of the sign, a notice of violation was sent to the property owner and to Lamar, as tenant, on September 16, 2022. We continued to work with Lamar to resolve the issue, but, again, became stalled, so a second notice was sent to Lamar on November 10, 2022. The second notice is being appealed by Lamar.

Appeal #1: The issuance of a violation for failure to obtain an improvement location permit.

Section 21-10.01(c)(1) states, “All sign types described in this section, except those listed as exempt require a permit.” As noted above, the sign work performed at this site is not listed as an exempt sign type. Since the work performed is a change to a structural component, it is not exempt as routine maintenance.

The evidence provided by Lamar repeatedly mentions customary practices performed by Lamar to improve aesthetics and safety. However, every municipality has their own ordinance, regulations, and interpretations thereof. No effort was made to contact the City during any of their due diligence process to verify the City’s interpretation of the Ordinance. Lamar’s identification of customary business practices does not avoid the requirement to employ those practices in compliance with the City of South Bend Zoning Ordinance.

The claim that because Lamar considers the metal panel to be the “sign face” and, thus, this would qualify as a reface, ignores the qualifying element of the sentence, “provided that no change is made to **any structural component** of the sign” [emphasis added]. At no point has Lamar claimed or presented any evidence to demonstrate that the advertising copy could be displayed without the metal panels that were replaced on the sign. The terms used to describe the metal panels do not change the fact that these are a structural component of the sign. The photographs taken by Staff demonstrate that the component of the sign which was removed to perform this work was a structural component. Lamar cannot avoid the requirement to obtain a permit for a change to a structural component by calling their structural components “sign faces” and claiming the work is a refacing.

The Staff does not contest the affidavit of Mr. Miller that the signs were originally legally installed. All the signs in question were considered legal non-conforming under the South Bend Zoning Ordinance until the work conducted by Lamar beginning on or about July 2022 which made changes to structural components of the sign. The impact of this work on the signs’ legal non-conforming status will be discussed more fully below in the Staff analysis of Appeal Issue No. 2.

The affidavit of Mr. Rush states that they review ordinances as part of due diligence and cites the section of the South Bend Zoning Ordinance related to permits. He states that when an ordinance is as clear and concise as the South Bend Zoning Ordinance, they are not required to contact the zoning department before proceeding. He offers the affidavits of Mr. Yoakum and Mr. Odum as evidence that the work performed was a reface, but he ignores the portion of the requirement that it does not apply to a change to any structural component. Every municipality across the country is regulated by different zoning ordinances. Lamar did not call or email the City during the due diligence

process, which is customary in many real estate transactions. Doing so would have avoided any confusion or misinterpretations.

The affidavit of Ms. Loup states it is the usual and customary business practice of Lamar to update the name and trade dress for the billboards acquired. The Staff did not object and did not cite Lamar for the repainting of the sign structures and replacement of the Burkhardt logo with the Lamar logo. The staff is unaware of the statement about “affixing a frame to its poster faces” as we did not see evidence of frames added. As depicted in photographs taken by Staff, frames were removed in the process of changing the metal component of the sign. While that may result in a reduction in the sign area, it does not negate the need for a permit based upon the change to a structural component.

The affidavit from Mr. Yoakum provided a graphic in support of Lamar’s claim that the metal panels would be considered the sign face. While there was no source provided for the graphic, it is definitively not part of the South Bend Zoning Ordinance. Therefore, it is not relevant to this case. Also presented is a graphic for the interior view of a sign cabinet, which is, again, not a graphic from the South Bend Zoning Ordinance. Neither of these items refutes the Staff interpretation that the portion of the sign removed was a structural component. He also mentions that the metal portion of the sign can get damaged and need repair. While that may be permitted in some municipalities, that practice within the City of South Bend would likely violate Section 21-13.01: Nonconformities, because the action would extend the life of a nonconforming sign. Again, the Staff disagrees that only the footings and the uprights are structural. As will be described in more detail below with respect to Indiana law, the City of South Bend Zoning Ordinance makes clear that its definition of structure includes an attachment to something having a fixed location on the ground. The fact that other communities may include such graphics or make such distinctions does not compel the City of South Bend to do so, nor does the fact that other communities have not challenged this practice.

The affidavit of Mr. Odom provides information regarding the services his company, ProFab, offers. It notes improvements in the industry from copy printed on paper to the use of vinyl and the change in how the vinyl is stretched. The material of the sign and how they are hung does not affect whether a permit is needed. Also, the fact that another company makes what they call the “face” does not mean that that element is not a structural component. It simply means that component is manufactured by another company. It is customary in many buildings and structures for various components to be made by different companies, much like a wall versus a roof of a building.

The use of the word “cabinet” in the violation notice has spurred a lot of discussion as to whether the component removed was a “face” or “cabinet.” However, the word “cabinet” never appears within Section 21-10.01(c) Permits Required. Because that

element of a sign is commonly referred to as a cabinet in South Bend, that terminology was used in the notice. Whether referred to as a “cabinet” or a “face,” the element replaced on the signs in question is clearly a structural component. The Zoning Ordinance clearly states that a permit is needed when a change is made to any structural component of the sign. The definition of structure and the distinction between a structure and the advertising copy is further supported by the Indiana Court of Appeals decision, *Cracker Barrel Old Country Store, Inc. v. Town of Plainfield ex rel. Plainfield Plan Com’n*, 848 N.E.2d 285 (Ind. Ct. App. 2006).

In *Cracker Barrel*, the restaurant constructed a sign consisting of “two surfaces, a cabinet, internal lighting, and a pole.” This sign was considered a legal non-conforming use under the Town of Plainfield’s Zoning Ordinance. Later, Cracker Barrel desired to perform work on the sign and were advised that they could “reface the existing surfaces without removing them from the structure. No permit was required to perform this work so long as Cracker Barrel swapped out existing panels with same type and size new panels . . . if the restaurant removed the cabinet from the sign structure, the sign would lose its pre-existing, legally established, non-conforming use status.” While the work was performed, the contractor detached the sign cabinet from the top of the sign and temporarily lowered it to the ground. The Town of Plainfield issued zoning violations, in part, based upon the sign losing its legal non-conforming use status.

Cracker Barrel argued that the work performed on the sign constituted maintenance under the Zoning Ordinance. Plainfield’s Zoning Ordinance permitted maintenance or replacement of sign surfaces, but it stated that if a structure is moved for any reason, it loses its legal non-conforming status. The Ordinance defined “structure” as “anything constructed or erected, the use of which requires location on the ground, or attachment to something having a fixed location on the ground.”

In its decision in favor of the Town of Plainfield, the court stated it was “undisputed under the definitions that Cracker Barrel moved its ‘sign’ and ‘sign structure,’ i.e., the cabinet and framework that housed the sign surface.” That movement caused the sign to lose its legal non-conforming status. The court disagreed with Cracker Barrel’s argument that it would have had to move the entire pole before violating that provision of the Ordinance. Instead, the court determined that because the definition of structure included an “attachment to something having a fixed location on the ground,” this definition included the component referred to as the “cabinet and framework that housed the sign surface.”

The facts of the *Cracker Barrel* case are nearly identical to the facts of this dispute. Just as Cracker Barrel’s removal of the sign cabinet from the pole was determined by the court to be the removal of a structural component, the work that Lamar performed on its South Bend signs, as depicted in the Staff photographs, was the removal of a structural component. As a result, Lamar was required to obtain a permit.

No matter the term, the work performed is clearly a violation from Section 21-13.02(f)(1) Failure to obtain an improvement location permit when one is required by the terms and provisions of this Ordinance.

Appeal #2: The issuance of a violation for the location, erection, or maintenance of any sign not specifically permitted by this Ordinance.

Section 21-10.07(b) states “Off-premise signs shall only be permitted in a C or I district.” This property is zoned NC Neighborhood Center District. Off-premise signs are not permitted in the NC District. A sign permit cannot be issued except in conformance with signs allowed on the property.

Lamar contends that the sign is legal nonconforming and states that since they are not in violation of work without a permit, the sign is unchanged and remains legal nonconforming. However, even if no permit was required, a legal nonconforming sign can only have normal and routine maintenance performed on the sign in strict application of Section 21-13.01(i) Legally Established Nonconforming Signs.

Section 21-13.01(i)(2) specifically outlines the conditions under which legally established nonconforming sign may receive normal and routine repair and maintenance. The evidence presented by Lamar states that the sign area was decreased in size, thus the nonconformity was decreased. While this may be true, Section 21-13.01(i)(2)(B) clearly states that only applies if the sign was approved through the grant of a variance. The sign in question has never received a variance. Therefore, the work performed was not legal as normal maintenance and repair. This section also would not avoid the violation in light of the provisions of (C).

Subsection 21-13.019(i)(2)(C) specifically states that “the removal of a sign structure or a sign cabinet shall be deemed definitive evidence that such sign requires work beyond normal maintenance.” This is consistent with the intent of this Article which states that legally established nonconforming signs may “continue until they are removed, but not to encourage their survival.”

The analysis above with respect to Appeal Issue No. 1 sets forth in greater detail the basis for the Staff’s position that the work performed on the signs constituted the removal of a sign structure or sign cabinet. This was also the precise issue before the Court of Appeals in the *Cracker Barrel* case. As noted above, the court held that the removal of the sign cabinet, which was a structural component attached to something having a fixed location on the ground, was the removal of a structural component. As a result, this work removed the sign from its legal nonconforming status, and the court

upheld the trial court's determination that the sign must be removed. The work that was actually performed to Cracker Barrel's sign was nearly identical to the work performed on Lamar's signs throughout South Bend. As a result, the same conclusion is warranted that the work constituted the removal of a structure.

Not only does the Staff contend that the work performed would constitute the removal of a sign structure or sign cabinet, which definitively indicates it is beyond normal maintenance and repair by the clear language of the Zoning Ordinance, but it is also clear that replacing any portion of the sign structure would extend the life of the sign and encourage its survival. Once this work was performed on the sign and was performed without a permit, it no longer remained otherwise lawful. Any maintenance or repair to the sign moving forward can only be performed under the conditions of the Ordinance.

memo

To: Board of Zoning Appeals
From: Angela M. Smith
CC: Tom Panowicz
Date: January 27, 2023
Re: Administrative Appeal for 322 Laurel Street

Background:

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- (4) Maintain and improve the appearance of the City as an attractive place in which to live and conduct business;
- (5) Safeguard and enhance property values by minimizing the possible adverse effects of signs on nearby properties;
- (6) Protect public and private investment in buildings and open spaces; and
- (7) Eliminate potential hazards to motorists and pedestrians resulting from signs.

Based on the intent and general impact of this sign type, off-premise signs have been limited to the C Commercial and I Industrial Districts in the City. Any sign within a district other than C or I is considered legal non-conforming, provided it otherwise meets the requirements for a legal non-conforming use. Legal non-conforming signs are regulated by Section 21-13.01(i).

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The South Bend Zoning Ordinance offers the following definition:

Structure. Anything constructed or erected, the use of which requires location on the ground, or attachment to something having a fixed location on the ground. Among other things, structures include buildings, mobile homes, fences, walls, parking areas, loading areas, towers, antenna, and signs.

Component is not defined, however, Section 21-02.01(a) states that “Words not defined in this Ordinance are interpreted in accord with their usual dictionary meaning and customary usage.” The Zoning Administrator is the individual responsible for making those interpretations. It is not at the discretion of the property owner or petitioner. The

Merriam Webster Dictionary defines component as: “a constituent (constituent: serving the form, compose, or make up a unit or whole) part.”

Example of sign in process – 510 Lincolnway West (source: Google)



Note: During this process, Section 20-84 Parking on sidewalk, alley or parkway was violated. This is not covered by the South Bend Zoning Ordinance, but illustrates lack of due diligence in municipal requirements.

It is the Staff's position that the work performed on the various locations included a change to a structural component of the sign. Thus, a sign permit is required prior to any work being completed on the signs. The advertising copy, whether vinyl or paper, cannot be displayed or supported without the panel behind them to help distribute wind load and hold the advertising face in place. The Ordinance allows the advertising face (the vinyl that displays the message) to be replaced as a face change without requiring a permit, but the work performed by Lamar including changing the advertising face and the structural component to which it is attached. The change can be seen in the removal of the white frame and back support panel and the installation of a new support panel with rounded corners to hold the advertising copy.



Before – August, 2019



After – July, 2022

Based on the information outlined above and the photographic evidence of a change to the structural component of the sign, a notice of violation was sent to the property owner and to Lamar, as tenant, on September 16, 2022. We continued to work with Lamar to resolve the issue, but, again, became stalled, so a second notice was sent to Lamar on November 10, 2022. The second notice is being appealed by Lamar.

Appeal #1: The issuance of a violation for failure to obtain an improvement location permit.

Section 21-10.01(c)(1) states, “All sign types described in this section, except those listed as exempt require a permit.” As noted above, the sign work performed at this site is not listed as an exempt sign type. Since the work performed is a change to a structural component, it is not exempt as routine maintenance.

The evidence provided by Lamar repeatedly mentions customary practices performed by Lamar to improve aesthetics and safety. However, every municipality has their own ordinance, regulations, and interpretations thereof. No effort was made to contact the City during any of their due diligence process to verify the City’s interpretation of the Ordinance. Lamar’s identification of customary business practices does not avoid the requirement to employ those practices in compliance with the City of South Bend Zoning Ordinance.

The claim that because Lamar considers the metal panel to be the “sign face” and, thus, this would qualify as a reface, ignores the qualifying element of the sentence, “provided that no change is made to **any structural component** of the sign” [emphasis added]. At no point has Lamar claimed or presented any evidence to demonstrate that the advertising copy could be displayed without the metal panels that were replaced on the sign. The terms used to describe the metal panels do not change the fact that these are a structural component of the sign. The photographs taken by Staff demonstrate that the component of the sign which was removed to perform this work was a structural component. Lamar cannot avoid the requirement to obtain a permit for a change to a structural component by calling their structural components “sign faces” and claiming the work is a refacing.

The Staff does not contest the affidavit of Mr. Miller that the signs were originally legally installed. All the signs in question were considered legal non-conforming under the South Bend Zoning Ordinance until the work conducted by Lamar beginning on or about July 2022 which made changes to structural components of the sign. The impact of this work on the signs’ legal non-conforming status will be discussed more fully below in the Staff analysis of Appeal Issue No. 2.

The affidavit of Mr. Rush states that they review ordinances as part of due diligence and cites the section of the South Bend Zoning Ordinance related to permits. He states that when an ordinance is as clear and concise as the South Bend Zoning Ordinance, they are not required to contact the zoning department before proceeding. He offers the affidavits of Mr. Yoakum and Mr. Odum as evidence that the work performed was a reface, but he ignores the portion of the requirement that it does not apply to a change to any structural component. Every municipality across the country is regulated by different zoning ordinances. Lamar did not call or email the City during the due diligence

process, which is customary in many real estate transactions. Doing so would have avoided any confusion or misinterpretations.

The affidavit of Ms. Loup states it is the usual and customary business practice of Lamar to update the name and trade dress for the billboards acquired. The Staff did not object and did not cite Lamar for the repainting of the sign structures and replacement of the Burkhardt logo with the Lamar logo. The staff is unaware of the statement about “affixing a frame to its poster faces” as we did not see evidence of frames added. As depicted in photographs taken by Staff, frames were removed in the process of changing the metal component of the sign. While that may result in a reduction in the sign area, it does not negate the need for a permit based upon the change to a structural component.

The affidavit from Mr. Yoakum provided a graphic in support of Lamar’s claim that the metal panels would be considered the sign face. While there was no source provided for the graphic, it is definitively not part of the South Bend Zoning Ordinance. Therefore, it is not relevant to this case. Also presented is a graphic for the interior view of a sign cabinet, which is, again, not a graphic from the South Bend Zoning Ordinance. Neither of these items refutes the Staff interpretation that the portion of the sign removed was a structural component. He also mentions that the metal portion of the sign can get damaged and need repair. While that may be permitted in some municipalities, that practice within the City of South Bend would likely violate Section 21-13.01: Nonconformities, because the action would extend the life of a nonconforming sign. Again, the Staff disagrees that only the footings and the uprights are structural. As will be described in more detail below with respect to Indiana law, the City of South Bend Zoning Ordinance makes clear that its definition of structure includes an attachment to something having a fixed location on the ground. The fact that other communities may include such graphics or make such distinctions does not compel the City of South Bend to do so, nor does the fact that other communities have not challenged this practice.

The affidavit of Mr. Odom provides information regarding the services his company, ProFab, offers. It notes improvements in the industry from copy printed on paper to the use of vinyl and the change in how the vinyl is stretched. The material of the sign and how they are hung does not affect whether a permit is needed. Also, the fact that another company makes what they call the “face” does not mean that that element is not a structural component. It simply means that component is manufactured by another company. It is customary in many buildings and structures for various components to be made by different companies, much like a wall versus a roof of a building.

The use of the word “cabinet” in the violation notice has spurred a lot of discussion as to whether the component removed was a “face” or “cabinet.” However, the word “cabinet” never appears within Section 21-10.01(c) Permits Required. Because that

element of a sign is commonly referred to as a cabinet in South Bend, that terminology was used in the notice. Whether referred to as a “cabinet” or a “face,” the element replaced on the signs in question is clearly a structural component. The Zoning Ordinance clearly states that a permit is needed when a change is made to any structural component of the sign. The definition of structure and the distinction between a structure and the advertising copy is further supported by the Indiana Court of Appeals decision, *Cracker Barrel Old Country Store, Inc. v. Town of Plainfield ex rel. Plainfield Plan Com’n*, 848 N.E.2d 285 (Ind. Ct. App. 2006).

In *Cracker Barrel*, the restaurant constructed a sign consisting of “two surfaces, a cabinet, internal lighting, and a pole.” This sign was considered a legal non-conforming use under the Town of Plainfield’s Zoning Ordinance. Later, Cracker Barrel desired to perform work on the sign and were advised that they could “reface the existing surfaces without removing them from the structure. No permit was required to perform this work so long as Cracker Barrel swapped out existing panels with same type and size new panels . . . if the restaurant removed the cabinet from the sign structure, the sign would lose its pre-existing, legally established, non-conforming use status.” While the work was performed, the contractor detached the sign cabinet from the top of the sign and temporarily lowered it to the ground. The Town of Plainfield issued zoning violations, in part, based upon the sign losing its legal non-conforming use status.

Cracker Barrel argued that the work performed on the sign constituted maintenance under the Zoning Ordinance. Plainfield’s Zoning Ordinance permitted maintenance or replacement of sign surfaces, but it stated that if a structure is moved for any reason, it loses its legal non-conforming status. The Ordinance defined “structure” as “anything constructed or erected, the use of which requires location on the ground, or attachment to something having a fixed location on the ground.”

In its decision in favor of the Town of Plainfield, the court stated it was “undisputed under the definitions that Cracker Barrel moved its ‘sign’ and ‘sign structure,’ i.e., the cabinet and framework that housed the sign surface.” That movement caused the sign to lose its legal non-conforming status. The court disagreed with Cracker Barrel’s argument that it would have had to move the entire pole before violating that provision of the Ordinance. Instead, the court determined that because the definition of structure included an “attachment to something having a fixed location on the ground,” this definition included the component referred to as the “cabinet and framework that housed the sign surface.”

The facts of the *Cracker Barrel* case are nearly identical to the facts of this dispute. Just as Cracker Barrel’s removal of the sign cabinet from the pole was determined by the court to be the removal of a structural component, the work that Lamar performed on its South Bend signs, as depicted in the Staff photographs, was the removal of a structural component. As a result, Lamar was required to obtain a permit.

No matter the term, the work performed is clearly a violation from Section 21-13.02(f)(1) Failure to obtain an improvement location permit when one is required by the terms and provisions of this Ordinance.

Appeal #2: The issuance of a violation for the location, erection, or maintenance of any sign not specifically permitted by this Ordinance.

Section 21-10.07(b) states “Off-premise signs shall only be permitted in a C or I district.” This property is zoned NC Neighborhood Center District. Off-premise signs are not permitted in the NC District. A sign permit cannot be issued except in conformance with signs allowed on the property.

Lamar contends that the sign is legal nonconforming and states that since they are not in violation of work without a permit, the sign is unchanged and remains legal nonconforming. However, even if no permit was required, a legal nonconforming sign can only have normal and routine maintenance performed on the sign in strict application of Section 21-13.01(i) Legally Established Nonconforming Signs.

Section 21-13.01(i)(2) specifically outlines the conditions under which legally established nonconforming sign may receive normal and routine repair and maintenance. The evidence presented by Lamar states that the sign area was decreased in size, thus the nonconformity was decreased. While this may be true, Section 21-13.01(i)(2)(B) clearly states that only applies if the sign was approved through the grant of a variance. The sign in question has never received a variance. Therefore, the work performed was not legal as normal maintenance and repair. This section also would not avoid the violation in light of the provisions of (C).

Subsection 21-13.019i)(2)(C) specifically states that “the removal of a sign structure or a sign cabinet shall be deemed definitive evidence that such sign requires work beyond normal maintenance.” This is consistent with the intent of this Article which states that legally established nonconforming signs may “continue until they are removed, but not to encourage their survival.”

The analysis above with respect to Appeal Issue No. 1 sets forth in greater detail the basis for the Staff’s position that the work performed on the signs constituted the removal of a sign structure or sign cabinet. This was also the precise issue before the Court of Appeals in the *Cracker Barrel* case. As noted above, the court held that the removal of the sign cabinet, which was a structural component attached to something having a fixed location on the ground, was the removal of a structural component. As a result, this work removed the sign from its legal nonconforming status, and the court

upheld the trial court's determination that the sign must be removed. The work that was actually performed to Cracker Barrel's sign was nearly identical to the work performed on Lamar's signs throughout South Bend. As a result, the same conclusion is warranted that the work constituted the removal of a structure.

Not only does the Staff contend that the work performed would constitute the removal of a sign structure or sign cabinet, which definitively indicates it is beyond normal maintenance and repair by the clear language of the Zoning Ordinance, but it is also clear that replacing any portion of the sign structure would extend the life of the sign and encourage its survival. Once this work was performed on the sign and was performed without a permit, it no longer remained otherwise lawful. Any maintenance or repair to the sign moving forward can only be performed under the conditions of the Ordinance.

memo

To: Board of Zoning Appeals
From: Angela M. Smith
CC: Tom Panowicz
Date: January 27, 2023
Re: Administrative Appeal for 416 S William

Background:

Off-premise advertising signs, typically referred to as billboards, are regulated under Article 10: Signs, of the South Bend Zoning Ordinance. While the development standards for off-premise signs are different from on-premise, Section 21-10.01 General Provisions apply to both classifications of signs. The intent of Article 10 includes the following:

- (1) Encourage the effective use of signs as a means of communication;
- (2) Encourage signs which, by their design, are integrated with and harmonious to the buildings and sites which they occupy;
- (3) Eliminate excessive and confusing sign displays;
- (4) Maintain and improve the appearance of the City as an attractive place in which to live and conduct business;
- (5) Safeguard and enhance property values by minimizing the possible adverse effects of signs on nearby properties;
- (6) Protect public and private investment in buildings and open spaces; and
- (7) Eliminate potential hazards to motorists and pedestrians resulting from signs.

Based on the intent and general impact of this sign type, off-premise signs have been limited to the C Commercial and I Industrial Districts in the City. Any sign within a district other than C or I is considered legal non-conforming, provided it otherwise meets the requirements for a legal non-conforming use. Legal non-conforming signs are regulated by Section 21-13.01(i).

On Sunday, July 17, 2022, a City Staff person noticed an off-premise sign being modified. The photo was sent to my attention on July 18th.



Photos sent July 17, 2022 – 208 Sample

On July 19th, I notified my contact from Lamar, Terry O’Brien, that this type of work would require a permit and provided details, as described more fully below. On July 20th, I witnessed additional work on a nearby site. A meeting was immediately set between the City and Lamar on July 21st, 2022. Despite repeated requests from the City, Lamar did not provide a full list of sites modified. However, Staff was able to identify and document several locations. Over the next couple months, a series of communications and meetings occurred. In September, when no further progress was being made, the Staff began the formal enforcement process.

Section 21-10.01(c)(1) states, “All sign types described in this section, except those listed as exempt require a permit.” Section 21-10.01(c)(2) states: “Painting, cleaning, refacing, or other normal maintenance and repair of a sign does not require a sign permit, **provided that no change is made to any structural component of the sign.**” [emphasis added]

The South Bend Zoning Ordinance offers the following definition:

Structure. Anything constructed or erected, the use of which requires location on the ground, or attachment to something having a fixed location on the ground. Among other things, structures include buildings, mobile homes, fences, walls, parking areas, loading areas, towers, antenna, and signs.

Component is not defined, however, Section 21-02.01(a) states that “Words not defined in this Ordinance are interpreted in accord with their usual dictionary meaning and customary usage.” The Zoning Administrator is the individual responsible for making those interpretations. It is not at the discretion of the property owner or petitioner. The

Merriam Webster Dictionary defines component as: “a constituent (constituent: serving the form, compose, or make up a unit or whole) part.”

Example of sign in process – 510 Lincolnway West (source: Google)



Note: During this process, Section 20-84 Parking on sidewalk, alley or parkway was violated. This is not covered by the South Bend Zoning Ordinance, but illustrates lack of due diligence in municipal requirements.

It is the Staff's position that the work performed on the various locations included a change to a structural component of the sign. Thus, a sign permit is required prior to any work being completed on the signs. The advertising copy, whether vinyl or paper, cannot be displayed or supported without the panel behind them to help distribute wind load and hold the advertising face in place. The Ordinance allows the advertising face (the vinyl that displays the message) to be replaced as a face change without requiring a permit, but the work performed by Lamar including changing the advertising face and the structural component to which it is attached. The change can be seen in the removal of the white frame and back support panel and the installation of a new support panel with rounded corners to hold the advertising copy.



Before – August, 2019



After – July, 2022

Based on the information outlined above and the photographic evidence of a change to the structural component of the sign, a notice of violation was sent to the property owner and to Lamar, as tenant, on September 16, 2022. We continued to work with Lamar to resolve the issue, but, again, became stalled, so a second notice was sent to Lamar on November 10, 2022. The second notice is being appealed by Lamar.

Appeal #1: The issuance of a violation for failure to obtain an improvement location permit.

Section 21-10.01(c)(1) states, “All sign types described in this section, except those listed as exempt require a permit.” As noted above, the sign work performed at this site is not listed as an exempt sign type. Since the work performed is a change to a structural component, it is not exempt as routine maintenance.

The evidence provided by Lamar repeatedly mentions customary practices performed by Lamar to improve aesthetics and safety. However, every municipality has their own ordinance, regulations, and interpretations thereof. No effort was made to contact the City during any of their due diligence process to verify the City’s interpretation of the Ordinance. Lamar’s identification of customary business practices does not avoid the requirement to employ those practices in compliance with the City of South Bend Zoning Ordinance.

The claim that because Lamar considers the metal panel to be the “sign face” and, thus, this would qualify as a reface, ignores the qualifying element of the sentence, “provided that no change is made to **any structural component** of the sign” [emphasis added]. At no point has Lamar claimed or presented any evidence to demonstrate that the advertising copy could be displayed without the metal panels that were replaced on the sign. The terms used to describe the metal panels do not change the fact that these are a structural component of the sign. The photographs taken by Staff demonstrate that the component of the sign which was removed to perform this work was a structural component. Lamar cannot avoid the requirement to obtain a permit for a change to a structural component by calling their structural components “sign faces” and claiming the work is a refacing.

The Staff does not contest the affidavit of Mr. Miller that the signs were originally legally installed. All the signs in question were considered legal non-conforming under the South Bend Zoning Ordinance until the work conducted by Lamar beginning on or about July 2022 which made changes to structural components of the sign. The impact of this work on the signs’ legal non-conforming status will be discussed more fully below in the Staff analysis of Appeal Issue No. 2.

The affidavit of Mr. Rush states that they review ordinances as part of due diligence and cites the section of the South Bend Zoning Ordinance related to permits. He states that when an ordinance is as clear and concise as the South Bend Zoning Ordinance, they are not required to contact the zoning department before proceeding. He offers the affidavits of Mr. Yoakum and Mr. Odum as evidence that the work performed was a reface, but he ignores the portion of the requirement that it does not apply to a change to any structural component. Every municipality across the country is regulated by different zoning ordinances. Lamar did not call or email the City during the due diligence

process, which is customary in many real estate transactions. Doing so would have avoided any confusion or misinterpretations.

The affidavit of Ms. Loup states it is the usual and customary business practice of Lamar to update the name and trade dress for the billboards acquired. The Staff did not object and did not cite Lamar for the repainting of the sign structures and replacement of the Burkhardt logo with the Lamar logo. The staff is unaware of the statement about “affixing a frame to its poster faces” as we did not see evidence of frames added. As depicted in photographs taken by Staff, frames were removed in the process of changing the metal component of the sign. While that may result in a reduction in the sign area, it does not negate the need for a permit based upon the change to a structural component.

The affidavit from Mr. Yoakum provided a graphic in support of Lamar’s claim that the metal panels would be considered the sign face. While there was no source provided for the graphic, it is definitively not part of the South Bend Zoning Ordinance. Therefore, it is not relevant to this case. Also presented is a graphic for the interior view of a sign cabinet, which is, again, not a graphic from the South Bend Zoning Ordinance. Neither of these items refutes the Staff interpretation that the portion of the sign removed was a structural component. He also mentions that the metal portion of the sign can get damaged and need repair. While that may be permitted in some municipalities, that practice within the City of South Bend would likely violate Section 21-13.01: Nonconformities, because the action would extend the life of a nonconforming sign. Again, the Staff disagrees that only the footings and the uprights are structural. As will be described in more detail below with respect to Indiana law, the City of South Bend Zoning Ordinance makes clear that its definition of structure includes an attachment to something having a fixed location on the ground. The fact that other communities may include such graphics or make such distinctions does not compel the City of South Bend to do so, nor does the fact that other communities have not challenged this practice.

The affidavit of Mr. Odom provides information regarding the services his company, ProFab, offers. It notes improvements in the industry from copy printed on paper to the use of vinyl and the change in how the vinyl is stretched. The material of the sign and how they are hung does not affect whether a permit is needed. Also, the fact that another company makes what they call the “face” does not mean that that element is not a structural component. It simply means that component is manufactured by another company. It is customary in many buildings and structures for various components to be made by different companies, much like a wall versus a roof of a building.

The use of the word “cabinet” in the violation notice has spurred a lot of discussion as to whether the component removed was a “face” or “cabinet.” However, the word “cabinet” never appears within Section 21-10.01(c) Permits Required. Because that

element of a sign is commonly referred to as a cabinet in South Bend, that terminology was used in the notice. Whether referred to as a “cabinet” or a “face,” the element replaced on the signs in question is clearly a structural component. The Zoning Ordinance clearly states that a permit is needed when a change is made to any structural component of the sign. The definition of structure and the distinction between a structure and the advertising copy is further supported by the Indiana Court of Appeals decision, *Cracker Barrel Old Country Store, Inc. v. Town of Plainfield ex rel. Plainfield Plan Com’n*, 848 N.E.2d 285 (Ind. Ct. App. 2006).

In *Cracker Barrel*, the restaurant constructed a sign consisting of “two surfaces, a cabinet, internal lighting, and a pole.” This sign was considered a legal non-conforming use under the Town of Plainfield’s Zoning Ordinance. Later, Cracker Barrel desired to perform work on the sign and were advised that they could “reface the existing surfaces without removing them from the structure. No permit was required to perform this work so long as Cracker Barrel swapped out existing panels with same type and size new panels . . . if the restaurant removed the cabinet from the sign structure, the sign would lose its pre-existing, legally established, non-conforming use status.” While the work was performed, the contractor detached the sign cabinet from the top of the sign and temporarily lowered it to the ground. The Town of Plainfield issued zoning violations, in part, based upon the sign losing its legal non-conforming use status.

Cracker Barrel argued that the work performed on the sign constituted maintenance under the Zoning Ordinance. Plainfield’s Zoning Ordinance permitted maintenance or replacement of sign surfaces, but it stated that if a structure is moved for any reason, it loses its legal non-conforming status. The Ordinance defined “structure” as “anything constructed or erected, the use of which requires location on the ground, or attachment to something having a fixed location on the ground.”

In its decision in favor of the Town of Plainfield, the court stated it was “undisputed under the definitions that Cracker Barrel moved its ‘sign’ and ‘sign structure,’ i.e., the cabinet and framework that housed the sign surface.” That movement caused the sign to lose its legal non-conforming status. The court disagreed with Cracker Barrel’s argument that it would have had to move the entire pole before violating that provision of the Ordinance. Instead, the court determined that because the definition of structure included an “attachment to something having a fixed location on the ground,” this definition included the component referred to as the “cabinet and framework that housed the sign surface.”

The facts of the *Cracker Barrel* case are nearly identical to the facts of this dispute. Just as Cracker Barrel’s removal of the sign cabinet from the pole was determined by the court to be the removal of a structural component, the work that Lamar performed on its South Bend signs, as depicted in the Staff photographs, was the removal of a structural component. As a result, Lamar was required to obtain a permit.

No matter the term, the work performed is clearly a violation from Section 21-13.02(f)(1) Failure to obtain an improvement location permit when one is required by the terms and provisions of this Ordinance.

Appeal #2: The issuance of a violation for the location, erection, or maintenance of any sign not specifically permitted by this Ordinance.

Section 21-10.07(b) states “Off-premise signs shall only be permitted in a C or I district.” This property is zoned NC Neighborhood Center District. Off-premise signs are not permitted in the NC District. A sign permit cannot be issued except in conformance with signs allowed on the property.

Lamar contends that the sign is legal nonconforming and states that since they are not in violation of work without a permit, the sign is unchanged and remains legal nonconforming. However, even if no permit was required, a legal nonconforming sign can only have normal and routine maintenance performed on the sign in strict application of Section 21-13.01(i) Legally Established Nonconforming Signs.

Section 21-13.01(i)(2) specifically outlines the conditions under which legally established nonconforming sign may receive normal and routine repair and maintenance. The evidence presented by Lamar states that the sign area was decreased in size, thus the nonconformity was decreased. While this may be true, Section 21-13.01(i)(2)(B) clearly states that only applies if the sign was approved through the grant of a variance. The sign in question has never received a variance. Therefore, the work performed was not legal as normal maintenance and repair. This section also would not avoid the violation in light of the provisions of (C).

Subsection 21-13.019(i)(2)(C) specifically states that “the removal of a sign structure or a sign cabinet shall be deemed definitive evidence that such sign requires work beyond normal maintenance.” This is consistent with the intent of this Article which states that legally established nonconforming signs may “continue until they are removed, but not to encourage their survival.”

The analysis above with respect to Appeal Issue No. 1 sets forth in greater detail the basis for the Staff’s position that the work performed on the signs constituted the removal of a sign structure or sign cabinet. This was also the precise issue before the Court of Appeals in the *Cracker Barrel* case. As noted above, the court held that the removal of the sign cabinet, which was a structural component attached to something having a fixed location on the ground, was the removal of a structural component. As a result, this work removed the sign from its legal nonconforming status, and the court

upheld the trial court's determination that the sign must be removed. The work that was actually performed to Cracker Barrel's sign was nearly identical to the work performed on Lamar's signs throughout South Bend. As a result, the same conclusion is warranted that the work constituted the removal of a structure.

Not only does the Staff contend that the work performed would constitute the removal of a sign structure or sign cabinet, which definitively indicates it is beyond normal maintenance and repair by the clear language of the Zoning Ordinance, but it is also clear that replacing any portion of the sign structure would extend the life of the sign and encourage its survival. Once this work was performed on the sign and was performed without a permit, it no longer remained otherwise lawful. Any maintenance or repair to the sign moving forward can only be performed under the conditions of the Ordinance.

memo

To: Board of Zoning Appeals
From: Angela M. Smith
CC: Tom Panowicz
Date: January 27, 2023
Re: Administrative Appeal for 429 Main

Background:

Off-premise advertising signs, typically referred to as billboards, are regulated under Article 10: Signs, of the South Bend Zoning Ordinance. While the development standards for off-premise signs are different from on-premise, Section 21-10.01 General Provisions apply to both classifications of signs. The intent of Article 10 includes the following:

- (1) Encourage the effective use of signs as a means of communication;
- (2) Encourage signs which, by their design, are integrated with and harmonious to the buildings and sites which they occupy;
- (3) Eliminate excessive and confusing sign displays;
- (4) Maintain and improve the appearance of the City as an attractive place in which to live and conduct business;
- (5) Safeguard and enhance property values by minimizing the possible adverse effects of signs on nearby properties;
- (6) Protect public and private investment in buildings and open spaces; and
- (7) Eliminate potential hazards to motorists and pedestrians resulting from signs.

Based on the intent and general impact of this sign type, off-premise signs have been limited to the C Commercial and I Industrial Districts in the City. Any sign within a district other than C or I is considered legal non-conforming, provided it otherwise meets the requirements for a legal non-conforming use. Legal non-conforming signs are regulated by Section 21-13.01(i).

On Sunday, July 17, 2022, a City Staff person noticed an off-premise sign being modified. The photo was sent to my attention on July 18th.



Photos sent July 17, 2022 – 208 Sample

On July 19th, I notified my contact from Lamar, Terry O’Brien, that this type of work would require a permit and provided details, as described more fully below. On July 20th, I witnessed additional work on a nearby site. A meeting was immediately set between the City and Lamar on July 21st, 2022. Despite repeated requests from the City, Lamar did not provide a full list of sites modified. However, Staff was able to identify and document several locations. Over the next couple months, a series of communications and meetings occurred. In September, when no further progress was being made, the Staff began the formal enforcement process.

Section 21-10.01(c)(1) states, “All sign types described in this section, except those listed as exempt require a permit.” Section 21-10.01(c)(2) states: “Painting, cleaning, refacing, or other normal maintenance and repair of a sign does not require a sign permit, **provided that no change is made to any structural component of the sign.**” [emphasis added]

The South Bend Zoning Ordinance offers the following definition:

Structure. Anything constructed or erected, the use of which requires location on the ground, or attachment to something having a fixed location on the ground. Among other things, structures include buildings, mobile homes, fences, walls, parking areas, loading areas, towers, antenna, and signs.

Component is not defined, however, Section 21-02.01(a) states that “Words not defined in this Ordinance are interpreted in accord with their usual dictionary meaning and customary usage.” The Zoning Administrator is the individual responsible for making those interpretations. It is not at the discretion of the property owner or petitioner. The

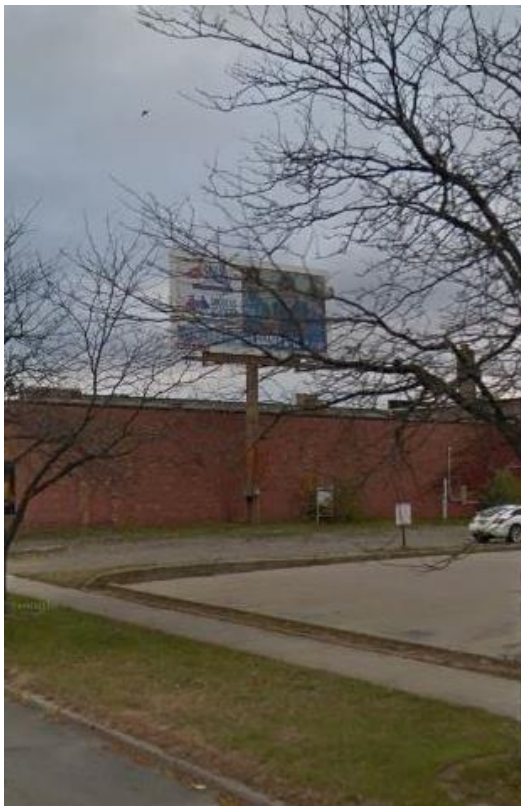
Merriam Webster Dictionary defines component as: “a constituent (constituent: serving the form, compose, or make up a unit or whole) part.”

Example of sign in process – 510 Lincolnway West (source: Google)



Note: During this process, Section 20-84 Parking on sidewalk, alley or parkway was violated. This is not covered by the South Bend Zoning Ordinance, but illustrates lack of due diligence in municipal requirements.

It is the Staff's position that the work performed on the various locations included a change to a structural component of the sign. Thus, a sign permit is required prior to any work being completed on the signs. The advertising copy, whether vinyl or paper, cannot be displayed or supported without the panel behind them to help distribute wind load and hold the advertising face in place. The Ordinance allows the advertising face (the vinyl that displays the message) to be replaced as a face change without requiring a permit, but the work performed by Lamar including changing the advertising face and the structural component to which it is attached. The change can be seen in the removal of the white frame and back support panel and the installation of a new support panel with rounded corners to hold the advertising copy.



Before – August, 2019



After – July, 2022

Based on the information outlined above and the photographic evidence of a change to the structural component of the sign, a notice of violation was sent to the property owner and to Lamar, as tenant, on September 16, 2022. We continued to work with Lamar to resolve the issue, but, again, became stalled, so a second notice was sent to Lamar on November 10, 2022. The second notice is being appealed by Lamar.

Appeal #1: The issuance of a violation for failure to obtain an improvement location permit.

Section 21-10.01(c)(1) states, “All sign types described in this section, except those listed as exempt require a permit.” As noted above, the sign work performed at this site is not listed as an exempt sign type. Since the work performed is a change to a structural component, it is not exempt as routine maintenance.

The evidence provided by Lamar repeatedly mentions customary practices performed by Lamar to improve aesthetics and safety. However, every municipality has their own ordinance, regulations, and interpretations thereof. No effort was made to contact the City during any of their due diligence process to verify the City’s interpretation of the Ordinance. Lamar’s identification of customary business practices does not avoid the requirement to employ those practices in compliance with the City of South Bend Zoning Ordinance.

The claim that because Lamar considers the metal panel to be the “sign face” and, thus, this would qualify as a reface, ignores the qualifying element of the sentence, “provided that no change is made to **any structural component** of the sign” [emphasis added]. At no point has Lamar claimed or presented any evidence to demonstrate that the advertising copy could be displayed without the metal panels that were replaced on the sign. The terms used to describe the metal panels do not change the fact that these are a structural component of the sign. The photographs taken by Staff demonstrate that the component of the sign which was removed to perform this work was a structural component. Lamar cannot avoid the requirement to obtain a permit for a change to a structural component by calling their structural components “sign faces” and claiming the work is a refacing.

The Staff does not contest the affidavit of Mr. Miller that the signs were originally legally installed. All the signs in question were considered legal non-conforming under the South Bend Zoning Ordinance until the work conducted by Lamar beginning on or about July 2022 which made changes to structural components of the sign. The impact of this work on the signs’ legal non-conforming status will be discussed more fully below in the Staff analysis of Appeal Issue No. 2.

The affidavit of Mr. Rush states that they review ordinances as part of due diligence and cites the section of the South Bend Zoning Ordinance related to permits. He states that when an ordinance is as clear and concise as the South Bend Zoning Ordinance, they are not required to contact the zoning department before proceeding. He offers the affidavits of Mr. Yoakum and Mr. Odum as evidence that the work performed was a reface, but he ignores the portion of the requirement that it does not apply to a change to any structural component. Every municipality across the country is regulated by different zoning ordinances. Lamar did not call or email the City during the due diligence

process, which is customary in many real estate transactions. Doing so would have avoided any confusion or misinterpretations.

The affidavit of Ms. Loup states it is the usual and customary business practice of Lamar to update the name and trade dress for the billboards acquired. The Staff did not object and did not cite Lamar for the repainting of the sign structures and replacement of the Burkhardt logo with the Lamar logo. The staff is unaware of the statement about “affixing a frame to its poster faces” as we did not see evidence of frames added. As depicted in photographs taken by Staff, frames were removed in the process of changing the metal component of the sign. While that may result in a reduction in the sign area, it does not negate the need for a permit based upon the change to a structural component.

The affidavit from Mr. Yoakum provided a graphic in support of Lamar’s claim that the metal panels would be considered the sign face. While there was no source provided for the graphic, it is definitively not part of the South Bend Zoning Ordinance. Therefore, it is not relevant to this case. Also presented is a graphic for the interior view of a sign cabinet, which is, again, not a graphic from the South Bend Zoning Ordinance. Neither of these items refutes the Staff interpretation that the portion of the sign removed was a structural component. He also mentions that the metal portion of the sign can get damaged and need repair. While that may be permitted in some municipalities, that practice within the City of South Bend would likely violate Section 21-13.01: Nonconformities, because the action would extend the life of a nonconforming sign. Again, the Staff disagrees that only the footings and the uprights are structural. As will be described in more detail below with respect to Indiana law, the City of South Bend Zoning Ordinance makes clear that its definition of structure includes an attachment to something having a fixed location on the ground. The fact that other communities may include such graphics or make such distinctions does not compel the City of South Bend to do so, nor does the fact that other communities have not challenged this practice.

The affidavit of Mr. Odom provides information regarding the services his company, ProFab, offers. It notes improvements in the industry from copy printed on paper to the use of vinyl and the change in how the vinyl is stretched. The material of the sign and how they are hung does not affect whether a permit is needed. Also, the fact that another company makes what they call the “face” does not mean that that element is not a structural component. It simply means that component is manufactured by another company. It is customary in many buildings and structures for various components to be made by different companies, much like a wall versus a roof of a building.

The use of the word “cabinet” in the violation notice has spurred a lot of discussion as to whether the component removed was a “face” or “cabinet.” However, the word “cabinet” never appears within Section 21-10.01(c) Permits Required. Because that

element of a sign is commonly referred to as a cabinet in South Bend, that terminology was used in the notice. Whether referred to as a “cabinet” or a “face,” the element replaced on the signs in question is clearly a structural component. The Zoning Ordinance clearly states that a permit is needed when a change is made to any structural component of the sign. The definition of structure and the distinction between a structure and the advertising copy is further supported by the Indiana Court of Appeals decision, *Cracker Barrel Old Country Store, Inc. v. Town of Plainfield ex rel. Plainfield Plan Com’n*, 848 N.E.2d 285 (Ind. Ct. App. 2006).

In *Cracker Barrel*, the restaurant constructed a sign consisting of “two surfaces, a cabinet, internal lighting, and a pole.” This sign was considered a legal non-conforming use under the Town of Plainfield’s Zoning Ordinance. Later, Cracker Barrel desired to perform work on the sign and were advised that they could “reface the existing surfaces without removing them from the structure. No permit was required to perform this work so long as Cracker Barrel swapped out existing panels with same type and size new panels . . . if the restaurant removed the cabinet from the sign structure, the sign would lose its pre-existing, legally established, non-conforming use status.” While the work was performed, the contractor detached the sign cabinet from the top of the sign and temporarily lowered it to the ground. The Town of Plainfield issued zoning violations, in part, based upon the sign losing its legal non-conforming use status.

Cracker Barrel argued that the work performed on the sign constituted maintenance under the Zoning Ordinance. Plainfield’s Zoning Ordinance permitted maintenance or replacement of sign surfaces, but it stated that if a structure is moved for any reason, it loses its legal non-conforming status. The Ordinance defined “structure” as “anything constructed or erected, the use of which requires location on the ground, or attachment to something having a fixed location on the ground.”

In its decision in favor of the Town of Plainfield, the court stated it was “undisputed under the definitions that Cracker Barrel moved its ‘sign’ and ‘sign structure,’ i.e., the cabinet and framework that housed the sign surface.” That movement caused the sign to lose its legal non-conforming status. The court disagreed with Cracker Barrel’s argument that it would have had to move the entire pole before violating that provision of the Ordinance. Instead, the court determined that because the definition of structure included an “attachment to something having a fixed location on the ground,” this definition included the component referred to as the “cabinet and framework that housed the sign surface.”

The facts of the *Cracker Barrel* case are nearly identical to the facts of this dispute. Just as Cracker Barrel’s removal of the sign cabinet from the pole was determined by the court to be the removal of a structural component, the work that Lamar performed on its South Bend signs, as depicted in the Staff photographs, was the removal of a structural component. As a result, Lamar was required to obtain a permit.

No matter the term, the work performed is clearly a violation from Section 21-13.02(f)(1) Failure to obtain an improvement location permit when one is required by the terms and provisions of this Ordinance.

Appeal #2: The issuance of a violation for the location, erection, or maintenance of any sign not specifically permitted by this Ordinance.

Section 21-10.07(b) states “Off-premise signs shall only be permitted in a C or I district.” This property is zoned NC Neighborhood Center District. Off-premise signs are not permitted in the NC District. A sign permit cannot be issued except in conformance with signs allowed on the property.

Lamar contends that the sign is legal nonconforming and states that since they are not in violation of work without a permit, the sign is unchanged and remains legal nonconforming. However, even if no permit was required, a legal nonconforming sign can only have normal and routine maintenance performed on the sign in strict application of Section 21-13.01(i) Legally Established Nonconforming Signs.

Section 21-13.01(i)(2) specifically outlines the conditions under which legally established nonconforming sign may receive normal and routine repair and maintenance. The evidence presented by Lamar states that the sign area was decreased in size, thus the nonconformity was decreased. While this may be true, Section 21-13.01(i)(2)(B) clearly states that only applies if the sign was approved through the grant of a variance. The sign in question has never received a variance. Therefore, the work performed was not legal as normal maintenance and repair. This section also would not avoid the violation in light of the provisions of (C).

Subsection 21-13.019i)(2)(C) specifically states that “the removal of a sign structure or a sign cabinet shall be deemed definitive evidence that such sign requires work beyond normal maintenance.” This is consistent with the intent of this Article which states that legally established nonconforming signs may “continue until they are removed, but not to encourage their survival.”

The analysis above with respect to Appeal Issue No. 1 sets forth in greater detail the basis for the Staff’s position that the work performed on the signs constituted the removal of a sign structure or sign cabinet. This was also the precise issue before the Court of Appeals in the *Cracker Barrel* case. As noted above, the court held that the removal of the sign cabinet, which was a structural component attached to something having a fixed location on the ground, was the removal of a structural component. As a result, this work removed the sign from its legal nonconforming status, and the court

upheld the trial court's determination that the sign must be removed. The work that was actually performed to Cracker Barrel's sign was nearly identical to the work performed on Lamar's signs throughout South Bend. As a result, the same conclusion is warranted that the work constituted the removal of a structure.

Not only does the Staff contend that the work performed would constitute the removal of a sign structure or sign cabinet, which definitively indicates it is beyond normal maintenance and repair by the clear language of the Zoning Ordinance, but it is also clear that replacing any portion of the sign structure would extend the life of the sign and encourage its survival. Once this work was performed on the sign and was performed without a permit, it no longer remained otherwise lawful. Any maintenance or repair to the sign moving forward can only be performed under the conditions of the Ordinance.

memo

To: Board of Zoning Appeals
From: Angela M. Smith
CC: Tom Panowicz
Date: January 27, 2023
Re: Administrative Appeal for 509 Main

Background:

Off-premise advertising signs, typically referred to as billboards, are regulated under Article 10: Signs, of the South Bend Zoning Ordinance. While the development standards for off-premise signs are different from on-premise, Section 21-10.01 General Provisions apply to both classifications of signs. The intent of Article 10 includes the following:

- (1) Encourage the effective use of signs as a means of communication;
- (2) Encourage signs which, by their design, are integrated with and harmonious to the buildings and sites which they occupy;
- (3) Eliminate excessive and confusing sign displays;
- (4) Maintain and improve the appearance of the City as an attractive place in which to live and conduct business;
- (5) Safeguard and enhance property values by minimizing the possible adverse effects of signs on nearby properties;
- (6) Protect public and private investment in buildings and open spaces; and
- (7) Eliminate potential hazards to motorists and pedestrians resulting from signs.

Based on the intent and general impact of this sign type, off-premise signs have been limited to the C Commercial and I Industrial Districts in the City. Any sign within a district other than C or I is considered legal non-conforming, provided it otherwise meets the requirements for a legal non-conforming use. Legal non-conforming signs are regulated by Section 21-13.01(i).

On Sunday, July 17, 2022, a City Staff person noticed an off-premise sign being modified. The photo was sent to my attention on July 18th.



Photos sent July 17, 2022 – 208 Sample

On July 19th, I notified my contact from Lamar, Terry O’Brien, that this type of work would require a permit and provided details, as described more fully below. On July 20th, I witnessed additional work on a nearby site. A meeting was immediately set between the City and Lamar on July 21st, 2022. Despite repeated requests from the City, Lamar did not provide a full list of sites modified. However, Staff was able to identify and document several locations. Over the next couple months, a series of communications and meetings occurred. In September, when no further progress was being made, the Staff began the formal enforcement process.

Section 21-10.01(c)(1) states, “All sign types described in this section, except those listed as exempt require a permit.” Section 21-10.01(c)(2) states: “Painting, cleaning, refacing, or other normal maintenance and repair of a sign does not require a sign permit, **provided that no change is made to any structural component of the sign.**” [emphasis added]

The South Bend Zoning Ordinance offers the following definition:

Structure. Anything constructed or erected, the use of which requires location on the ground, or attachment to something having a fixed location on the ground. Among other things, structures include buildings, mobile homes, fences, walls, parking areas, loading areas, towers, antenna, and signs.

Component is not defined, however, Section 21-02.01(a) states that “Words not defined in this Ordinance are interpreted in accord with their usual dictionary meaning and customary usage.” The Zoning Administrator is the individual responsible for making those interpretations. It is not at the discretion of the property owner or petitioner. The

Merriam Webster Dictionary defines component as: “a constituent (constituent: serving the form, compose, or make up a unit or whole) part.”

Example of sign in process – 510 Lincolnway West (source: Google)



Note: During this process, Section 20-84 Parking on sidewalk, alley or parkway was violated. This is not covered by the South Bend Zoning Ordinance, but illustrates lack of due diligence in municipal requirements.

It is the Staff's position that the work performed on the various locations included a change to a structural component of the sign. Thus, a sign permit is required prior to any work being completed on the signs. The advertising copy, whether vinyl or paper, cannot be displayed or supported without the panel behind them to help distribute wind load and hold the advertising face in place. The Ordinance allows the advertising face (the vinyl that displays the message) to be replaced as a face change without requiring a permit, but the work performed by Lamar including changing the advertising face and the structural component to which it is attached. The change can be seen in the removal of the white frame and back support panel and the installation of a new support panel with rounded corners to hold the advertising copy.



Before – June, 2022



After – July, 2022

Based on the information outlined above and the photographic evidence of a change to the structural component of the sign, a notice of violation was sent to the property owner and to Lamar, as tenant, on September 16, 2022. We continued to work with Lamar to resolve the issue, but, again, became stalled, so a second notice was sent to Lamar on November 10, 2022. The second notice is being appealed by Lamar.

Appeal #1: The issuance of a violation for failure to obtain an improvement location permit.

Section 21-10.01(c)(1) states, “All sign types described in this section, except those listed as exempt require a permit.” As noted above, the sign work performed at this site is not listed as an exempt sign type. Since the work performed is a change to a structural component, it is not exempt as routine maintenance.

The evidence provided by Lamar repeatedly mentions customary practices performed by Lamar to improve aesthetics and safety. However, every municipality has their own ordinance, regulations, and interpretations thereof. No effort was made to contact the City during any of their due diligence process to verify the City’s interpretation of the Ordinance. Lamar’s identification of customary business practices does not avoid the requirement to employ those practices in compliance with the City of South Bend Zoning Ordinance.

The claim that because Lamar considers the metal panel to be the “sign face” and, thus, this would qualify as a reface, ignores the qualifying element of the sentence, “provided that no change is made to **any structural component** of the sign” [emphasis added]. At no point has Lamar claimed or presented any evidence to demonstrate that the advertising copy could be displayed without the metal panels that were replaced on the sign. The terms used to describe the metal panels do not change the fact that these are a structural component of the sign. The photographs taken by Staff demonstrate that the component of the sign which was removed to perform this work was a structural component. Lamar cannot avoid the requirement to obtain a permit for a change to a structural component by calling their structural components “sign faces” and claiming the work is a refacing.

The Staff does not contest the affidavit of Mr. Miller that the signs were originally legally installed. All the signs in question were considered legal non-conforming under the South Bend Zoning Ordinance until the work conducted by Lamar beginning on or about July 2022 which made changes to structural components of the sign. The impact of this work on the signs’ legal non-conforming status will be discussed more fully below in the Staff analysis of Appeal Issue No. 2.

The affidavit of Mr. Rush states that they review ordinances as part of due diligence and cites the section of the South Bend Zoning Ordinance related to permits. He states that when an ordinance is as clear and concise as the South Bend Zoning Ordinance, they are not required to contact the zoning department before proceeding. He offers the affidavits of Mr. Yoakum and Mr. Odum as evidence that the work performed was a reface, but he ignores the portion of the requirement that it does not apply to a change to any structural component. Every municipality across the country is regulated by different zoning ordinances. Lamar did not call or email the City during the due diligence

process, which is customary in many real estate transactions. Doing so would have avoided any confusion or misinterpretations.

The affidavit of Ms. Loup states it is the usual and customary business practice of Lamar to update the name and trade dress for the billboards acquired. The Staff did not object and did not cite Lamar for the repainting of the sign structures and replacement of the Burkhardt logo with the Lamar logo. The staff is unaware of the statement about “affixing a frame to its poster faces” as we did not see evidence of frames added. As depicted in photographs taken by Staff, frames were removed in the process of changing the metal component of the sign. While that may result in a reduction in the sign area, it does not negate the need for a permit based upon the change to a structural component.

The affidavit from Mr. Yoakum provided a graphic in support of Lamar’s claim that the metal panels would be considered the sign face. While there was no source provided for the graphic, it is definitively not part of the South Bend Zoning Ordinance. Therefore, it is not relevant to this case. Also presented is a graphic for the interior view of a sign cabinet, which is, again, not a graphic from the South Bend Zoning Ordinance. Neither of these items refutes the Staff interpretation that the portion of the sign removed was a structural component. He also mentions that the metal portion of the sign can get damaged and need repair. While that may be permitted in some municipalities, that practice within the City of South Bend would likely violate Section 21-13.01: Nonconformities, because the action would extend the life of a nonconforming sign. Again, the Staff disagrees that only the footings and the uprights are structural. As will be described in more detail below with respect to Indiana law, the City of South Bend Zoning Ordinance makes clear that its definition of structure includes an attachment to something having a fixed location on the ground. The fact that other communities may include such graphics or make such distinctions does not compel the City of South Bend to do so, nor does the fact that other communities have not challenged this practice.

The affidavit of Mr. Odom provides information regarding the services his company, ProFab, offers. It notes improvements in the industry from copy printed on paper to the use of vinyl and the change in how the vinyl is stretched. The material of the sign and how they are hung does not affect whether a permit is needed. Also, the fact that another company makes what they call the “face” does not mean that that element is not a structural component. It simply means that component is manufactured by another company. It is customary in many buildings and structures for various components to be made by different companies, much like a wall versus a roof of a building.

The use of the word “cabinet” in the violation notice has spurred a lot of discussion as to whether the component removed was a “face” or “cabinet.” However, the word “cabinet” never appears within Section 21-10.01(c) Permits Required. Because that

element of a sign is commonly referred to as a cabinet in South Bend, that terminology was used in the notice. Whether referred to as a “cabinet” or a “face,” the element replaced on the signs in question is clearly a structural component. The Zoning Ordinance clearly states that a permit is needed when a change is made to any structural component of the sign. The definition of structure and the distinction between a structure and the advertising copy is further supported by the Indiana Court of Appeals decision, *Cracker Barrel Old Country Store, Inc. v. Town of Plainfield ex rel. Plainfield Plan Com’n*, 848 N.E.2d 285 (Ind. Ct. App. 2006).

In *Cracker Barrel*, the restaurant constructed a sign consisting of “two surfaces, a cabinet, internal lighting, and a pole.” This sign was considered a legal non-conforming use under the Town of Plainfield’s Zoning Ordinance. Later, Cracker Barrel desired to perform work on the sign and were advised that they could “reface the existing surfaces without removing them from the structure. No permit was required to perform this work so long as Cracker Barrel swapped out existing panels with same type and size new panels . . . if the restaurant removed the cabinet from the sign structure, the sign would lose its pre-existing, legally established, non-conforming use status.” While the work was performed, the contractor detached the sign cabinet from the top of the sign and temporarily lowered it to the ground. The Town of Plainfield issued zoning violations, in part, based upon the sign losing its legal non-conforming use status.

Cracker Barrel argued that the work performed on the sign constituted maintenance under the Zoning Ordinance. Plainfield’s Zoning Ordinance permitted maintenance or replacement of sign surfaces, but it stated that if a structure is moved for any reason, it loses its legal non-conforming status. The Ordinance defined “structure” as “anything constructed or erected, the use of which requires location on the ground, or attachment to something having a fixed location on the ground.”

In its decision in favor of the Town of Plainfield, the court stated it was “undisputed under the definitions that Cracker Barrel moved its ‘sign’ and ‘sign structure,’ i.e., the cabinet and framework that housed the sign surface.” That movement caused the sign to lose its legal non-conforming status. The court disagreed with Cracker Barrel’s argument that it would have had to move the entire pole before violating that provision of the Ordinance. Instead, the court determined that because the definition of structure included an “attachment to something having a fixed location on the ground,” this definition included the component referred to as the “cabinet and framework that housed the sign surface.”

The facts of the *Cracker Barrel* case are nearly identical to the facts of this dispute. Just as Cracker Barrel’s removal of the sign cabinet from the pole was determined by the court to be the removal of a structural component, the work that Lamar performed on its South Bend signs, as depicted in the Staff photographs, was the removal of a structural component. As a result, Lamar was required to obtain a permit.

No matter the term, the work performed is clearly a violation from Section 21-13.02(f)(1) Failure to obtain an improvement location permit when one is required by the terms and provisions of this Ordinance.

Appeal #2: The issuance of a violation for the location, erection, or maintenance of any sign not specifically permitted by this Ordinance.

Section 21-10.07(b) states “Off-premise signs shall only be permitted in a C or I district.” This property is zoned NC Neighborhood Center District. Off-premise signs are not permitted in the NC District. A sign permit cannot be issued except in conformance with signs allowed on the property.

Lamar contends that the sign is legal nonconforming and states that since they are not in violation of work without a permit, the sign is unchanged and remains legal nonconforming. However, even if no permit was required, a legal nonconforming sign can only have normal and routine maintenance performed on the sign in strict application of Section 21-13.01(i) Legally Established Nonconforming Signs.

Section 21-13.01(i)(2) specifically outlines the conditions under which legally established nonconforming sign may receive normal and routine repair and maintenance. The evidence presented by Lamar states that the sign area was decreased in size, thus the nonconformity was decreased. While this may be true, Section 21-13.01(i)(2)(B) clearly states that only applies if the sign was approved through the grant of a variance. The sign in question has never received a variance. Therefore, the work performed was not legal as normal maintenance and repair. This section also would not avoid the violation in light of the provisions of (C).

Subsection 21-13.019(i)(2)(C) specifically states that “the removal of a sign structure or a sign cabinet shall be deemed definitive evidence that such sign requires work beyond normal maintenance.” This is consistent with the intent of this Article which states that legally established nonconforming signs may “continue until they are removed, but not to encourage their survival.”

The analysis above with respect to Appeal Issue No. 1 sets forth in greater detail the basis for the Staff’s position that the work performed on the signs constituted the removal of a sign structure or sign cabinet. This was also the precise issue before the Court of Appeals in the *Cracker Barrel* case. As noted above, the court held that the removal of the sign cabinet, which was a structural component attached to something having a fixed location on the ground, was the removal of a structural component. As a result, this work removed the sign from its legal nonconforming status, and the court

upheld the trial court's determination that the sign must be removed. The work that was actually performed to Cracker Barrel's sign was nearly identical to the work performed on Lamar's signs throughout South Bend. As a result, the same conclusion is warranted that the work constituted the removal of a structure.

Not only does the Staff contend that the work performed would constitute the removal of a sign structure or sign cabinet, which definitively indicates it is beyond normal maintenance and repair by the clear language of the Zoning Ordinance, but it is also clear that replacing any portion of the sign structure would extend the life of the sign and encourage its survival. Once this work was performed on the sign and was performed without a permit, it no longer remained otherwise lawful. Any maintenance or repair to the sign moving forward can only be performed under the conditions of the Ordinance.

memo

To: Board of Zoning Appeals
From: Angela M. Smith
CC: Tom Panowicz
Date: January 27, 2023
Re: Administrative Appeal for 510 Lincoln Way

Background:

Off-premise advertising signs, typically referred to as billboards, are regulated under Article 10: Signs, of the South Bend Zoning Ordinance. While the development standards for off-premise signs are different from on-premise, Section 21-10.01 General Provisions apply to both classifications of signs. The intent of Article 10 includes the following:

- (1) Encourage the effective use of signs as a means of communication;
- (2) Encourage signs which, by their design, are integrated with and harmonious to the buildings and sites which they occupy;
- (3) Eliminate excessive and confusing sign displays;
- (4) Maintain and improve the appearance of the City as an attractive place in which to live and conduct business;
- (5) Safeguard and enhance property values by minimizing the possible adverse effects of signs on nearby properties;
- (6) Protect public and private investment in buildings and open spaces; and
- (7) Eliminate potential hazards to motorists and pedestrians resulting from signs.

Based on the intent and general impact of this sign type, off-premise signs have been limited to the C Commercial and I Industrial Districts in the City. Any sign within a district other than C or I is considered legal non-conforming, provided it otherwise meets the requirements for a legal non-conforming use. Legal non-conforming signs are regulated by Section 21-13.01(i).

On Sunday, July 17, 2022, a City Staff person noticed an off-premise sign being modified. The photo was sent to my attention on July 18th.



Photos sent July 17, 2022 – 208 Sample

On July 19th, I notified my contact from Lamar, Terry O’Brien, that this type of work would require a permit and provided details, as described more fully below. On July 20th, I witnessed additional work on a nearby site. A meeting was immediately set between the City and Lamar on July 21st, 2022. Despite repeated requests from the City, Lamar did not provide a full list of sites modified. However, Staff was able to identify and document several locations. Over the next couple months, a series of communications and meetings occurred. In September, when no further progress was being made, the Staff began the formal enforcement process.

Section 21-10.01(c)(1) states, “All sign types described in this section, except those listed as exempt require a permit.” Section 21-10.01(c)(2) states: “Painting, cleaning, refacing, or other normal maintenance and repair of a sign does not require a sign permit, **provided that no change is made to any structural component of the sign.**” [emphasis added]

The South Bend Zoning Ordinance offers the following definition:

Structure. Anything constructed or erected, the use of which requires location on the ground, or attachment to something having a fixed location on the ground. Among other things, structures include buildings, mobile homes, fences, walls, parking areas, loading areas, towers, antenna, and signs.

Component is not defined, however, Section 21-02.01(a) states that “Words not defined in this Ordinance are interpreted in accord with their usual dictionary meaning and customary usage.” The Zoning Administrator is the individual responsible for making those interpretations. It is not at the discretion of the property owner or petitioner. The

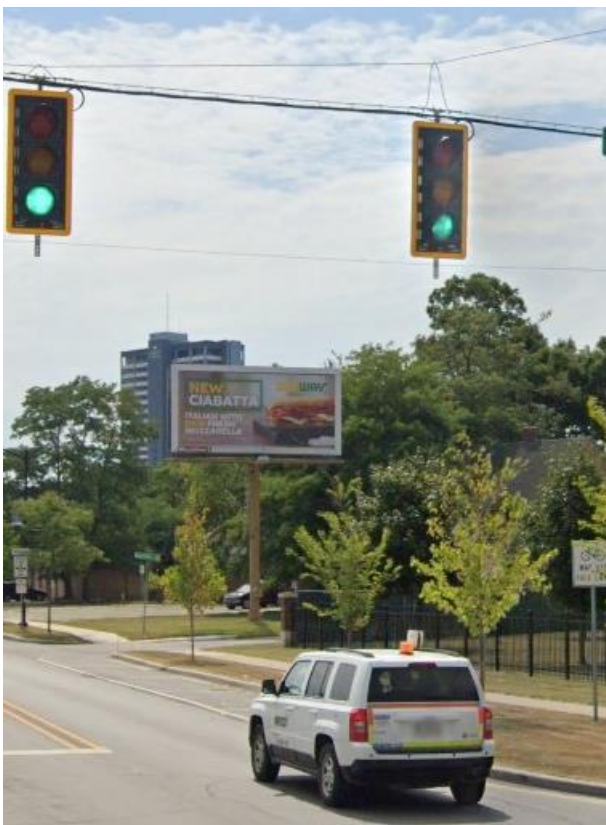
Merriam Webster Dictionary defines component as: “a constituent (constituent: serving the form, compose, or make up a unit or whole) part.”

Example of sign in process – 510 Lincolnway West (source: Google)



Note: During this process, Section 20-84 Parking on sidewalk, alley or parkway was violated. This is not covered by the South Bend Zoning Ordinance, but illustrates lack of due diligence in municipal requirements.

It is the Staff's position that the work performed on the various locations included a change to a structural component of the sign. Thus, a sign permit is required prior to any work being completed on the signs. The advertising copy, whether vinyl or paper, cannot be displayed or supported without the panel behind them to help distribute wind load and hold the advertising face in place. The Ordinance allows the advertising face (the vinyl that displays the message) to be replaced as a face change without requiring a permit, but the work performed by Lamar including changing the advertising face and the structural component to which it is attached. The change can be seen in the removal of the white frame and back support panel and the installation of a new support panel with rounded corners to hold the advertising copy.



Before – August, 2019



After – July, 2022

Based on the information outlined above and the photographic evidence of a change to the structural component of the sign, a notice of violation was sent to the property owner and to Lamar, as tenant, on September 16, 2022. We continued to work with Lamar to resolve the issue, but, again, became stalled, so a second notice was sent to Lamar on November 10, 2022. The second notice is being appealed by Lamar.

Appeal #1: The issuance of a violation for failure to obtain an improvement location permit.

Section 21-10.01(c)(1) states, “All sign types described in this section, except those listed as exempt require a permit.” As noted above, the sign work performed at this site is not listed as an exempt sign type. Since the work performed is a change to a structural component, it is not exempt as routine maintenance.

The evidence provided by Lamar repeatedly mentions customary practices performed by Lamar to improve aesthetics and safety. However, every municipality has their own ordinance, regulations, and interpretations thereof. No effort was made to contact the City during any of their due diligence process to verify the City’s interpretation of the Ordinance. Lamar’s identification of customary business practices does not avoid the requirement to employ those practices in compliance with the City of South Bend Zoning Ordinance.

The claim that because Lamar considers the metal panel to be the “sign face” and, thus, this would qualify as a reface, ignores the qualifying element of the sentence, “provided that no change is made to **any structural component** of the sign” [emphasis added]. At no point has Lamar claimed or presented any evidence to demonstrate that the advertising copy could be displayed without the metal panels that were replaced on the sign. The terms used to describe the metal panels do not change the fact that these are a structural component of the sign. The photographs taken by Staff demonstrate that the component of the sign which was removed to perform this work was a structural component. Lamar cannot avoid the requirement to obtain a permit for a change to a structural component by calling their structural components “sign faces” and claiming the work is a refacing.

The Staff does not contest the affidavit of Mr. Miller that the signs were originally legally installed. All the signs in question were considered legal non-conforming under the South Bend Zoning Ordinance until the work conducted by Lamar beginning on or about July 2022 which made changes to structural components of the sign. The impact of this work on the signs’ legal non-conforming status will be discussed more fully below in the Staff analysis of Appeal Issue No. 2.

The affidavit of Mr. Rush states that they review ordinances as part of due diligence and cites the section of the South Bend Zoning Ordinance related to permits. He states that when an ordinance is as clear and concise as the South Bend Zoning Ordinance, they are not required to contact the zoning department before proceeding. He offers the affidavits of Mr. Yoakum and Mr. Odum as evidence that the work performed was a reface, but he ignores the portion of the requirement that it does not apply to a change to any structural component. Every municipality across the country is regulated by different zoning ordinances. Lamar did not call or email the City during the due diligence

process, which is customary in many real estate transactions. Doing so would have avoided any confusion or misinterpretations.

The affidavit of Ms. Loup states it is the usual and customary business practice of Lamar to update the name and trade dress for the billboards acquired. The Staff did not object and did not cite Lamar for the repainting of the sign structures and replacement of the Burkhardt logo with the Lamar logo. The staff is unaware of the statement about “affixing a frame to its poster faces” as we did not see evidence of frames added. As depicted in photographs taken by Staff, frames were removed in the process of changing the metal component of the sign. While that may result in a reduction in the sign area, it does not negate the need for a permit based upon the change to a structural component.

The affidavit from Mr. Yoakum provided a graphic in support of Lamar’s claim that the metal panels would be considered the sign face. While there was no source provided for the graphic, it is definitively not part of the South Bend Zoning Ordinance. Therefore, it is not relevant to this case. Also presented is a graphic for the interior view of a sign cabinet, which is, again, not a graphic from the South Bend Zoning Ordinance. Neither of these items refutes the Staff interpretation that the portion of the sign removed was a structural component. He also mentions that the metal portion of the sign can get damaged and need repair. While that may be permitted in some municipalities, that practice within the City of South Bend would likely violate Section 21-13.01: Nonconformities, because the action would extend the life of a nonconforming sign. Again, the Staff disagrees that only the footings and the uprights are structural. As will be described in more detail below with respect to Indiana law, the City of South Bend Zoning Ordinance makes clear that its definition of structure includes an attachment to something having a fixed location on the ground. The fact that other communities may include such graphics or make such distinctions does not compel the City of South Bend to do so, nor does the fact that other communities have not challenged this practice.

The affidavit of Mr. Odom provides information regarding the services his company, ProFab, offers. It notes improvements in the industry from copy printed on paper to the use of vinyl and the change in how the vinyl is stretched. The material of the sign and how they are hung does not affect whether a permit is needed. Also, the fact that another company makes what they call the “face” does not mean that that element is not a structural component. It simply means that component is manufactured by another company. It is customary in many buildings and structures for various components to be made by different companies, much like a wall versus a roof of a building.

The use of the word “cabinet” in the violation notice has spurred a lot of discussion as to whether the component removed was a “face” or “cabinet.” However, the word “cabinet” never appears within Section 21-10.01(c) Permits Required. Because that

element of a sign is commonly referred to as a cabinet in South Bend, that terminology was used in the notice. Whether referred to as a “cabinet” or a “face,” the element replaced on the signs in question is clearly a structural component. The Zoning Ordinance clearly states that a permit is needed when a change is made to any structural component of the sign. The definition of structure and the distinction between a structure and the advertising copy is further supported by the Indiana Court of Appeals decision, *Cracker Barrel Old Country Store, Inc. v. Town of Plainfield ex rel. Plainfield Plan Com’n*, 848 N.E.2d 285 (Ind. Ct. App. 2006).

In *Cracker Barrel*, the restaurant constructed a sign consisting of “two surfaces, a cabinet, internal lighting, and a pole.” This sign was considered a legal non-conforming use under the Town of Plainfield’s Zoning Ordinance. Later, Cracker Barrel desired to perform work on the sign and were advised that they could “reface the existing surfaces without removing them from the structure. No permit was required to perform this work so long as Cracker Barrel swapped out existing panels with same type and size new panels . . . if the restaurant removed the cabinet from the sign structure, the sign would lose its pre-existing, legally established, non-conforming use status.” While the work was performed, the contractor detached the sign cabinet from the top of the sign and temporarily lowered it to the ground. The Town of Plainfield issued zoning violations, in part, based upon the sign losing its legal non-conforming use status.

Cracker Barrel argued that the work performed on the sign constituted maintenance under the Zoning Ordinance. Plainfield’s Zoning Ordinance permitted maintenance or replacement of sign surfaces, but it stated that if a structure is moved for any reason, it loses its legal non-conforming status. The Ordinance defined “structure” as “anything constructed or erected, the use of which requires location on the ground, or attachment to something having a fixed location on the ground.”

In its decision in favor of the Town of Plainfield, the court stated it was “undisputed under the definitions that Cracker Barrel moved its ‘sign’ and ‘sign structure,’ i.e., the cabinet and framework that housed the sign surface.” That movement caused the sign to lose its legal non-conforming status. The court disagreed with Cracker Barrel’s argument that it would have had to move the entire pole before violating that provision of the Ordinance. Instead, the court determined that because the definition of structure included an “attachment to something having a fixed location on the ground,” this definition included the component referred to as the “cabinet and framework that housed the sign surface.”

The facts of the *Cracker Barrel* case are nearly identical to the facts of this dispute. Just as Cracker Barrel’s removal of the sign cabinet from the pole was determined by the court to be the removal of a structural component, the work that Lamar performed on its South Bend signs, as depicted in the Staff photographs, was the removal of a structural component. As a result, Lamar was required to obtain a permit.

No matter the term, the work performed is clearly a violation from Section 21-13.02(f)(1) Failure to obtain an improvement location permit when one is required by the terms and provisions of this Ordinance.

Appeal #2: The issuance of a violation for the location, erection, or maintenance of any sign not specifically permitted by this Ordinance.

Section 21-10.07(b) states “Off-premise signs shall only be permitted in a C or I district.” This property is zoned NC Neighborhood Center District. Off-premise signs are not permitted in the NC District. A sign permit cannot be issued except in conformance with signs allowed on the property.

Lamar contends that the sign is legal nonconforming and states that since they are not in violation of work without a permit, the sign is unchanged and remains legal nonconforming. However, even if no permit was required, a legal nonconforming sign can only have normal and routine maintenance performed on the sign in strict application of Section 21-13.01(i) Legally Established Nonconforming Signs.

Section 21-13.01(i)(2) specifically outlines the conditions under which legally established nonconforming sign may receive normal and routine repair and maintenance. The evidence presented by Lamar states that the sign area was decreased in size, thus the nonconformity was decreased. While this may be true, Section 21-13.01(i)(2)(B) clearly states that only applies if the sign was approved through the grant of a variance. The sign in question has never received a variance. Therefore, the work performed was not legal as normal maintenance and repair. This section also would not avoid the violation in light of the provisions of (C).

Subsection 21-13.019i)(2)(C) specifically states that “the removal of a sign structure or a sign cabinet shall be deemed definitive evidence that such sign requires work beyond normal maintenance.” This is consistent with the intent of this Article which states that legally established nonconforming signs may “continue until they are removed, but not to encourage their survival.”

The analysis above with respect to Appeal Issue No. 1 sets forth in greater detail the basis for the Staff’s position that the work performed on the signs constituted the removal of a sign structure or sign cabinet. This was also the precise issue before the Court of Appeals in the *Cracker Barrel* case. As noted above, the court held that the removal of the sign cabinet, which was a structural component attached to something having a fixed location on the ground, was the removal of a structural component. As a result, this work removed the sign from its legal nonconforming status, and the court

upheld the trial court's determination that the sign must be removed. The work that was actually performed to Cracker Barrel's sign was nearly identical to the work performed on Lamar's signs throughout South Bend. As a result, the same conclusion is warranted that the work constituted the removal of a structure.

Not only does the Staff contend that the work performed would constitute the removal of a sign structure or sign cabinet, which definitively indicates it is beyond normal maintenance and repair by the clear language of the Zoning Ordinance, but it is also clear that replacing any portion of the sign structure would extend the life of the sign and encourage its survival. Once this work was performed on the sign and was performed without a permit, it no longer remained otherwise lawful. Any maintenance or repair to the sign moving forward can only be performed under the conditions of the Ordinance.

memo

To: Board of Zoning Appeals
From: Angela M. Smith
CC: Tom Panowicz
Date: January 27, 2023
Re: Administrative Appeal for 1138 Mishawaka

Background:

Off-premise advertising signs, typically referred to as billboards, are regulated under Article 10: Signs, of the South Bend Zoning Ordinance. While the development standards for off-premise signs are different from on-premise, Section 21-10.01 General Provisions apply to both classifications of signs. The intent of Article 10 includes the following:

- (1) Encourage the effective use of signs as a means of communication;
- (2) Encourage signs which, by their design, are integrated with and harmonious to the buildings and sites which they occupy;
- (3) Eliminate excessive and confusing sign displays;
- (4) Maintain and improve the appearance of the City as an attractive place in which to live and conduct business;
- (5) Safeguard and enhance property values by minimizing the possible adverse effects of signs on nearby properties;
- (6) Protect public and private investment in buildings and open spaces; and
- (7) Eliminate potential hazards to motorists and pedestrians resulting from signs.

Based on the intent and general impact of this sign type, off-premise signs have been limited to the C Commercial and I Industrial Districts in the City. Any sign within a district other than C or I is considered legal non-conforming, provided it otherwise meets the requirements for a legal non-conforming use. Legal non-conforming signs are regulated by Section 21-13.01(i).

On Sunday, July 17, 2022, a City Staff person noticed an off-premise sign being modified. The photo was sent to my attention on July 18th.



Photos sent July 17, 2022 – 208 Sample

On July 19th, I notified my contact from Lamar, Terry O’Brien, that this type of work would require a permit and provided details, as described more fully below. On July 20th, I witnessed additional work on a nearby site. A meeting was immediately set between the City and Lamar on July 21st, 2022. Despite repeated requests from the City, Lamar did not provide a full list of sites modified. However, Staff was able to identify and document several locations. Over the next couple months, a series of communications and meetings occurred. In September, when no further progress was being made, the Staff began the formal enforcement process.

Section 21-10.01(c)(1) states, “All sign types described in this section, except those listed as exempt require a permit.” Section 21-10.01(c)(2) states: “Painting, cleaning, refacing, or other normal maintenance and repair of a sign does not require a sign permit, **provided that no change is made to any structural component of the sign.**” [emphasis added]

The South Bend Zoning Ordinance offers the following definition:

Structure. Anything constructed or erected, the use of which requires location on the ground, or attachment to something having a fixed location on the ground. Among other things, structures include buildings, mobile homes, fences, walls, parking areas, loading areas, towers, antenna, and signs.

Component is not defined, however, Section 21-02.01(a) states that “Words not defined in this Ordinance are interpreted in accord with their usual dictionary meaning and customary usage.” The Zoning Administrator is the individual responsible for making those interpretations. It is not at the discretion of the property owner or petitioner. The

Merriam Webster Dictionary defines component as: “a constituent (constituent: serving the form, compose, or make up a unit or whole) part.”

Example of sign in process – 510 Lincolnway West (source: Google)



Note: During this process, Section 20-84 Parking on sidewalk, alley or parkway was violated. This is not covered by the South Bend Zoning Ordinance, but illustrates lack of due diligence in municipal requirements.

It is the Staff's position that the work performed on the various locations included a change to a structural component of the sign. Thus, a sign permit is required prior to any work being completed on the signs. The advertising copy, whether vinyl or paper, cannot be displayed or supported without the panel behind them to help distribute wind load and hold the advertising face in place. The Ordinance allows the advertising face (the vinyl that displays the message) to be replaced as a face change without requiring a permit, but the work performed by Lamar including changing the advertising face and the structural component to which it is attached. The change can be seen in the removal of the white frame and back support panel and the installation of a new support panel with rounded corners to hold the advertising copy.



Before – August, 2019



After – July, 2022

Based on the information outlined above and the photographic evidence of a change to the structural component of the sign, a notice of violation was sent to the property owner and to Lamar, as tenant, on September 16, 2022. We continued to work with Lamar to resolve the issue, but, again, became stalled, so a second notice was sent to Lamar on November 10, 2022. The second notice is being appealed by Lamar.

Appeal #1: The issuance of a violation for failure to obtain an improvement location permit.

Section 21-10.01(c)(1) states, “All sign types described in this section, except those listed as exempt require a permit.” As noted above, the sign work performed at this site is not listed as an exempt sign type. Since the work performed is a change to a structural component, it is not exempt as routine maintenance.

The evidence provided by Lamar repeatedly mentions customary practices performed by Lamar to improve aesthetics and safety. However, every municipality has their own ordinance, regulations, and interpretations thereof. No effort was made to contact the City during any of their due diligence process to verify the City’s interpretation of the Ordinance. Lamar’s identification of customary business practices does not avoid the requirement to employ those practices in compliance with the City of South Bend Zoning Ordinance.

The claim that because Lamar considers the metal panel to be the “sign face” and, thus, this would qualify as a reface, ignores the qualifying element of the sentence, “provided that no change is made to **any structural component** of the sign” [emphasis added]. At no point has Lamar claimed or presented any evidence to demonstrate that the advertising copy could be displayed without the metal panels that were replaced on the sign. The terms used to describe the metal panels do not change the fact that these are a structural component of the sign. The photographs taken by Staff demonstrate that the component of the sign which was removed to perform this work was a structural component. Lamar cannot avoid the requirement to obtain a permit for a change to a structural component by calling their structural components “sign faces” and claiming the work is a refacing.

The Staff does not contest the affidavit of Mr. Miller that the signs were originally legally installed. All the signs in question were considered legal non-conforming under the South Bend Zoning Ordinance until the work conducted by Lamar beginning on or about July 2022 which made changes to structural components of the sign. The impact of this work on the signs’ legal non-conforming status will be discussed more fully below in the Staff analysis of Appeal Issue No. 2.

The affidavit of Mr. Rush states that they review ordinances as part of due diligence and cites the section of the South Bend Zoning Ordinance related to permits. He states that when an ordinance is as clear and concise as the South Bend Zoning Ordinance, they are not required to contact the zoning department before proceeding. He offers the affidavits of Mr. Yoakum and Mr. Odum as evidence that the work performed was a reface, but he ignores the portion of the requirement that it does not apply to a change to any structural component. Every municipality across the country is regulated by different zoning ordinances. Lamar did not call or email the City during the due diligence

process, which is customary in many real estate transactions. Doing so would have avoided any confusion or misinterpretations.

The affidavit of Ms. Loup states it is the usual and customary business practice of Lamar to update the name and trade dress for the billboards acquired. The Staff did not object and did not cite Lamar for the repainting of the sign structures and replacement of the Burkhardt logo with the Lamar logo. The staff is unaware of the statement about “affixing a frame to its poster faces” as we did not see evidence of frames added. As depicted in photographs taken by Staff, frames were removed in the process of changing the metal component of the sign. While that may result in a reduction in the sign area, it does not negate the need for a permit based upon the change to a structural component.

The affidavit from Mr. Yoakum provided a graphic in support of Lamar’s claim that the metal panels would be considered the sign face. While there was no source provided for the graphic, it is definitively not part of the South Bend Zoning Ordinance. Therefore, it is not relevant to this case. Also presented is a graphic for the interior view of a sign cabinet, which is, again, not a graphic from the South Bend Zoning Ordinance. Neither of these items refutes the Staff interpretation that the portion of the sign removed was a structural component. He also mentions that the metal portion of the sign can get damaged and need repair. While that may be permitted in some municipalities, that practice within the City of South Bend would likely violate Section 21-13.01: Nonconformities, because the action would extend the life of a nonconforming sign. Again, the Staff disagrees that only the footings and the uprights are structural. As will be described in more detail below with respect to Indiana law, the City of South Bend Zoning Ordinance makes clear that its definition of structure includes an attachment to something having a fixed location on the ground. The fact that other communities may include such graphics or make such distinctions does not compel the City of South Bend to do so, nor does the fact that other communities have not challenged this practice.

The affidavit of Mr. Odom provides information regarding the services his company, ProFab, offers. It notes improvements in the industry from copy printed on paper to the use of vinyl and the change in how the vinyl is stretched. The material of the sign and how they are hung does not affect whether a permit is needed. Also, the fact that another company makes what they call the “face” does not mean that that element is not a structural component. It simply means that component is manufactured by another company. It is customary in many buildings and structures for various components to be made by different companies, much like a wall versus a roof of a building.

The use of the word “cabinet” in the violation notice has spurred a lot of discussion as to whether the component removed was a “face” or “cabinet.” However, the word “cabinet” never appears within Section 21-10.01(c) Permits Required. Because that

element of a sign is commonly referred to as a cabinet in South Bend, that terminology was used in the notice. Whether referred to as a “cabinet” or a “face,” the element replaced on the signs in question is clearly a structural component. The Zoning Ordinance clearly states that a permit is needed when a change is made to any structural component of the sign. The definition of structure and the distinction between a structure and the advertising copy is further supported by the Indiana Court of Appeals decision, *Cracker Barrel Old Country Store, Inc. v. Town of Plainfield ex rel. Plainfield Plan Com’n*, 848 N.E.2d 285 (Ind. Ct. App. 2006).

In *Cracker Barrel*, the restaurant constructed a sign consisting of “two surfaces, a cabinet, internal lighting, and a pole.” This sign was considered a legal non-conforming use under the Town of Plainfield’s Zoning Ordinance. Later, Cracker Barrel desired to perform work on the sign and were advised that they could “reface the existing surfaces without removing them from the structure. No permit was required to perform this work so long as Cracker Barrel swapped out existing panels with same type and size new panels . . . if the restaurant removed the cabinet from the sign structure, the sign would lose its pre-existing, legally established, non-conforming use status.” While the work was performed, the contractor detached the sign cabinet from the top of the sign and temporarily lowered it to the ground. The Town of Plainfield issued zoning violations, in part, based upon the sign losing its legal non-conforming use status.

Cracker Barrel argued that the work performed on the sign constituted maintenance under the Zoning Ordinance. Plainfield’s Zoning Ordinance permitted maintenance or replacement of sign surfaces, but it stated that if a structure is moved for any reason, it loses its legal non-conforming status. The Ordinance defined “structure” as “anything constructed or erected, the use of which requires location on the ground, or attachment to something having a fixed location on the ground.”

In its decision in favor of the Town of Plainfield, the court stated it was “undisputed under the definitions that Cracker Barrel moved its ‘sign’ and ‘sign structure,’ i.e., the cabinet and framework that housed the sign surface.” That movement caused the sign to lose its legal non-conforming status. The court disagreed with Cracker Barrel’s argument that it would have had to move the entire pole before violating that provision of the Ordinance. Instead, the court determined that because the definition of structure included an “attachment to something having a fixed location on the ground,” this definition included the component referred to as the “cabinet and framework that housed the sign surface.”

The facts of the *Cracker Barrel* case are nearly identical to the facts of this dispute. Just as Cracker Barrel’s removal of the sign cabinet from the pole was determined by the court to be the removal of a structural component, the work that Lamar performed on its South Bend signs, as depicted in the Staff photographs, was the removal of a structural component. As a result, Lamar was required to obtain a permit.

No matter the term, the work performed is clearly a violation from Section 21-13.02(f)(1) Failure to obtain an improvement location permit when one is required by the terms and provisions of this Ordinance.

Appeal #2: The issuance of a violation for the location, erection, or maintenance of any sign not specifically permitted by this Ordinance.

Section 21-10.07(b) states “Off-premise signs shall only be permitted in a C or I district.” This property is zoned NC Neighborhood Center District. Off-premise signs are not permitted in the NC District. A sign permit cannot be issued except in conformance with signs allowed on the property.

Lamar contends that the sign is legal nonconforming and states that since they are not in violation of work without a permit, the sign is unchanged and remains legal nonconforming. However, even if no permit was required, a legal nonconforming sign can only have normal and routine maintenance performed on the sign in strict application of Section 21-13.01(i) Legally Established Nonconforming Signs.

Section 21-13.01(i)(2) specifically outlines the conditions under which legally established nonconforming sign may receive normal and routine repair and maintenance. The evidence presented by Lamar states that the sign area was decreased in size, thus the nonconformity was decreased. While this may be true, Section 21-13.01(i)(2)(B) clearly states that only applies if the sign was approved through the grant of a variance. The sign in question has never received a variance. Therefore, the work performed was not legal as normal maintenance and repair. This section also would not avoid the violation in light of the provisions of (C).

Subsection 21-13.019i)(2)(C) specifically states that “the removal of a sign structure or a sign cabinet shall be deemed definitive evidence that such sign requires work beyond normal maintenance.” This is consistent with the intent of this Article which states that legally established nonconforming signs may “continue until they are removed, but not to encourage their survival.”

The analysis above with respect to Appeal Issue No. 1 sets forth in greater detail the basis for the Staff’s position that the work performed on the signs constituted the removal of a sign structure or sign cabinet. This was also the precise issue before the Court of Appeals in the *Cracker Barrel* case. As noted above, the court held that the removal of the sign cabinet, which was a structural component attached to something having a fixed location on the ground, was the removal of a structural component. As a result, this work removed the sign from its legal nonconforming status, and the court

upheld the trial court's determination that the sign must be removed. The work that was actually performed to Cracker Barrel's sign was nearly identical to the work performed on Lamar's signs throughout South Bend. As a result, the same conclusion is warranted that the work constituted the removal of a structure.

Not only does the Staff contend that the work performed would constitute the removal of a sign structure or sign cabinet, which definitively indicates it is beyond normal maintenance and repair by the clear language of the Zoning Ordinance, but it is also clear that replacing any portion of the sign structure would extend the life of the sign and encourage its survival. Once this work was performed on the sign and was performed without a permit, it no longer remained otherwise lawful. Any maintenance or repair to the sign moving forward can only be performed under the conditions of the Ordinance.

memo

To: Board of Zoning Appeals
From: Angela M. Smith
CC: Tom Panowicz
Date: January 27, 2023
Re: Administrative Appeal for 1415 Lincoln Way

Background:

Off-premise advertising signs, typically referred to as billboards, are regulated under Article 10: Signs, of the South Bend Zoning Ordinance. While the development standards for off-premise signs are different from on-premise, Section 21-10.01 General Provisions apply to both classifications of signs. The intent of Article 10 includes the following:

- (1) Encourage the effective use of signs as a means of communication;
- (2) Encourage signs which, by their design, are integrated with and harmonious to the buildings and sites which they occupy;
- (3) Eliminate excessive and confusing sign displays;
- (4) Maintain and improve the appearance of the City as an attractive place in which to live and conduct business;
- (5) Safeguard and enhance property values by minimizing the possible adverse effects of signs on nearby properties;
- (6) Protect public and private investment in buildings and open spaces; and
- (7) Eliminate potential hazards to motorists and pedestrians resulting from signs.

Based on the intent and general impact of this sign type, off-premise signs have been limited to the C Commercial and I Industrial Districts in the City. Any sign within a district other than C or I is considered legal non-conforming, provided it otherwise meets the requirements for a legal non-conforming use. Legal non-conforming signs are regulated by Section 21-13.01(i).

On Sunday, July 17, 2022, a City Staff person noticed an off-premise sign being modified. The photo was sent to my attention on July 18th.



Photos sent July 17, 2022 – 208 Sample

On July 19th, I notified my contact from Lamar, Terry O’Brien, that this type of work would require a permit and provided details, as described more fully below. On July 20th, I witnessed additional work on a nearby site. A meeting was immediately set between the City and Lamar on July 21st, 2022. Despite repeated requests from the City, Lamar did not provide a full list of sites modified. However, Staff was able to identify and document several locations. Over the next couple months, a series of communications and meetings occurred. In September, when no further progress was being made, the Staff began the formal enforcement process.

Section 21-10.01(c)(1) states, “All sign types described in this section, except those listed as exempt require a permit.” Section 21-10.01(c)(2) states: “Painting, cleaning, refacing, or other normal maintenance and repair of a sign does not require a sign permit, **provided that no change is made to any structural component of the sign.**” [emphasis added]

The South Bend Zoning Ordinance offers the following definition:

Structure. Anything constructed or erected, the use of which requires location on the ground, or attachment to something having a fixed location on the ground. Among other things, structures include buildings, mobile homes, fences, walls, parking areas, loading areas, towers, antenna, and signs.

Component is not defined, however, Section 21-02.01(a) states that “Words not defined in this Ordinance are interpreted in accord with their usual dictionary meaning and customary usage.” The Zoning Administrator is the individual responsible for making those interpretations. It is not at the discretion of the property owner or petitioner. The

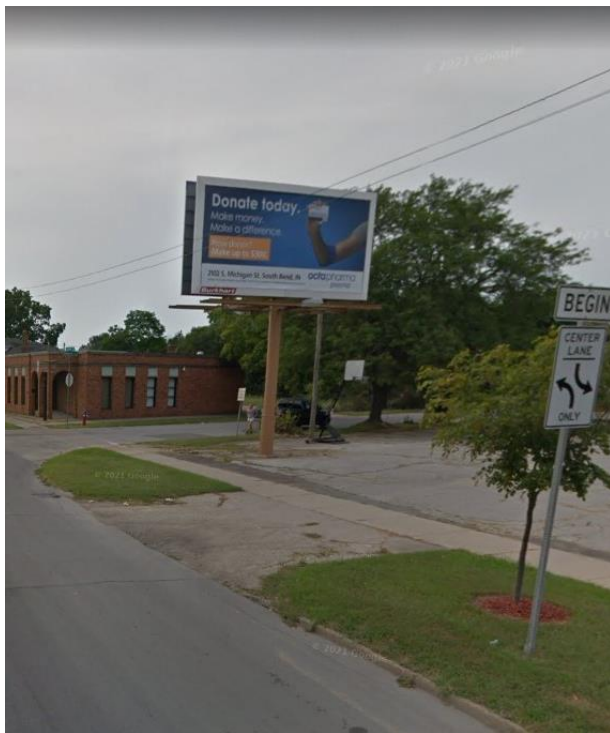
Merriam Webster Dictionary defines component as: “a constituent (constituent: serving the form, compose, or make up a unit or whole) part.”

Example of sign in process – 510 Lincolnway West (source: Google)

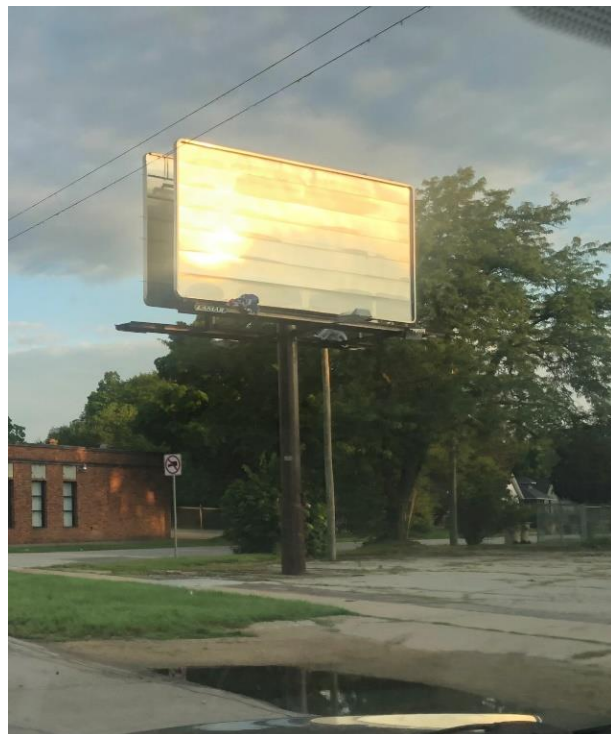


Note: During this process, Section 20-84 Parking on sidewalk, alley or parkway was violated. This is not covered by the South Bend Zoning Ordinance, but illustrates lack of due diligence in municipal requirements.

It is the Staff's position that the work performed on the various locations included a change to a structural component of the sign. Thus, a sign permit is required prior to any work being completed on the signs. The advertising copy, whether vinyl or paper, cannot be displayed or supported without the panel behind them to help distribute wind load and hold the advertising face in place. The Ordinance allows the advertising face (the vinyl that displays the message) to be replaced as a face change without requiring a permit, but the work performed by Lamar including changing the advertising face and the structural component to which it is attached. The change can be seen in the removal of the white frame and back support panel and the installation of a new support panel with rounded corners to hold the advertising copy.



Before – August, 2017



After – July, 2022

Based on the information outlined above and the photographic evidence of a change to the structural component of the sign, a notice of violation was sent to the property owner and to Lamar, as tenant, on September 16, 2022. We continued to work with Lamar to resolve the issue, but, again, became stalled, so a second notice was sent to Lamar on November 10, 2022. The second notice is being appealed by Lamar.

Appeal #1: The issuance of a violation for failure to obtain an improvement location permit.

Section 21-10.01(c)(1) states, “All sign types described in this section, except those listed as exempt require a permit.” As noted above, the sign work performed at this site is not listed as an exempt sign type. Since the work performed is a change to a structural component, it is not exempt as routine maintenance.

The evidence provided by Lamar repeatedly mentions customary practices performed by Lamar to improve aesthetics and safety. However, every municipality has their own ordinance, regulations, and interpretations thereof. No effort was made to contact the City during any of their due diligence process to verify the City’s interpretation of the Ordinance. Lamar’s identification of customary business practices does not avoid the requirement to employ those practices in compliance with the City of South Bend Zoning Ordinance.

The claim that because Lamar considers the metal panel to be the “sign face” and, thus, this would qualify as a reface, ignores the qualifying element of the sentence, “provided that no change is made to **any structural component** of the sign” [emphasis added]. At no point has Lamar claimed or presented any evidence to demonstrate that the advertising copy could be displayed without the metal panels that were replaced on the sign. The terms used to describe the metal panels do not change the fact that these are a structural component of the sign. The photographs taken by Staff demonstrate that the component of the sign which was removed to perform this work was a structural component. Lamar cannot avoid the requirement to obtain a permit for a change to a structural component by calling their structural components “sign faces” and claiming the work is a refacing.

The Staff does not contest the affidavit of Mr. Miller that the signs were originally legally installed. All the signs in question were considered legal non-conforming under the South Bend Zoning Ordinance until the work conducted by Lamar beginning on or about July 2022 which made changes to structural components of the sign. The impact of this work on the signs’ legal non-conforming status will be discussed more fully below in the Staff analysis of Appeal Issue No. 2.

The affidavit of Mr. Rush states that they review ordinances as part of due diligence and cites the section of the South Bend Zoning Ordinance related to permits. He states that when an ordinance is as clear and concise as the South Bend Zoning Ordinance, they are not required to contact the zoning department before proceeding. He offers the affidavits of Mr. Yoakum and Mr. Odum as evidence that the work performed was a reface, but he ignores the portion of the requirement that it does not apply to a change to any structural component. Every municipality across the country is regulated by different zoning ordinances. Lamar did not call or email the City during the due diligence

process, which is customary in many real estate transactions. Doing so would have avoided any confusion or misinterpretations.

The affidavit of Ms. Loup states it is the usual and customary business practice of Lamar to update the name and trade dress for the billboards acquired. The Staff did not object and did not cite Lamar for the repainting of the sign structures and replacement of the Burkhardt logo with the Lamar logo. The staff is unaware of the statement about “affixing a frame to its poster faces” as we did not see evidence of frames added. As depicted in photographs taken by Staff, frames were removed in the process of changing the metal component of the sign. While that may result in a reduction in the sign area, it does not negate the need for a permit based upon the change to a structural component.

The affidavit from Mr. Yoakum provided a graphic in support of Lamar’s claim that the metal panels would be considered the sign face. While there was no source provided for the graphic, it is definitively not part of the South Bend Zoning Ordinance. Therefore, it is not relevant to this case. Also presented is a graphic for the interior view of a sign cabinet, which is, again, not a graphic from the South Bend Zoning Ordinance. Neither of these items refutes the Staff interpretation that the portion of the sign removed was a structural component. He also mentions that the metal portion of the sign can get damaged and need repair. While that may be permitted in some municipalities, that practice within the City of South Bend would likely violate Section 21-13.01: Nonconformities, because the action would extend the life of a nonconforming sign. Again, the Staff disagrees that only the footings and the uprights are structural. As will be described in more detail below with respect to Indiana law, the City of South Bend Zoning Ordinance makes clear that its definition of structure includes an attachment to something having a fixed location on the ground. The fact that other communities may include such graphics or make such distinctions does not compel the City of South Bend to do so, nor does the fact that other communities have not challenged this practice.

The affidavit of Mr. Odom provides information regarding the services his company, ProFab, offers. It notes improvements in the industry from copy printed on paper to the use of vinyl and the change in how the vinyl is stretched. The material of the sign and how they are hung does not affect whether a permit is needed. Also, the fact that another company makes what they call the “face” does not mean that that element is not a structural component. It simply means that component is manufactured by another company. It is customary in many buildings and structures for various components to be made by different companies, much like a wall versus a roof of a building.

The use of the word “cabinet” in the violation notice has spurred a lot of discussion as to whether the component removed was a “face” or “cabinet.” However, the word “cabinet” never appears within Section 21-10.01(c) Permits Required. Because that

element of a sign is commonly referred to as a cabinet in South Bend, that terminology was used in the notice. Whether referred to as a “cabinet” or a “face,” the element replaced on the signs in question is clearly a structural component. The Zoning Ordinance clearly states that a permit is needed when a change is made to any structural component of the sign. The definition of structure and the distinction between a structure and the advertising copy is further supported by the Indiana Court of Appeals decision, *Cracker Barrel Old Country Store, Inc. v. Town of Plainfield ex rel. Plainfield Plan Com’n*, 848 N.E.2d 285 (Ind. Ct. App. 2006).

In *Cracker Barrel*, the restaurant constructed a sign consisting of “two surfaces, a cabinet, internal lighting, and a pole.” This sign was considered a legal non-conforming use under the Town of Plainfield’s Zoning Ordinance. Later, Cracker Barrel desired to perform work on the sign and were advised that they could “reface the existing surfaces without removing them from the structure. No permit was required to perform this work so long as Cracker Barrel swapped out existing panels with same type and size new panels . . . if the restaurant removed the cabinet from the sign structure, the sign would lose its pre-existing, legally established, non-conforming use status.” While the work was performed, the contractor detached the sign cabinet from the top of the sign and temporarily lowered it to the ground. The Town of Plainfield issued zoning violations, in part, based upon the sign losing its legal non-conforming use status.

Cracker Barrel argued that the work performed on the sign constituted maintenance under the Zoning Ordinance. Plainfield’s Zoning Ordinance permitted maintenance or replacement of sign surfaces, but it stated that if a structure is moved for any reason, it loses its legal non-conforming status. The Ordinance defined “structure” as “anything constructed or erected, the use of which requires location on the ground, or attachment to something having a fixed location on the ground.”

In its decision in favor of the Town of Plainfield, the court stated it was “undisputed under the definitions that Cracker Barrel moved its ‘sign’ and ‘sign structure,’ i.e., the cabinet and framework that housed the sign surface.” That movement caused the sign to lose its legal non-conforming status. The court disagreed with Cracker Barrel’s argument that it would have had to move the entire pole before violating that provision of the Ordinance. Instead, the court determined that because the definition of structure included an “attachment to something having a fixed location on the ground,” this definition included the component referred to as the “cabinet and framework that housed the sign surface.”

The facts of the *Cracker Barrel* case are nearly identical to the facts of this dispute. Just as Cracker Barrel’s removal of the sign cabinet from the pole was determined by the court to be the removal of a structural component, the work that Lamar performed on its South Bend signs, as depicted in the Staff photographs, was the removal of a structural component. As a result, Lamar was required to obtain a permit.

No matter the term, the work performed is clearly a violation from Section 21-13.02(f)(1) Failure to obtain an improvement location permit when one is required by the terms and provisions of this Ordinance.

Appeal #2: The issuance of a violation for the location, erection, or maintenance of any sign not specifically permitted by this Ordinance.

Section 21-10.07(b) states “Off-premise signs shall only be permitted in a C or I district.” This property is zoned NC Neighborhood Center District. Off-premise signs are not permitted in the NC District. A sign permit cannot be issued except in conformance with signs allowed on the property.

Lamar contends that the sign is legal nonconforming and states that since they are not in violation of work without a permit, the sign is unchanged and remains legal nonconforming. However, even if no permit was required, a legal nonconforming sign can only have normal and routine maintenance performed on the sign in strict application of Section 21-13.01(i) Legally Established Nonconforming Signs.

Section 21-13.01(i)(2) specifically outlines the conditions under which legally established nonconforming sign may receive normal and routine repair and maintenance. The evidence presented by Lamar states that the sign area was decreased in size, thus the nonconformity was decreased. While this may be true, Section 21-13.01(i)(2)(B) clearly states that only applies if the sign was approved through the grant of a variance. The sign in question has never received a variance. Therefore, the work performed was not legal as normal maintenance and repair. This section also would not avoid the violation in light of the provisions of (C).

Subsection 21-13.019i)(2)(C) specifically states that “the removal of a sign structure or a sign cabinet shall be deemed definitive evidence that such sign requires work beyond normal maintenance.” This is consistent with the intent of this Article which states that legally established nonconforming signs may “continue until they are removed, but not to encourage their survival.”

The analysis above with respect to Appeal Issue No. 1 sets forth in greater detail the basis for the Staff’s position that the work performed on the signs constituted the removal of a sign structure or sign cabinet. This was also the precise issue before the Court of Appeals in the *Cracker Barrel* case. As noted above, the court held that the removal of the sign cabinet, which was a structural component attached to something having a fixed location on the ground, was the removal of a structural component. As a result, this work removed the sign from its legal nonconforming status, and the court

upheld the trial court's determination that the sign must be removed. The work that was actually performed to Cracker Barrel's sign was nearly identical to the work performed on Lamar's signs throughout South Bend. As a result, the same conclusion is warranted that the work constituted the removal of a structure.

Not only does the Staff contend that the work performed would constitute the removal of a sign structure or sign cabinet, which definitively indicates it is beyond normal maintenance and repair by the clear language of the Zoning Ordinance, but it is also clear that replacing any portion of the sign structure would extend the life of the sign and encourage its survival. Once this work was performed on the sign and was performed without a permit, it no longer remained otherwise lawful. Any maintenance or repair to the sign moving forward can only be performed under the conditions of the Ordinance.

memo

To: Board of Zoning Appeals
From: Angela M. Smith
CC: Tom Panowicz
Date: January 27, 2023
Re: Administrative Appeal for 3003 Lincoln Way

Background:

Off-premise advertising signs, typically referred to as billboards, are regulated under Article 10: Signs, of the South Bend Zoning Ordinance. While the development standards for off-premise signs are different from on-premise, Section 21-10.01 General Provisions apply to both classifications of signs. The intent of Article 10 includes the following:

- (1) Encourage the effective use of signs as a means of communication;
- (2) Encourage signs which, by their design, are integrated with and harmonious to the buildings and sites which they occupy;
- (3) Eliminate excessive and confusing sign displays;
- (4) Maintain and improve the appearance of the City as an attractive place in which to live and conduct business;
- (5) Safeguard and enhance property values by minimizing the possible adverse effects of signs on nearby properties;
- (6) Protect public and private investment in buildings and open spaces; and
- (7) Eliminate potential hazards to motorists and pedestrians resulting from signs.

Based on the intent and general impact of this sign type, off-premise signs have been limited to the C Commercial and I Industrial Districts in the City. Any sign within a district other than C or I is considered legal non-conforming, provided it otherwise meets the requirements for a legal non-conforming use. Legal non-conforming signs are regulated by Section 21-13.01(i).

On Sunday, July 17, 2022, a City Staff person noticed an off-premise sign being modified. The photo was sent to my attention on July 18th.



Photos sent July 17, 2022 – 208 Sample

On July 19th, I notified my contact from Lamar, Terry O’Brien, that this type of work would require a permit and provided details, as described more fully below. On July 20th, I witnessed additional work on a nearby site. A meeting was immediately set between the City and Lamar on July 21st, 2022. Despite repeated requests from the City, Lamar did not provide a full list of sites modified. However, Staff was able to identify and document several locations. Over the next couple months, a series of communications and meetings occurred. In September, when no further progress was being made, the Staff began the formal enforcement process.

Section 21-10.01(c)(1) states, “All sign types described in this section, except those listed as exempt require a permit.” Section 21-10.01(c)(2) states: “Painting, cleaning, refacing, or other normal maintenance and repair of a sign does not require a sign permit, **provided that no change is made to any structural component of the sign.**” [emphasis added]

The South Bend Zoning Ordinance offers the following definition:

Structure. Anything constructed or erected, the use of which requires location on the ground, or attachment to something having a fixed location on the ground. Among other things, structures include buildings, mobile homes, fences, walls, parking areas, loading areas, towers, antenna, and signs.

Component is not defined, however, Section 21-02.01(a) states that “Words not defined in this Ordinance are interpreted in accord with their usual dictionary meaning and customary usage.” The Zoning Administrator is the individual responsible for making those interpretations. It is not at the discretion of the property owner or petitioner. The

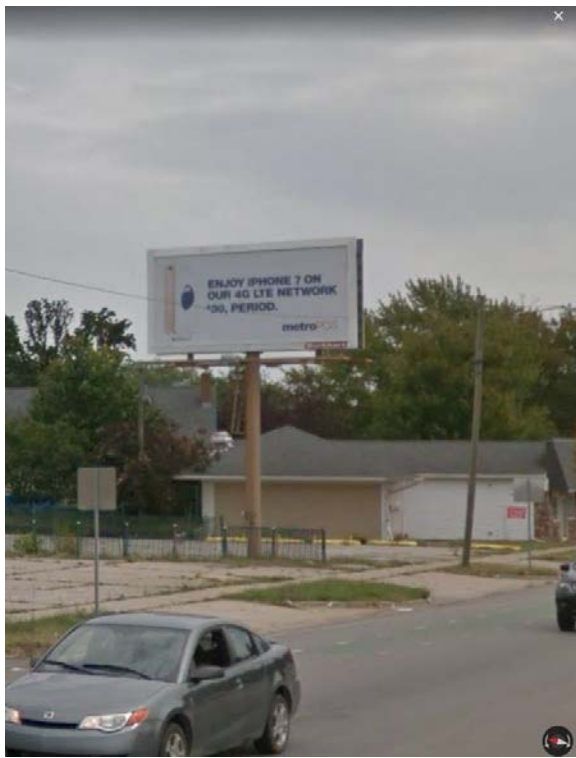
Merriam Webster Dictionary defines component as: “a constituent (constituent: serving the form, compose, or make up a unit or whole) part.”

Example of sign in process – 510 Lincolnway West (source: Google)



Note: During this process, Section 20-84 Parking on sidewalk, alley or parkway was violated. This is not covered by the South Bend Zoning Ordinance, but illustrates lack of due diligence in municipal requirements.

It is the Staff's position that the work performed on the various locations included a change to a structural component of the sign. Thus, a sign permit is required prior to any work being completed on the signs. The advertising copy, whether vinyl or paper, cannot be displayed or supported without the panel behind them to help distribute wind load and hold the advertising face in place. The Ordinance allows the advertising face (the vinyl that displays the message) to be replaced as a face change without requiring a permit, but the work performed by Lamar including changing the advertising face and the structural component to which it is attached. The change can be seen in the removal of the white frame and back support panel and the installation of a new support panel with rounded corners to hold the advertising copy.



Before – August, 2017



After – July, 2022

Based on the information outlined above and the photographic evidence of a change to the structural component of the sign, a notice of violation was sent to the property owner and to Lamar, as tenant, on September 16, 2022. We continued to work with Lamar to resolve the issue, but, again, became stalled, so a second notice was sent to Lamar on November 10, 2022. The second notice is being appealed by Lamar.

Appeal #1: The issuance of a violation for failure to obtain an improvement location permit.

Section 21-10.01(c)(1) states, “All sign types described in this section, except those listed as exempt require a permit.” As noted above, the sign work performed at this site is not listed as an exempt sign type. Since the work performed is a change to a structural component, it is not exempt as routine maintenance.

The evidence provided by Lamar repeatedly mentions customary practices performed by Lamar to improve aesthetics and safety. However, every municipality has their own ordinance, regulations, and interpretations thereof. No effort was made to contact the City during any of their due diligence process to verify the City’s interpretation of the Ordinance. Lamar’s identification of customary business practices does not avoid the requirement to employ those practices in compliance with the City of South Bend Zoning Ordinance.

The claim that because Lamar considers the metal panel to be the “sign face” and, thus, this would qualify as a reface, ignores the qualifying element of the sentence, “provided that no change is made to **any structural component** of the sign” [emphasis added]. At no point has Lamar claimed or presented any evidence to demonstrate that the advertising copy could be displayed without the metal panels that were replaced on the sign. The terms used to describe the metal panels do not change the fact that these are a structural component of the sign. The photographs taken by Staff demonstrate that the component of the sign which was removed to perform this work was a structural component. Lamar cannot avoid the requirement to obtain a permit for a change to a structural component by calling their structural components “sign faces” and claiming the work is a refacing.

The Staff does not contest the affidavit of Mr. Miller that the signs were originally legally installed. All the signs in question were considered legal non-conforming under the South Bend Zoning Ordinance until the work conducted by Lamar beginning on or about July 2022 which made changes to structural components of the sign. The impact of this work on the signs’ legal non-conforming status will be discussed more fully below in the Staff analysis of Appeal Issue No. 2.

The affidavit of Mr. Rush states that they review ordinances as part of due diligence and cites the section of the South Bend Zoning Ordinance related to permits. He states that when an ordinance is as clear and concise as the South Bend Zoning Ordinance, they are not required to contact the zoning department before proceeding. He offers the affidavits of Mr. Yoakum and Mr. Odum as evidence that the work performed was a reface, but he ignores the portion of the requirement that it does not apply to a change to any structural component. Every municipality across the country is regulated by different zoning ordinances. Lamar did not call or email the City during the due diligence

process, which is customary in many real estate transactions. Doing so would have avoided any confusion or misinterpretations.

The affidavit of Ms. Loup states it is the usual and customary business practice of Lamar to update the name and trade dress for the billboards acquired. The Staff did not object and did not cite Lamar for the repainting of the sign structures and replacement of the Burkhardt logo with the Lamar logo. The staff is unaware of the statement about “affixing a frame to its poster faces” as we did not see evidence of frames added. As depicted in photographs taken by Staff, frames were removed in the process of changing the metal component of the sign. While that may result in a reduction in the sign area, it does not negate the need for a permit based upon the change to a structural component.

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The affidavit of Mr. Odom provides information regarding the services his company, ProFab, offers. It notes improvements in the industry from copy printed on paper to the use of vinyl and the change in how the vinyl is stretched. The material of the sign and how they are hung does not affect whether a permit is needed. Also, the fact that another company makes what they call the “face” does not mean that that element is not a structural component. It simply means that component is manufactured by another company. It is customary in many buildings and structures for various components to be made by different companies, much like a wall versus a roof of a building.

The use of the word “cabinet” in the violation notice has spurred a lot of discussion as to whether the component removed was a “face” or “cabinet.” However, the word “cabinet” never appears within Section 21-10.01(c) Permits Required. Because that

element of a sign is commonly referred to as a cabinet in South Bend, that terminology was used in the notice. Whether referred to as a “cabinet” or a “face,” the element replaced on the signs in question is clearly a structural component. The Zoning Ordinance clearly states that a permit is needed when a change is made to any structural component of the sign. The definition of structure and the distinction between a structure and the advertising copy is further supported by the Indiana Court of Appeals decision, *Cracker Barrel Old Country Store, Inc. v. Town of Plainfield ex rel. Plainfield Plan Com’n*, 848 N.E.2d 285 (Ind. Ct. App. 2006).

In *Cracker Barrel*, the restaurant constructed a sign consisting of “two surfaces, a cabinet, internal lighting, and a pole.” This sign was considered a legal non-conforming use under the Town of Plainfield’s Zoning Ordinance. Later, Cracker Barrel desired to perform work on the sign and were advised that they could “reface the existing surfaces without removing them from the structure. No permit was required to perform this work so long as Cracker Barrel swapped out existing panels with same type and size new panels . . . if the restaurant removed the cabinet from the sign structure, the sign would lose its pre-existing, legally established, non-conforming use status.” While the work was performed, the contractor detached the sign cabinet from the top of the sign and temporarily lowered it to the ground. The Town of Plainfield issued zoning violations, in part, based upon the sign losing its legal non-conforming use status.

Cracker Barrel argued that the work performed on the sign constituted maintenance under the Zoning Ordinance. Plainfield’s Zoning Ordinance permitted maintenance or replacement of sign surfaces, but it stated that if a structure is moved for any reason, it loses its legal non-conforming status. The Ordinance defined “structure” as “anything constructed or erected, the use of which requires location on the ground, or attachment to something having a fixed location on the ground.”

In its decision in favor of the Town of Plainfield, the court stated it was “undisputed under the definitions that Cracker Barrel moved its ‘sign’ and ‘sign structure,’ i.e., the cabinet and framework that housed the sign surface.” That movement caused the sign to lose its legal non-conforming status. The court disagreed with Cracker Barrel’s argument that it would have had to move the entire pole before violating that provision of the Ordinance. Instead, the court determined that because the definition of structure included an “attachment to something having a fixed location on the ground,” this definition included the component referred to as the “cabinet and framework that housed the sign surface.”

The facts of the *Cracker Barrel* case are nearly identical to the facts of this dispute. Just as Cracker Barrel’s removal of the sign cabinet from the pole was determined by the court to be the removal of a structural component, the work that Lamar performed on its South Bend signs, as depicted in the Staff photographs, was the removal of a structural component. As a result, Lamar was required to obtain a permit.

No matter the term, the work performed is clearly a violation from Section 21-13.02(f)(1) Failure to obtain an improvement location permit when one is required by the terms and provisions of this Ordinance.

Appeal #2: The issuance of a violation for the location, erection, or maintenance of any sign not specifically permitted by this Ordinance.

Section 21-10.07(b) states “Off-premise signs shall only be permitted in a C or I district.” This property is zoned NC Neighborhood Center District. Off-premise signs are not permitted in the NC District. A sign permit cannot be issued except in conformance with signs allowed on the property.

Lamar contends that the sign is legal nonconforming and states that since they are not in violation of work without a permit, the sign is unchanged and remains legal nonconforming. However, even if no permit was required, a legal nonconforming sign can only have normal and routine maintenance performed on the sign in strict application of Section 21-13.01(i) Legally Established Nonconforming Signs.

Section 21-13.01(i)(2) specifically outlines the conditions under which legally established nonconforming sign may receive normal and routine repair and maintenance. The evidence presented by Lamar states that the sign area was decreased in size, thus the nonconformity was decreased. While this may be true, Section 21-13.01(i)(2)(B) clearly states that only applies if the sign was approved through the grant of a variance. The sign in question has never received a variance. Therefore, the work performed was not legal as normal maintenance and repair. This section also would not avoid the violation in light of the provisions of (C).

Subsection 21-13.019(i)(2)(C) specifically states that “the removal of a sign structure or a sign cabinet shall be deemed definitive evidence that such sign requires work beyond normal maintenance.” This is consistent with the intent of this Article which states that legally established nonconforming signs may “continue until they are removed, but not to encourage their survival.”

The analysis above with respect to Appeal Issue No. 1 sets forth in greater detail the basis for the Staff’s position that the work performed on the signs constituted the removal of a sign structure or sign cabinet. This was also the precise issue before the Court of Appeals in the *Cracker Barrel* case. As noted above, the court held that the removal of the sign cabinet, which was a structural component attached to something having a fixed location on the ground, was the removal of a structural component. As a result, this work removed the sign from its legal nonconforming status, and the court

upheld the trial court's determination that the sign must be removed. The work that was actually performed to Cracker Barrel's sign was nearly identical to the work performed on Lamar's signs throughout South Bend. As a result, the same conclusion is warranted that the work constituted the removal of a structure.

Not only does the Staff contend that the work performed would constitute the removal of a sign structure or sign cabinet, which definitively indicates it is beyond normal maintenance and repair by the clear language of the Zoning Ordinance, but it is also clear that replacing any portion of the sign structure would extend the life of the sign and encourage its survival. Once this work was performed on the sign and was performed without a permit, it no longer remained otherwise lawful. Any maintenance or repair to the sign moving forward can only be performed under the conditions of the Ordinance.

memo

To: Board of Zoning Appeals
From: Angela M. Smith
CC: Tom Panowicz
Date: January 27, 2023
Re: Administrative Appeal for 2401 Western

Background:

Off-premise advertising signs, typically referred to as billboards, are regulated under Article 10: Signs, of the South Bend Zoning Ordinance. While the development standards for off-premise signs are different from on-premise, Section 21-10.01 General Provisions apply to both classifications of signs. The intent of Article 10 includes the following:

- (1) Encourage the effective use of signs as a means of communication;
- (2) Encourage signs which, by their design, are integrated with and harmonious to the buildings and sites which they occupy;
- (3) Eliminate excessive and confusing sign displays;
- (4) Maintain and improve the appearance of the City as an attractive place in which to live and conduct business;
- (5) Safeguard and enhance property values by minimizing the possible adverse effects of signs on nearby properties;
- (6) Protect public and private investment in buildings and open spaces; and
- (7) Eliminate potential hazards to motorists and pedestrians resulting from signs.

Based on the intent and general impact of this sign type, off-premise signs have been limited to the C Commercial and I Industrial Districts in the City. Any sign within a district other than C or I is considered legal non-conforming, provided it otherwise meets the requirements for a legal non-conforming use. Legal non-conforming signs are regulated by Section 21-13.01(i).

On Sunday, July 17, 2022, a City Staff person noticed an off-premise sign being modified. The photo was sent to my attention on July 18th.



Photos sent July 17, 2022 – 208 Sample

On July 19th, I notified my contact from Lamar, Terry O’Brien, that this type of work would require a permit and provided details, as described more fully below. On July 20th, I witnessed additional work on a nearby site. A meeting was immediately set between the City and Lamar on July 21st, 2022. Despite repeated requests from the City, Lamar did not provide a full list of sites modified. However, Staff was able to identify and document several locations. Over the next couple months, a series of communications and meetings occurred. In September, when no further progress was being made, the Staff began the formal enforcement process.

Section 21-10.01(c)(1) states, “All sign types described in this section, except those listed as exempt require a permit.” Section 21-10.01(c)(2) states: “Painting, cleaning, refacing, or other normal maintenance and repair of a sign does not require a sign permit, **provided that no change is made to any structural component of the sign.**” [emphasis added]

The South Bend Zoning Ordinance offers the following definition:

Structure. Anything constructed or erected, the use of which requires location on the ground, or attachment to something having a fixed location on the ground. Among other things, structures include buildings, mobile homes, fences, walls, parking areas, loading areas, towers, antenna, and signs.

Component is not defined, however, Section 21-02.01(a) states that “Words not defined in this Ordinance are interpreted in accord with their usual dictionary meaning and customary usage.” The Zoning Administrator is the individual responsible for making those interpretations. It is not at the discretion of the property owner or petitioner. The

Merriam Webster Dictionary defines component as: “a constituent (constituent: serving the form, compose, or make up a unit or whole) part.”

Example of sign in process – 510 Lincolnway West (source: Google)



Note: During this process, Section 20-84 Parking on sidewalk, alley or parkway was violated. This is not covered by the South Bend Zoning Ordinance, but illustrates lack of due diligence in municipal requirements.

It is the Staff's position that the work performed on the various locations included a change to a structural component of the sign. Thus, a sign permit is required prior to any work being completed on the signs. The advertising copy, whether vinyl or paper, cannot be displayed or supported without the panel behind them to help distribute wind load and hold the advertising face in place. The Ordinance allows the advertising face (the vinyl that displays the message) to be replaced as a face change without requiring a permit, but the work performed by Lamar including changing the advertising face and the structural component to which it is attached. The change can be seen in the removal of the white frame and back support panel and the installation of a new support panel with rounded corners to hold the advertising copy.



Before – August, 2019



After – July, 2022

Based on the information outlined above and the photographic evidence of a change to the structural component of the sign, a notice of violation was sent to the property owner and to Lamar, as tenant, on September 16, 2022. We continued to work with Lamar to resolve the issue, but, again, became stalled, so a second notice was sent to Lamar on November 10, 2022. The second notice is being appealed by Lamar.

Appeal #1: The issuance of a violation for failure to obtain an improvement location permit.

Section 21-10.01(c)(1) states, “All sign types described in this section, except those listed as exempt require a permit.” As noted above, the sign work performed at this site is not listed as an exempt sign type. Since the work performed is a change to a structural component, it is not exempt as routine maintenance.

The evidence provided by Lamar repeatedly mentions customary practices performed by Lamar to improve aesthetics and safety. However, every municipality has their own ordinance, regulations, and interpretations thereof. No effort was made to contact the City during any of their due diligence process to verify the City’s interpretation of the Ordinance. Lamar’s identification of customary business practices does not avoid the requirement to employ those practices in compliance with the City of South Bend Zoning Ordinance.

The claim that because Lamar considers the metal panel to be the “sign face” and, thus, this would qualify as a reface, ignores the qualifying element of the sentence, “provided that no change is made to **any structural component** of the sign” [emphasis added]. At no point has Lamar claimed or presented any evidence to demonstrate that the advertising copy could be displayed without the metal panels that were replaced on the sign. The terms used to describe the metal panels do not change the fact that these are a structural component of the sign. The photographs taken by Staff demonstrate that the component of the sign which was removed to perform this work was a structural component. Lamar cannot avoid the requirement to obtain a permit for a change to a structural component by calling their structural components “sign faces” and claiming the work is a refacing.

The Staff does not contest the affidavit of Mr. Miller that the signs were originally legally installed. All the signs in question were considered legal non-conforming under the South Bend Zoning Ordinance until the work conducted by Lamar beginning on or about July 2022 which made changes to structural components of the sign. The impact of this work on the signs’ legal non-conforming status will be discussed more fully below in the Staff analysis of Appeal Issue No. 2.

The affidavit of Mr. Rush states that they review ordinances as part of due diligence and cites the section of the South Bend Zoning Ordinance related to permits. He states that when an ordinance is as clear and concise as the South Bend Zoning Ordinance, they are not required to contact the zoning department before proceeding. He offers the affidavits of Mr. Yoakum and Mr. Odum as evidence that the work performed was a reface, but he ignores the portion of the requirement that it does not apply to a change to any structural component. Every municipality across the country is regulated by different zoning ordinances. Lamar did not call or email the City during the due diligence

process, which is customary in many real estate transactions. Doing so would have avoided any confusion or misinterpretations.

The affidavit of Ms. Loup states it is the usual and customary business practice of Lamar to update the name and trade dress for the billboards acquired. The Staff did not object and did not cite Lamar for the repainting of the sign structures and replacement of the Burkhardt logo with the Lamar logo. The staff is unaware of the statement about “affixing a frame to its poster faces” as we did not see evidence of frames added. As depicted in photographs taken by Staff, frames were removed in the process of changing the metal component of the sign. While that may result in a reduction in the sign area, it does not negate the need for a permit based upon the change to a structural component.

The affidavit from Mr. Yoakum provided a graphic in support of Lamar’s claim that the metal panels would be considered the sign face. While there was no source provided for the graphic, it is definitively not part of the South Bend Zoning Ordinance. Therefore, it is not relevant to this case. Also presented is a graphic for the interior view of a sign cabinet, which is, again, not a graphic from the South Bend Zoning Ordinance. Neither of these items refutes the Staff interpretation that the portion of the sign removed was a structural component. He also mentions that the metal portion of the sign can get damaged and need repair. While that may be permitted in some municipalities, that practice within the City of South Bend would likely violate Section 21-13.01: Nonconformities, because the action would extend the life of a nonconforming sign. Again, the Staff disagrees that only the footings and the uprights are structural. As will be described in more detail below with respect to Indiana law, the City of South Bend Zoning Ordinance makes clear that its definition of structure includes an attachment to something having a fixed location on the ground. The fact that other communities may include such graphics or make such distinctions does not compel the City of South Bend to do so, nor does the fact that other communities have not challenged this practice.

The affidavit of Mr. Odom provides information regarding the services his company, ProFab, offers. It notes improvements in the industry from copy printed on paper to the use of vinyl and the change in how the vinyl is stretched. The material of the sign and how they are hung does not affect whether a permit is needed. Also, the fact that another company makes what they call the “face” does not mean that that element is not a structural component. It simply means that component is manufactured by another company. It is customary in many buildings and structures for various components to be made by different companies, much like a wall versus a roof of a building.

The use of the word “cabinet” in the violation notice has spurred a lot of discussion as to whether the component removed was a “face” or “cabinet.” However, the word “cabinet” never appears within Section 21-10.01(c) Permits Required. Because that

element of a sign is commonly referred to as a cabinet in South Bend, that terminology was used in the notice. Whether referred to as a “cabinet” or a “face,” the element replaced on the signs in question is clearly a structural component. The Zoning Ordinance clearly states that a permit is needed when a change is made to any structural component of the sign. The definition of structure and the distinction between a structure and the advertising copy is further supported by the Indiana Court of Appeals decision, *Cracker Barrel Old Country Store, Inc. v. Town of Plainfield ex rel. Plainfield Plan Com’n*, 848 N.E.2d 285 (Ind. Ct. App. 2006).

In *Cracker Barrel*, the restaurant constructed a sign consisting of “two surfaces, a cabinet, internal lighting, and a pole.” This sign was considered a legal non-conforming use under the Town of Plainfield’s Zoning Ordinance. Later, Cracker Barrel desired to perform work on the sign and were advised that they could “reface the existing surfaces without removing them from the structure. No permit was required to perform this work so long as Cracker Barrel swapped out existing panels with same type and size new panels . . . if the restaurant removed the cabinet from the sign structure, the sign would lose its pre-existing, legally established, non-conforming use status.” While the work was performed, the contractor detached the sign cabinet from the top of the sign and temporarily lowered it to the ground. The Town of Plainfield issued zoning violations, in part, based upon the sign losing its legal non-conforming use status.

Cracker Barrel argued that the work performed on the sign constituted maintenance under the Zoning Ordinance. Plainfield’s Zoning Ordinance permitted maintenance or replacement of sign surfaces, but it stated that if a structure is moved for any reason, it loses its legal non-conforming status. The Ordinance defined “structure” as “anything constructed or erected, the use of which requires location on the ground, or attachment to something having a fixed location on the ground.”

In its decision in favor of the Town of Plainfield, the court stated it was “undisputed under the definitions that Cracker Barrel moved its ‘sign’ and ‘sign structure,’ i.e., the cabinet and framework that housed the sign surface.” That movement caused the sign to lose its legal non-conforming status. The court disagreed with Cracker Barrel’s argument that it would have had to move the entire pole before violating that provision of the Ordinance. Instead, the court determined that because the definition of structure included an “attachment to something having a fixed location on the ground,” this definition included the component referred to as the “cabinet and framework that housed the sign surface.”

The facts of the *Cracker Barrel* case are nearly identical to the facts of this dispute. Just as Cracker Barrel’s removal of the sign cabinet from the pole was determined by the court to be the removal of a structural component, the work that Lamar performed on its South Bend signs, as depicted in the Staff photographs, was the removal of a structural component. As a result, Lamar was required to obtain a permit.

No matter the term, the work performed is clearly a violation from Section 21-13.02(f)(1) Failure to obtain an improvement location permit when one is required by the terms and provisions of this Ordinance.

Appeal #2: The issuance of a violation for the location, erection, or maintenance of any sign not specifically permitted by this Ordinance.

Section 21-10.07(b) states “Off-premise signs shall only be permitted in a C or I district.” This property is zoned NC Neighborhood Center District. Off-premise signs are not permitted in the NC District. A sign permit cannot be issued except in conformance with signs allowed on the property.

Lamar contends that the sign is legal nonconforming and states that since they are not in violation of work without a permit, the sign is unchanged and remains legal nonconforming. However, even if no permit was required, a legal nonconforming sign can only have normal and routine maintenance performed on the sign in strict application of Section 21-13.01(i) Legally Established Nonconforming Signs.

Section 21-13.01(i)(2) specifically outlines the conditions under which legally established nonconforming sign may receive normal and routine repair and maintenance. The evidence presented by Lamar states that the sign area was decreased in size, thus the nonconformity was decreased. While this may be true, Section 21-13.01(i)(2)(B) clearly states that only applies if the sign was approved through the grant of a variance. The sign in question has never received a variance. Therefore, the work performed was not legal as normal maintenance and repair. This section also would not avoid the violation in light of the provisions of (C).

Subsection 21-13.019(i)(2)(C) specifically states that “the removal of a sign structure or a sign cabinet shall be deemed definitive evidence that such sign requires work beyond normal maintenance.” This is consistent with the intent of this Article which states that legally established nonconforming signs may “continue until they are removed, but not to encourage their survival.”

The analysis above with respect to Appeal Issue No. 1 sets forth in greater detail the basis for the Staff’s position that the work performed on the signs constituted the removal of a sign structure or sign cabinet. This was also the precise issue before the Court of Appeals in the *Cracker Barrel* case. As noted above, the court held that the removal of the sign cabinet, which was a structural component attached to something having a fixed location on the ground, was the removal of a structural component. As a result, this work removed the sign from its legal nonconforming status, and the court

upheld the trial court's determination that the sign must be removed. The work that was actually performed to Cracker Barrel's sign was nearly identical to the work performed on Lamar's signs throughout South Bend. As a result, the same conclusion is warranted that the work constituted the removal of a structure.

Not only does the Staff contend that the work performed would constitute the removal of a sign structure or sign cabinet, which definitively indicates it is beyond normal maintenance and repair by the clear language of the Zoning Ordinance, but it is also clear that replacing any portion of the sign structure would extend the life of the sign and encourage its survival. Once this work was performed on the sign and was performed without a permit, it no longer remained otherwise lawful. Any maintenance or repair to the sign moving forward can only be performed under the conditions of the Ordinance.