

STATE OF MINNESOTA
COUNTY OF HENNEPIN

FILED

DISTRICT COURT

07 JAN 30 AM 11:26 FOURTH JUDICIAL DISTRICT

BY _____ DEPUTY

Clear Channel Outdoor, Inc., a Delaware
corporation, f/k/a Eller Media Company,

HENN. CO. DISTRICT
COURT ADMINISTRATOR

Plaintiff,

**ORDER DENYING
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

v.

City of Minnetonka,

Court File No. 27-CV-06-23485

Defendant.

"The medium is the message." – Marshall McLuhan.

"Things are happening up there: moving parts, eye-catching devices, video projection In outdoor, the medium IS the message" – Clear Channel sales document, 2006.¹

The above-entitled matter came on for hearing before Judge Lloyd B. Zimmerman of District Court on January 19, 2007 on Plaintiff's motion for temporary injunction.

APPEARANCES:

Michael A. Ponto, Esq., Michael C. Soules, Esq., Peter C. Hennigan, Esq., Faegre & Benson, L.L.P.; and Marvin A. Liszt, Esq., Bernick & Lifson, P.A., appeared for Plaintiff, Clear Channel Outdoor, Inc., ("Clear Channel").

John M. Baker, Esq., and Robin M. Wolpert, Esq., Greene Espel, P.L.L.P., appeared for Defendant, City of Minnetonka ("Minnetonka").

A. Introduction

Clear Channel has filed a motion for a temporary injunction, asking that the Court turn the

¹ See Baker Aff. Ex. 10.

power back on its two large electronic outdoor advertising billboards in the City of Minnetonka. This lawsuit challenges whether a Minnesota city can pull the plug on two large 14x48 feet outdoor electronic billboard signs near highway I-394 and I-494 in the City of Minnetonka, and prevent Clear Channel – which has invested millions in the cutting-edge digital technology – from using its illuminated, colorful signs to catch the attention of thousands of passing motorists. Minnetonka directed that power be cut-off to these two signs on December 12, 2006, after determining that they violated legal standards.² This is one of the first challenges in Minnesota to a new technology that is sweeping the nation, and reflects a controversy over whether the new technology, with its graphic and compelling billboard advertisements, will increase accidents, or simply make for more visually interesting billboard ads and increase sales for satisfied advertisers who use them.

This lawsuit, and Clear Channel's motion for a temporary emergency order until the issues can be fully developed for trial, present fundamental issues about the power of local government to regulate new technologies in highway billboards. Both sides make accusations of unlawful and unfair dealing. Clear Channel accuses Minnetonka of abruptly, and without notice, shutting down the power on two billboards approved by the City – two billboards employing a technology that is assertedly lawful under Minnetonka's ordinance, and state and federal law. Clear Channel accuses Minnetonka of rashly denying it due process and costing it potentially millions of dollars. Equally indignantly, Minnetonka asserts that it is Clear Channel which acted rashly and stealthily, deliberately energizing and activating the brilliant new megawatt billboards in violation of Minnetonka's electrical code, and in alleged violation of city, state, and federal law which prohibit the changing colors, lights, and technology of the high-tech billboards.

The lawsuit – now about six weeks old – pits the western suburb of Minnetonka, long

² Minnetonka ordered Xcel Energy to disconnect power to the I-394 sign. Power had not yet been connected to the I-494 sign. As a result of Minnetonka's orders, power to both signs has been off, except for testing, since December 12, 2006.

concerned with the aesthetics and safety issues behind outdoor billboards,³ against Clear Channel, one of the largest outdoor advertising companies in the world.

This Court does not now sit in final judgment of who is right or wrong. The Court only decides whether, on a preliminary basis, Clear Channel has demonstrated that the law and facts point sufficiently in its favor to justify a temporary order turning the power back on, as the litigation moves forward.

The Court entered the fray on January 19, 2007, on Clear Channel's motion for a temporary injunction. The hearing proceeded based upon a fully-briefed record, supported by extensive affidavits and exhibits. The hearing included testimony of Thomas McCarver, a witness called by Clear Channel. At the conclusion of the hearing, the parties and the Court agreed that the record would remain open until January 23, 2007, to allow the parties to submit two additional items of evidence.⁴

The record is now complete, and the Court respectfully issues its decision. For now, applying the five-factor test under Minn. R. Civ. P. 65, prescribed by the Minnesota Supreme Court in *Dahlberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965), this Court concludes that Minnetonka acted lawfully in proscribing outdoor billboard signs which change illumination and spots every eight seconds. Pending further litigation, if the billboards are re-activated, they must eliminate Electrical Code violations, and comply with Minnetonka's *Emergency Ordinance Establishing Regulations for Electronic Signs*. Minnetonka, MN (Dec. 18, 2006). Under this

³ See *Naegele Outdoor Advertising Co. of Minn. v. Village of Minnetonka*, 162 N.W.2d 206, 215 (1968) (affirming Minnetonka's authority to exclude billboards from its residentially-zoned areas).

⁴ The supplemental evidence was limited to two items: First, any updated federal-state agreements between the State of Minnesota and the United States Department of Transportation relating to highway signs. Second, a supplemental affidavit attesting to whether the City of Maplewood wrote a letter to Clear Channel executive Tom McCarver on or about December 29, 2006, objecting to the construction of LED signs in that city. At the evidentiary hearing on January 19, 2006, McCarver testified that he had not received any such letter and was unaware of its contents, and the Court conditionally allowed questioning relating to the letter, subject to the Defendant providing an affidavit from the City of Maplewood attesting to the fact that a letter was sent. That foundation was laid in the Defendant's January 23, 2007 submission, and the affidavit of Shann Finwall, city planner

Ordinance, Clear Channel may operate these signs provided that the advertising messages change no more than “once an hour.” Minnetonka, Minn., *Emergency Ordinance Establishing Regulations for Electronic Signs* § 3.01 (Dec. 18, 2006).

B. Procedural Background

On December 22, 2006, the plaintiff, Clear Channel filed this action, along with a motion for a temporary injunction.⁵ Clear Channel filed this suit to prevent the City of Minnetonka (“Minnetonka”) from interfering with the power supply to, and operation of, two outdoor advertising signs in Minnetonka. Clear Channel seeks a temporary order, pursuant to Minn. R. Civ. P. 65.02, which (1) enjoins Minnetonka from “implementing, sanctioning, continuing in effect or enforcing a Stop Work Order” on Clear Channel’s signs; (2) directs Minnetonka “to proceed with the final inspection for [Clear Channel’s] signs”; and (3) “[s]ubject to successful completion of the inspection process,” enjoins Minnetonka “from interfering with the operation of [Clear Channel’s] signs until further order of the Court pending a final resolution of the merits.”

Minnetonka opposes Clear Channel’s motion. The parties completed deposition and other discovery prior to arguing the motion before the Court on January 19, 2006.

C. The Factual Disputes Presented by the Case⁶

This case is about two outdoor large advertising signs in the City of Minnetonka, one located on highway I-394 near the Ridgedale Shopping Center, and one on Highway I-494 near Baker Road. These two signs employ computerized digital technology to allow illuminated, colorful advertisements to cycle through eight different spots at eight second intervals. These signs

for the City of Maplewood. *See also* Kantrud Aff., Jan. 23, 2007.

⁵ Minnetonka notes that Clear Channel’s motion was filed without prior notice, and served at 4:30 p.m. on the Friday before the three-day Christmas holiday weekend, when its counsel were out of town.

⁶ Obviously, the Court has not had a full-blown trial. The Court has heard testimony from only one witness. The Court’s recitation of the factual disputes presents mixed issues of fact and law, and weighs, through the prism of the Court’s mission under Minn. R. Civ. P. 65, the Court’s assessment of the relative strengths and weaknesses of the parties’ positions.

essentially constitute an electronic billboard, referred to by both parties as a digital LED display. By replacing the two large outdoor billboard signs that have occupied those same two locations for over 30 years, the new technology allows advertisers to tell drivers about breakfast specials on the morning drive to work, and dinner specials on the drive home. The changing advertisements use color, illumination, and the dynamic of eight-second changes in advertising spots to catch consumer attention. Their effectiveness in doing so is precisely what worries Minnetonka, which is concerned about a potential increase in accidents as drivers focus on the attention-getting electronic advertisements, rather than the road.

There is no serious factual dispute that the new technology is eye-catching. The electronic images are more clear, graphic, and captivating than traditional billboard signs, but the same size as the large, traditional billboards. The factual disputes focus on whether the signs are overly-eye-catching, and dangerously so, and thus violate city, state, and federal laws which prohibit “flashing” or changing illuminated messages. The dispute raises a question of statutory interpretation of whether a change every eight seconds is a “flashing” sign prohibited by city, state, and federal law. Equally so, the dispute raises a question of whether the change every eight seconds is a change in illumination and color, which is prohibited as well by Minnetonka’s sign ordinance. The Minnesota Department of Transportation (“MnDOT”), which regulates highway signs, has concluded that a sign which changes, or “flashes,” every six seconds or more, is not a prohibited flashing sign, and not a safety hazard. Minnetonka contends that the opinion of Minnesota’s highway engineers as to safety does not resolve the legal issue of whether Minnetonka can impose tighter standards on highway billboard media running through its borders than might be imposed by the State of Minnesota.

This case also presents a factual dispute over whether Minnetonka’s December 18, 2006 moratorium allowing only one message every hour, pending further study about the signs’ safety,

unlawfully affects Clear Channel's "vested interests." Clear Channel states that once it invested over \$100,000 in approved permits to upgrade the weight-bearing capacity of the I-394 and I-494 billboards, and increased their electrical capacity to 300 amps, it had a property interest that could not be negated by the moratorium. Minnetonka responds that Clear Channel's investment is simply a harsh but fair lesson for Clear Channel, and a warning lesson for other advertisers considering the same move, that they should follow Minnetonka's laws, and ask before they pour money into an unlawful improvement. Minnetonka avers that Clear Channel cannot claim a "vested interest" that would override its moratorium, when its action ran afoul of an existing ordinance, and it activated the LED machinery "under the radar" without obtaining advance approval.

The parties further dispute whether the LED signs required advance approval. Clear Channel states that its signs do not change in color or intensity in violation of Minnetonka's ordinance. Minnetonka states that they do. It is undisputed that the signs change every eight seconds, and every eight seconds a new advertising spot appears which is different in color, intensity, and content than the preceding advertisement. Depositions of city officials suggest that the LED technology itself -- as opposed to the changes in image, color, and illumination -- is not unlawful under Minnetonka ordinance. Minnetonka's testimony makes clear that they violate the ordinance because they change in color, intensity, and illumination, and because the eight-second changes represents prohibited "motion" and changes in constancy. Plainly, at least the I-394 sign was up and running in Minnetonka for two days, and Minnetonka officials watched the moving ads change every eight seconds in color, intensity, and illumination -- enough to call a violation. Clear Channel's exhibit, showing the operation of an LED billboard at I-35W and Stinson Boulevard, demonstrates moving changes in color and illumination,⁷ and this type of change would appear to

⁷ See Hennigan Aff. Ex. 1. The video shows the sign during daylight hours. The illumination would be even more pronounced at night. The Court observed the sign set forth in Hennigan Aff., Ex. 1 during nighttime driving hours. It is highly-visible at night, and eye-catching. Whether the sign is unduly distracting, as the messages change every

be banned under Minnetonka's ordinance banning signs on which "illumination is not kept stationary or constant in intensity and color at all times when such sign is in use." Minnetonka, Minn., Code of Ordinances § 300.02 (117) [hereinafter "City Code"].

It is undisputed that LED displays are popular with advertisers and outdoor advertising companies like Clear Channel, because they are attention-getting and effective.⁸ The digital billboards are intentionally located by Clear Channel on heavily traveled freeways throughout the Twin Cities metropolitan area for maximum impact. Minnetonka's concern that the eye-catching LED displays raise a safety hazard is reflected in the fact that protecting public safety is one of the key purposes of Minnetonka's sign ordinance. The ordinance bans signs on which "illumination is not kept stationary or constant in intensity and color at all times when such sign is in use." *Id.* This ban is applicable to signs that are "revolving and moving" and those that are "flashing, blinking or animated . . . but not limited to traveling lights or any other means not providing constant illumination." *Id.* §§ 300.30 (10)(b)-(c). One of the purposes behind Minnetonka's sign ordinance is to allow only those "signs which are designed, constructed, installed and maintained in a manner that does not adversely impact public safety or unduly distract motorists." *Id.* § 300.30(1)(a)(3).⁹ The Minnetonka ordinance is based on an explicit finding that "the safety of motorists, cyclists, pedestrians and other users of public streets and property is affected by the number, size, location and appearance of signs that unduly divert the attention of drivers." *Id.* §

eight seconds, is to some extent in the eye of the beholder. To the untrained eye, and the focused driver, the changing medium might not be unduly distracting. To a multi-tasking driver involved in the myriad of potential distractions driving on a highway, from potential cell phone use, map-reading, juggling coffee, changing the radio, or ordinary conversations, it could be one more unneeded distraction. Of course, the Court does not present itself as an expert in sensory overstimulation (few judges could), and the real issue is whether Minnetonka can regulate these signs, and whether reliable studies raise legitimate issues about their safety.

⁸ See Baker Aff. Ex. 6 (citing December 28, 2006 Clear Channel press release stating that "the advertising community [has] given high marks to the impact and versatility of our digital networks"); Baker Aff. Ex. 29 (citing January 11, 2007 New York Times article on digital billboards stating that "The technology has excited both billboard companies, which can generate three to five times more money from the digital signs, and advertisers.)

⁹ See Baker Aff. Ex. 1 at 189.

300.30(1)(b)(4).¹⁰

Minnetonka has not yet studied the effect of the new technology on drivers, because it is so new, and because Clear Channel activated the two billboards without giving Minnetonka a chance to talk about the technology and its effect on drivers. Clear Channel protests and states that Minnetonka understood what was coming when it obtained two permits to improve the I-394 and I-494 billboards. But the record is clear that Clear Channel requested and obtained a permit from Minnetonka to rebuild the billboard structure on I-394 and I-494 to hold more weight, and to increase the electric capacity of the two billboards. It is undisputed on this record that Clear Channel never explicitly told Minnetonka that it requested both permits in order to install and implement the new LED technology. Minnetonka's claim that it was surprised to discover the two signs illuminated and in action on December 12, 2006 is not undermined by any specific evidence to the contrary.

Minnetonka and Clear Channel have different opinions about whether the LED technology in the two large billboards pose a safety risk, and on a fully developed record at trial, or after further study by Minnetonka pursuant to its moratorium, a fuller picture will emerge. This Court cannot determine how many accidents will or will not occur if the signs stay on. On the one hand, Clear Channel states that the Minnesota Department of Transportation has concluded that electronic signs which change messages every six seconds or more pose no safety hazard to passing drivers, citing a technical memorandum of MnDOT issued on May 30, 2003.

But this conclusion only addresses the matter of frequency, and does not take into account the issues of changing color, illumination, intensity, and distraction addressed by Minnetonka's ordinance. There is no evidence that MnDOT has an opinion about the color, illumination, and change combination of the two specific signs at issue in this case, or the specific technology

¹⁰ See Baker Aff. Ex. 1 at 189.

allowing for “1.0 to 68 million combinations of intensities, with millions of chromaticities and thousands of brightness levels possible.”¹¹ It is unclear whether MnDOT’s 2003 memo addresses or contemplates the 2006 technology used by Clear Channel in these signs. Moreover, as Minnetonka points out, the conclusion of a MnDOT traffic engineer that a change every six seconds is safe does not have the force of a state statute, or preempt Minnetonka from regulating highway signs as it has for over four decades. For 41 years, Minnetonka has banned signs within its limits on which “illumination is not kept stationary or constant in intensity and color at all times when such sign is in use.”¹²

The conclusion that a senior highway engineer in the Minnesota Department of Transportation can preempt cities from regulating advertising in their borders would undo decades of just such regulation, and does not address the full range of concerns about illumination, intensity, color, or the effect of variable traffic speed on the highways. The state studies do not directly address federal research studies in the record which raise a concern that the eye-catching technology “may distract drivers from concentrating on the driving task and the visual surrounds.”¹³ At least two studies in the record have concluded that the addition of electronic billboards along major metropolitan freeways caused a greater number of auto accidents.¹⁴ An April 2006 study by the National Highway Traffic Safety Administration concluded that the risk of driver inattention and crashes or near-crashes doubles when a driver glances away from the roadway for any purpose for

¹¹ See Arturas Zukauskas, *Introduction to Solid-State Lighting*, attached as Baker Aff. Ex. 28; YESCO website (manufacturer of the Clear Channel devices) “The Big Picture/Electronic Displays/Understanding Electronics/The Big Picture,” attached as Baker Aff. Ex. 17; Hoeft Dep. 22.

¹² See Minnetonka, Minn., Code of Ordinances §§ 300.30 (10)(c) (prohibition), 300.02 (117)(definition of flashing sign) [hereinafter “City Code”], attached as Baker Aff. Ex. 1, 20.

¹³ See Office of Safety Research and Dev., Fed. Highway Admin., U.S. Dept of Transp., *Research Review of Potential Safety Effects of Electronic Billboards on Driver Attention and Distraction, Final Report* at 17 (2001), attached as Baker Aff. Ex. 2.

¹⁴ See J. Wachtel and R. Netherton, “Safety and Environmental Design Considerations in the Use of Commercial Electronic Variable-Message Signage” (1980), excerpts attached as Baker Aff. Ex. 7 at 7; 2001 Federal Research Review at 9-10, Baker Aff. Ex. 2. See also *Advantage Media v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir. 2006) (stating that large outdoor billboards using “trivision” electronic technology are “distracting” and “could also

more than two seconds.”¹⁵

There is substantial evidence to support Minnetonka’s claim that Clear Channel avoided disclosing its plans to deploy LED billboards in the City of Minnetonka, and operated “under the radar” in order to get the billboards up and running, in order to meet its expansion and profit goals for 2006.¹⁶ In the summer of 2006, Clear Channel executive Thomas McCarver contacted Bob Manor, a building official for Minnetonka, and told him that Clear Channel wanted to “rebuild as is” the two Clear Channel billboards in Minnetonka. Manor assisted McCarver in completing the building permits, and told McCarver to contact Minnetonka’s planning department regarding the proposed work on the signs.¹⁷ McCarver never contacted Minnetonka’s planning department regarding the proposed work. It is undisputed that before Clear Channel activated the digital displays in Minnetonka in December 2006, no one from Clear Channel contacted anyone from Minnetonka to explain that the company was transforming the two large billboards into digital displays, or to ask whether Minnetonka would consider the displays a violation of its ordinances.

Indeed, Clear Channel maintains that it was under no obligation to do so, and rightfully expected that had it made the request, Minnetonka would balk, and either say no, or request time to study the issue under existing ordinances. Clear Channel may also have sought to install and operate the two LED signs under the view that Minnetonka’s existing ordinance did not ban the technology, or at least clearly so, and sought to have the signs up and running before Minnetonka followed the course taken by the City of Bloomington two months earlier, which imposed a moratorium on any such signs. On this record, it seems to this Court that Clear Channel, a

pose real danger to both motorists and nearby pedestrians”).

¹⁵ See “The Impact of Driver Inattention on Near-Crash/Crash Risk: An Analysis Using the 100-Car Naturalistic Driving Study Data,” (April 2006), attached as Baker Aff. Ex. 9.

¹⁶ See Baker Aff. Ex. 12 (quoting statement from Clear Channel’s president that “Our goal for 2006 was to deploy fully networked, digital signage products in four to six markets . . . by years end”); Baker Aff. Ex. 6 (stating that at end of December 2006, Clear Channel met its goal).

¹⁷ See Manor Aff. ¶ 2

sophisticated world-wide company operating with counsel, considered its options and made a strategic decision to activate the signs before Minnetonka could weigh in against them, or impose a moratorium.

Clear Channel's two building permit applications relating to the I-394 and I-494 signs do not mention that the signs were to be transformed into digital displays. The building permits simply describe the weight-bearing or structural design of the signs, and describe the electrical changes to the signs, but do not indicate that a digital display was to be installed. The building permits submitted by Clear Channel state the value of the structural work on the I-394 sign (\$20,000) and the I-494 sign (\$50,000), but leave out the \$360,000 cost of the five-ton LED display, or any reference to it.

Leaving aside the LED disclosure issue, Minnetonka's electrical inspector, Carryl Transgrud, inspected the electrical equipment installed on the two signs, and determined that they violated three provisions of the National Electronic Code: (1) lack of UL listing or the listing of another third party required by Section 600.3 of the National Electric Code; (2) absence of three feet of working area in front of the electrical equipment required by Sections 110.26 of the National Electric Code; and (3) failure to lock down backfed breakers required by Section 408.36(f) of the National Electric Code.¹⁸ Absent code compliance, Clear Channel was not authorized to energize or operate the 300 amps. electrical equipment on the I-394 and I-494 signs, regardless of the LED display issues.¹⁹

While Clear Channel contends that the issues cited did not pose safety violations or were "just paperwork," the Court is inclined to defer to the expertise of Minnetonka's electrical inspector, and the National Electric Code, with respect to whether Clear Channel should have activated two large 300 amps. billboards without approval from Minnetonka's electrical inspector.

¹⁸ See Transgrud Aff. ¶¶ 3, 6-7 and Ex. A

The conclusion of Minnetonka's electrical inspector that the new installation did not comply with electrical standards, raising significant safety concerns, justified Minnetonka's action in directing that power be cut to the prematurely activated signs.²⁰

Based on its conclusion that the I-394 and I-494 signs violated Minnetonka's ordinance, banning signs on which "illumination is not kept stationary or constant in intensity at all times when such sign is in use," City Code § 300.02 (117), Minnetonka also issued a stop work order on the signs. In response to Clear Channel's assertion that its signs were lawful because they constitute neither animation, nor motion, nor flashing (albeit disagreeing with its position), Minnetonka's City Council unanimously adopted a 60-day moratorium on such signs. Minnetonka adopted this moratorium on December 18, 2006, in order in order to study the safety, aesthetic, and other concerns raised by the new technology.²¹

Other major cities have imposed similar moratoriums for similar reasons, including Bloomington, and most recently, St. Paul.²² The Bloomington moratorium was adopted on October 9, 2006, and the record suggests that Clear Channel acted quickly, without advance notice to Minnetonka, both to meet its business goals, and perhaps to avoid facing a moratorium in Minnetonka, like the one it faced in Bloomington. In summary, the record suggests that Clear Channel's decision not to communicate with Minnetonka about any concerns, and simply to activate the signs and take its chances, is consistent with Minnetonka's argument that Clear Channel ignored or discounted its ordinances in the hope of meeting its aggressive expansion

¹⁹ See Transgrud Aff. ¶¶ 3, 6-7.

²⁰ See Transgrud Aff. ¶ 10, and Ex. C to affidavit.

²¹ Minnetonka, Minn., *Emergency Ordinance Establishing Regulations for Electronic Signs* § 3.01 (Dec. 18, 2006), attached as McCarver Aff. Ex. F.

²² See Baker Aff. Ex. 15 (Bloomington moratorium ordinance); Myron P. Medcalf, "Electronic Billboards on Hold in St. Paul," *Star Tribune*, Jan. 26, 2007, <http://www.startribune.com/462/story/960940.html> (St. Paul adopts moratorium on Clear Channel LED signs).

goals.²³

B. Legal Analysis

The Court considers Clear Channel's request for a temporary injunction in light of Minn. R. Civ. Pro. 65, and the five factors set forth in *Dahlberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965). See also *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 451 (Minn. Ct. App. 2001) (citing *Dahlberg* factors). The five *Dahlberg* factors are: (1) the nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief; (2) the harm to be suffered by the plaintiff if the temporary restraint is denied, as compared to that inflicted on the defendant if the injunction issues pending trial; (3) the likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief; (4) the aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the state or federal statutes; and (5) the administrative burdens involved in judicial supervision and enforcement of the temporary decree. *Dahlberg Bros.*, 137 N.W.2d at 321-22.

1. The Relationship of the Parties

As noted earlier, Clear Channel is a large world-wide outdoor advertising firm, operating throughout the United States and in over 40 countries. Clear Channel is a Delaware corporation registered to do business in the State of Minnesota. It is one of the largest and most sophisticated

²³ With respect to Clear Channel's intention to activate an LED sign in Maplewood, the Court was struck by McCarver's testimony that he never received a December 29, 2006 letter addressed directly to him from the City of Maplewood planner, Shann Finwall, expressing concern that Clear Channel was replacing an existing sign with an LED sign face, in violation of Maplewood ordinances, and demanding that Clear Channel remove the LED sign. Finwall's affidavit attests that the letter was properly mailed to McCarver and never returned. Finwall Aff. Jan. 23, 2007. See also Kantrud Aff. Jan. 23, 2007. (The January 19, 2007 hearing record was left open to permit Minnetonka to submit this evidence.) The Court finds it curious that McCarver would claim never to receive a letter directly addressed to him, raising a matter of such importance to Maplewood and Clear Channel. This is particularly so when added to the evidence that McCarver never followed through on Minnetonka's official Bob Manor's directive to McCarver that he contact the City's planning division regarding work on the signs, and claims that he

companies in the world in the use of outdoor advertising technology. Minnetonka is a municipal corporation organized and existing pursuant to Minnesota statutes. Minnetonka is a relatively affluent suburb west of the Twin Cities and a presumably desirable advertising market. Clear Channel has had the I-394 stationary billboard in place since 1976, and the I-494 stationary billboard in place since 1970. Minnetonka has had ordinances in place regulating outdoor billboard signs for over four decades, and has a longstanding concern over the aesthetics and safety issues associated with outdoor advertising signs.

Clear Channel has operated these two I-394 and I-494 outdoor advertising signs for over three decades, and was entitled to make improvements to them. Under Minn. Stat. § 462.357 subd 1e(a), Clear Channel was entitled to engage in any “repair, replacement, restoration, maintenance, or improvement” of the signs. On the other hand, under Minnetonka zoning ordinances in place since 1966,²⁴ Minnetonka has prohibited illuminated flashing signs, moving signs, revolving signs . . . or similar devices” for over 40 years. Minnetonka has prohibited “revolving and moving signs except electronic message center/time and temperature display signs,” and “flashing, blinking, or animated signs including but not limited to traveling lights or any other means not providing constant illumination . . .” City Code, § 300.30(10)(b) and C).²⁵ Moreover, “flashing” signs under Minnetonka’s Code are broadly defined to include “any illuminated sign on which such illumination is not kept stationary or constant in intensity and color at all times when such sign is in use.” City Code § 300.02 (117).²⁶

As recounted above, against these four decades of regulation, Clear Channel did not obtain Minnetonka’s approval to install or activate signs which “flashed” every eight seconds, or which were not kept stationary or constant in intensity and color at all times when the signs were in use.

was never directed to do so. Manor Aff. ¶ 2.

²⁴ Ord. No. 77, Baker Aff. Ex. 20.

²⁵ Baker Aff., Ex. 1.

Minnetonka issued building and electrical permits, but Clear Channel never stated in applying for the permits that it intended to activate an LED light. Clear Channel also did not explain how the illumination would work or obtain approval to install signs, where the bright electrical image was not kept stationary, but rather changed in content, intensity, and color every eight seconds. Clear Channel disregarded Minnetonka's advice that it run the project past Minnetonka's planning department, which deals with such zoning changes.

On this record, the relationship of the parties, both as to longstanding regulation, and as to the process of installing the two LED signs, weighs against Clear Channel's request for injunctive relief.

2. The Balance of Harms

Clear Channel has invested millions of dollars to upgrade the signs and sell advertisements based upon the attractive new technology. Clear Channel has entered into multiple contracts with different companies for the display of advertisements, which it will be unlikely to recover from Minnetonka. This is so under doctrines of municipal immunity, and especially true if Minnetonka's actions are deemed lawful by this Court. Moreover, Clear Channel will suffer harm to its good will and reputation if it cannot stand behind existing advertising contracts, and face litigation if it cannot display the ads.

On the other hand, Clear Channel is not prohibited from running the advertisements under Minnetonka's moratorium ordinance. It is only limited in running the advertisements every eight seconds. It can change each advertisement every hour. While the dynamic of eight-second motion is key to their eye-catching appeal, it is unclear what amount of money is predicated on running the ads every eight seconds, and how many advertisers will bow out of their contract or not buy ads, if the ads run just every hour. This economic concern of how much Clear Channel can exploit the

²⁶ *Id.*

new technology, or what changes in speed dilute the potency of the ads, must be balanced against Minnetonka's prohibition of outdoor advertising billboards which change color and illumination. Presumably, employing sophisticated counsel, and operating in a volatile legal environment where the record demonstrates that cities and states have moved to bar the technology, Clear Channel has accounted for this risk in its advertising contracts. If it has not, an "ostrich-like" head in the sand approach to risk would not weigh in its favor. Finally, Clear Channel has not claimed that its inability to operate the Minnetonka advertisements at eight second intervals will create a significant economic harm that would place its existence in peril.

Minnetonka has no redress for harm if the Court grants Clear Channel's motion for temporary relief, and the signs are subsequently held unlawful. Minnetonka will suffer at least two potential harms if the Court grants Clear Channel's motion for a temporary injunction.

First, there is the harm in disregarding a four-decade old ordinance, passed by Minnetonka's elected officials, and the interest that a city has in regulating safety and aesthetic issues within its borders. The Court cannot conclude on this record that the safety purpose behind the ordinance is irrational and arbitrary, because numerous federal and other studies in the record demonstrate an increase in the accident rate from such signs.

Second, there is a harm to Minnetonka should accident rates increase at the I-394 and I-494 sites, as the result of the attention-getting effect of the signs. An increase in accident rates will involve an increase in litigation, harm to the public, and an increased drain in police and other public resources, such as medical care, relating to increased accidents.

Balancing the relative harms, the Court concludes that they weigh against the temporary relief sought by Clear Channel, and in favor of Minnetonka.

3. Likelihood of Success on the Merits

Clear Channel asserts that it is likely to succeed on the merits, because Minnesota law as

found that state statute only prohibits advertising devices which are “illuminated by any flashing light or lights.” Minn. Stat. § 173.16 subd. 3(a). Clear Channel points out that a 2003 technical memorandum from the Minnesota Department of Transportation, which applies the state standard, concludes that lighting displays which change “once every six seconds, or more, do not present motorists with any more a visual display than ordinary illuminated devices.”²⁷

Clear Channel’s likelihood of succeeding on the merits depends on its claim that Minnetonka’s ordinance is preempted by Minn. Stat. § 173.16 subd. 3(a), and that the Minnetonka ordinance does not proscribe its signs.²⁸ However, as noted above, there is a reasonable likelihood that the two signs at I-394 and I-494 run afoul of the City’s ordinances. They prohibit “revolving and moving signs except electronic message center/time and temperature display signs,” and “flashing, blinking, or animated signs including but not limited to traveling lights or any other means not providing constant illumination . . .” City Code §§ 300.30(10)(b)-(c).²⁹ Moreover, “flashing” signs under Minnetonka’s Code are broadly defined to include “any illuminated sign on which such illumination is not kept stationary or constant in intensity and color at all times when such sign is in use.” *Id.* § 300.02 (117).³⁰ It is undisputed that Clear Channel’s two electronic billboards at I-394 and I-494 change in color, content, and intensity every eight seconds, and they

²⁷ See Hennigan Aff. Ex. 1. MNDOT Technical Memorandum No. 03-11-TS-01

²⁸ The Court does not consider it necessary to reach the question of whether Clear Channel’s signs violate the federal Highway Beautification Act (“HBA”), 23 U.S.C. 131(c). It appears that Clear Channel correctly argues that advertising signs in commercial zones are governed by a section of the HBA, 23 U.S.C. § 131(d), which permits such signs so long as the state and the federal Transportation Secretary agree on appropriate size, lighting, and spacing standards. The state-federal agreements govern whether the type of advertising at issue here violate federal law. *See generally* 23 C.F.R. §§ 750.701-713 (proscribing Federal Highway Administration policies and requirements that relates to the control of outdoor advertising). Whether such signs are lawful under federal law is determined based upon the individual state-federal agreement. *See Baker* Ex. 22. The state-federal agreements for the period of 1976-71, and most recently, 1971 forward (as submitted on January 23, 2007), prohibit “Advertising devices which . . . contain, include or are illuminated by flashing light or lights . . . except those giving public service information such as . . . time, date, temperature, weather, or news. *See* “Agreement for Carrying Out National Policy Relative to Control of Outdoor Advertising in Areas Adjacent to the National System of Interstate and Defense Highways in the Federal-Aid Primary System,” dated November 18, 1971.

²⁹ Baker Aff. Ex. 1.

³⁰ *Id.*

are not therefore “kept stationary or constant in intensity and color at all times.” Minnetonka has a reasonable argument that they are unlawful under its ordinance.

Clear Channel’s statutory analysis for preemption would require that this Court give an unduly narrow reading to Minnesota’s statutes which provide that Minnesota localities can impose more restrictive ordinances on advertising and advertising devices than required by state law. But both Minn. Stat. §173.10 and Minn. Stat. § 172.20, which govern highway advertising, provide that nothing in state law “shall be construed to abrogate, or affect the provisions of any other law, municipal ordinance, regulation, or resolution which is more restrictive than are the provisions . . . [of state statutes].” Minn. Stat. §§ 173.10, 172.20. Moreover, the statutory provision cited by Clear Channel for state preemption, Minn. Stat. § 173.16, has an express provision for local control when, in the judgment of the state transportation commissioner, “a bona fide . . . local zoning authority has made a legitimate determination of customary usage and . . . reasonably provides for size, lighting and spacing control of advertising devices . . .” *Id.* § 173.16 subd. 5(a). In such a case, the local determination “shall be accepted in lieu of the provisions of this chapter in the zoned commercial and industrial areas within the geographical jurisdiction of such authority.” *Id.* See also Minn. R. § 8810.1400 (establishing the certification process for local advertising zoning).³¹

The Minnesota billboard advertising statute was adopted in 1965, and the Minnetonka ordinance regulating outdoor billboards more restrictively was adopted in 1966. There is nothing in the record to suggest the Commissioner of MnDOT has ever expressed a judgment that the local ordinance, now in operation for over forty years, is an improper exercise of local zoning authority. The authority of Minnesota cities to regulate signs is of longstanding vintage. See, e.g. *Naegele Outdoor Advertising Co. of Minn. v. Village of Minnetonka*, 162 N.W.2d 206, 211 (Minn. 1968)

³¹ It is unclear when this regulation became effective, or whether the regulation went into effect after Minnetonka’s 1966 ordinance. The Court considers it probative that the ordinance has been in place for 41 years without anything in the record to demonstrate an objection by the Commissioner of the Minnesota Department of Transportation.

(stating that municipalities may constitutionally exclude billboards from residential districts); *Arcadia Development Corp. v. City of Bloomington*, 125 N.W.2d 846, 851 (Minn. 1964) (stating that the city can regulate business signs and billboard so long as the regulations bear a reasonable relation to the purposes they were meant to attain); *City of Cottage Grove v. Ott*, 395 N.W.2d 111, 113-115 (Minn. Ct. App. 1986) (concluding a city may prohibit commercial speech on a billboard due to the city's interest in traffic, safety, and aesthetics). In the face of statutory language permitting more restrictive local advertising ordinances, and the historic recognized interest of cities in the field, Clear Channel has made an unpersuasive case that the more broad and general Minnesota statute, and an engineering opinion three years prior to the new technology here, should pre-empt Minnetonka's more specific and restrictive 41-year old ordinance.

“The doctrine of preemption is premised on the right of the state to so extensively and intensively occupy a particular field or subject with state laws that there is no reason for municipal regulation.” *Nordmarken v. City of Richfield*, 641 N.W.2d 343, 347 (Minn. Ct. App. 2002). The four factors that Minnesota courts apply in preemption analysis examine (1) the subject matter regulated; (2) whether the subject matter is so fully covered by state law that it has become solely a matter of state concern; (3) whether any partial legislation on the subject matter evinces an intent to treat the subject matter as being solely a state concern; and (4) whether the nature of the subject matter is such that local regulation will have an adverse effect on the general state population. *Id.* at 348.

The record does not demonstrate that the Minnesota legislature intended to occupy the field of outdoor billboard regulation, and preclude municipalities from imposing more restrictive rules. The relevant Minnesota statutes discussed above specifically contemplate more restrictive local control. Even the MnDOT application for an advertising device states that it is “Subject to Local

Ordinance.”³² The record before this Court, which includes actions by municipalities in Bloomington, Maplewood, St. Paul, Burnsville, and Minnetonka to limit or regulate Clear Channel’s Advertising, and nothing in the record from the Minnesota Department of Transportation expressing intent to preempt the field, undermines Clear Channel’s claim of preemption. Minnetonka has applied its ordinance for forty-one years without any edict from the Minnesota Transportation Commissioner suggesting the ordinance is invalid. In addition, no Minnesota court has thus far construed the ordinance, or any like it, to be invalid.

Clear Channel’s argument that the LED technology activated in December 2006 is simply an improvement to an existing use under Minn. Stat. § 462.357 subd., and that the moratorium against its use a deprivation of “vested interests,” falls short of the mark. The protection for existing uses only applies to lawful uses. *County of Morrison v. Wheeler*, 722 N.W.2d 329, 334 (Minn. App. 2006), *rev. denied*, (Minn. Dec. 20, 2006). Minnetonka has made a reasonable showing that the new LED signs at I-394 and I-494, with their bright, colorful messages changing every eight seconds, run afoul of its ordinance adopted decades earlier, and that therefore Clear Channel could not have a “vested” interest.

The 60-day moratorium on electric billboard signs adopted by Minnetonka on December 16, 2006 reflects a compromise from the existing ordinance, allowing Clear Channel to use its signs provided that the message changes less frequently, or once an hour, while Minnetonka studies the safety of the new technology in a more deliberate fashion. The moratorium is of limited duration, and allows Minnetonka to review the technology without operating under a sense of ambush. Such deliberate efforts to impose a short term moratorium have been upheld by the Minnesota Supreme Court. *See Almquist v. Town of Marshan*, 245 N.W.2d 819, 826 (1976) (stating that a short-term moratorium is implicit in Minn. Stat. § 462.351). Moreover, the moratorium falls within

³² See Baker Aff. Ex. 27, State of Minnesota Department of Transportation Advertising Device Permit Application.

Minnetonka's powers under Minn. Stat. § 462.355 subd. 4. In light of the record setting forth legitimate public safety concerns, it cannot be said that Minnetonka acted arbitrarily, or that its action are unrelated to the public health, safety, or general welfare of the community. *See e.g. Wedemeyer v. City of Minneapolis*, 540 N.W.2d 539, 542 (Minn. Ct. App. 1995) (stating that municipalities' zoning decisions are generally left undisturbed if the decision bears a substantial relationship to a legitimate public interest). Under similar circumstances, Minnesota courts have upheld moratoria, even if, as here, they focus on a particular project. *See, e.g. Duncanson v. Bd. Of Supervisors of Danville Twp.*, 551 N.W.2d 248, 252 (Minn. Ct. App. 1996) (holding that the township's moratorium is lawful, even though plaintiff's proposed feedlot was the only known project affected by the moratorium).

In this case, Minnetonka has reason for concern that Clear Channel's efforts will be mimicked by its competitors, and its concern is not limited to just the signs at I-394 and I-494. There are presumably other outdoor advertising signs in Minnetonka, owned both by Clear Channel and its competitors, and Minnetonka has a legitimate interest in studying the technology and its effect on driver safety before the signs spread or come to dominate the landscape. Clear Channel's claim that it has a vested interest in the I-394 and I-494 signs might be more compelling if the record established that Minnetonka approved the signs and then shut them down. But that is not what the record shows. Clear Channel obtained building and electrical permits, but never disclosed on its application, or told any Minnetonka official, that it intended to install and activate the LED signs. Coming before this Court seeking an extraordinary equitable remedy, Clear Channel is in a weak position to claim that it is being deprived of a vested interest for something it never disclosed.

Analyzing all of these factors, the Court concludes that Clear Channel has not demonstrated a likelihood of success on the merits.

4. Public Policy

Clear Channel's argument that public policy mandates temporary relief flows from its same argument relating to its likelihood of success on the merits. The Court finds little support for Clear Channel's argument that Minnetonka's ordinance does not prohibit the LED signs, that the Minnesota statutes preempt the field, or that the moratorium is invalid. For all of those reasons, public policy supports Minnetonka's right to regulate billboard advertising within its city, as has been the case for decades. The Court's analysis of public policy weighs against Clear Channel's request for injunctive relief.

5. Administrative Burden Related to Judicial Supervision of a Temporary Decree.

The Court agrees with Clear Channel that its motion requesting that it be permitted to complete the electrical inspection process and activate the billboards would involve little or no judicial oversight once the billboards are activated. In light of the Court's analysis of the preceding four factors, however, the fifth factor is essentially moot.

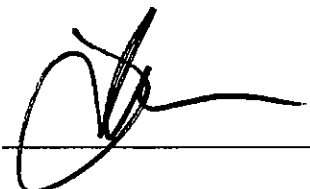
Conclusion

Therefore, for the reasons stated above, based upon the record and the arguments of counsel,

IT IS ORDERED:

- 1.) Clear Channel's motion for a preliminary injunction is denied.

Dated: January 30, 2007



Lloyd B. Zimmerman
Judge of District Court