

IN THE MATTER OF : BEFORE THE  
PLUMTREE, LLC, T/A : HOWARD COUNTY  
CRAB SHANTY RESTAURANT : BOARD OF APPEALS  
Appellant : HEARING EXAMINER  
vs. : BA Case No. 670-D  
HOWARD COUNTY DEPARTMENT  
OF INSPECTIONS, LICENSES AND  
PERMITS

Appellee

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**DECISION AND ORDER**

On December 14, 2009, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a hearing on the administrative appeal of Plumtree, LLC, t/a Crab Shanty Restaurant ("Appellant" or "Crab Shanty"). Crab Shanty is appealing the Howard County Department of Inspections, Licenses and Permits ("DILP") September 18, 2009 action letter denying Crab Shanty's sign permit application because the proposed modification violated the Sign Code's prohibition against blinking, flashing and changing lights.<sup>1</sup> Crab Shanty alleges it is aggrieved by the action letter because DILP is requiring it to go through unnecessary procedures and restricting Crab Shanty's use of its sign.

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<sup>1</sup> By letter dated November 17, 2009 to Thomas Meachum, Esquire, from Robert J. Frances, P.E., the Director of the Department of Inspections, Licenses and Permits, DILP advised Appellant it would not be pursuing its secondary claim, that the changes to the sign at issue required a variance.

I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Thomas Meachum, Esquire, represented Appellant. Camela Sandmann, Assistant County Solicitor, represented DILP. Eric King and Wayne Belsinger testified on behalf of the Appellant. Robert Frances testified on behalf of DILP.

#### Preliminary Matters

By letter dated November 17, 2009 to Thomas Meachum, Esquire, DILP's Director Robert J. Frances, P.E., requested the Hearing Examiner to render a declarative decision on whether lights that form writing or printing and change more than once every 24 hours constitute blinking or flashing in violation of the Sign Code. At the outset of the hearing, DILP stated it was open to permitting changes in copy more than once a day, with the attendant interpretation that a sign timed to change to whatever I determined to be a reasonable time would not be considered to be blinking or flashing.

#### Exhibits

The Appellant introduced the following documents into evidence:

1. Graphic depictions of the changed sign
  2. A January 23, 2009 Notice of Violation letter (CS090068) to Sea King V., Inc., c/o William C. King III, from Robert C. Porter, DILP Code Enforcement Officer, informing Mr. King of the need to obtain a new sign permit, electrical permits and an affidavit from
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the property and business owners stating the sign will not change text more than once in any 24-hour period

3. A July 14, 2009 notice of violation letter (CS090068) to Sea King V., Inc., c/o William C. King III, from Robert Frances, DILP Director, informing Mr. King that it was reissuing the notice of violation for failure to obtain proper permits for the new Crab Shanty sign

4. Four videos using the electronic message sign to depict: 1) the Webster Dictionary definition of "flashing"; 2) a change in sign copy every three seconds; 3) a change in sign copy every second, and; 4) a "static" change in sign copy

#### General Background

Appellant is the owner of the long-standing Crab Shanty Restaurant, which is located at the southwest corner of the intersection of Plumtree Drive and US 40 (Baltimore National Pike). The restaurant's address is 3410 Plumtree Road. The property is zoned B-2 (Business: General). In Board of Appeals Case No. 98-05S, the Board granted Sea King V. Inc., a sign variance to redesign and relocate an existing commercial identification sign, which would be 108-square feet in size, 21 feet in height and 8 feet from the existing US 40 right-of-way and 16 feet from the Plumtree Drive right-of-way, rather than the required setback of 108 feet in relation to the sign area and the required 42 feet in relation to the sign height. The Decision and Order did not describe the sign cabinet. Based on the photograph attached to DILP's January 23, 2009 letter to Appellant (Appellant's Exhibit 2), the illuminated sign cabinet's top third section (approximately) featured the words "Crab Shanty" in large fixed letters. The words in the lower section, however, could be changed manually through the placement of letters or symbols on a panel mounted in or on a track system.

In 2009 (apparently), Crab Shanty decided to update the sign. As depicted in Appellant's Exhibit 1, the modifications included repainting the existing pediment, footers and cabinet structure black and altering the lettering and graphics and background color of the upper portion of the internally illuminated cabinet (both faces). Pertinent to this case is Crab Shanty's decision to replace the lower portion of the sign cabinet with a double-faced 40-inch high, 11-foot wide electronic message center ("EMC"). The overall size of the sign did not change.

By letter of January 23, 2009, Robert C. Porter, a DILP code enforcement officer, issued Crab Shanty, a Notice of Violation ("NOV") for failure to obtain new sign and electrical sign permits and sign an affidavit agreeing not to change sign text more than once in any 24-hour period (CS090068). On July 14, 2009, DILP reissued the Notice of Violation to Crab Shanty. The letter explains it is County policy to limit message changes on changeable text signs to once every 24 hours. The letter informs Crab Shanty the NOV is being reissued because Crab Shanty failed to obtain the proper permits for the new sign pursuant to Section 3.509 of the Howard County Sign Code. The letter further informs Crab Shanty that DILP's affidavit/24 hour sign change policy represents a 20-year effort to respond to the advent of widely available electronic text signs and represents DILP's "interpretation" that a message that changes only once every 24 hours does not run afoul of Sign Code Section 3.508(b).

Crab Shanty makes two charges concerning the affidavit/copy change timing policy.<sup>2</sup> First, nothing in the Sign Code requires it to sign an affidavit to the effect that it will not change the sign more than once every 24 hours. Second, the Appellant asserts its use of illumination in the sign cannot be considered "blinking, flashing or fluttering" within the meaning of the law. In the Appellants view, while the message changes over the course of a day, the words themselves remain static.

#### Standard of Review

The Howard County Charter, Section 16.301 authorizes the Board of Appeals "[t]o hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by any administrative official in the application, interpretation, or enforcement of this title or of any regulations adopted pursuant to it." The matter is before me pursuant to Section 16.302(a), which authorizes a hearing examiner to first hear and decide a matter within the Board's jurisdiction.

Pursuant to Rule 10.2(c) of the Hearing Examiner Rules of Procedure, in an appeal of an administrative agency decision, the petitioner must show by substantial evidence the administrative agency action was clearly erroneous, arbitrary and capricious, or contrary to law. Additionally, Hearing Examiner Rule 10.5 permits the hearing examiner to grant or deny the petition, grant the petition with modifications or

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<sup>2</sup> Appellant also charged DILP's interpretation that a sign does not "move" within the meaning of Section 3.508(b) if the text copy changed once every 24 hours lacks clarity about the rational purpose intended to be advanced by regulating commercial free speech in this manner. Because Appellant did not brief this issue during the hearing, I do not address it in this Decision and Order.

conditions, or, in the case of an administrative appeal, remand the case to the agency for further proceedings.

### Discussion

#### **I. The Affidavit**

The primary issue in this case is whether DILP's policy of requiring sign permit applicants to sign the contested affidavit as a condition of approval is a reasonable interpretation of the sign illumination prohibited by the Sign Code. Section 3.501(c)(7) provides that all illumination in commercial districts must accord with the restrictions set forth in Section 3.508. Pertinent to this case is Section 3.508(b).

*Blinking or Flashing. No sign shall have blinking, flashing or fluttering lights or other illuminating devices which have a changing light operated as to create an appearance or illusion of writing or printing. A variance may be granted by the Board of Appeals for movement showing the date, the time and the temperature exclusively. Nothing contained in this section shall, however, be construed as preventing the use of lights or decorations related to religious and patriotic festivities. Beacon lights or search lights shall not be permitted as a sign for advertising purposes. (Emphasis added.)*

Crab Shanty argues DILP's "once a day" message change policy is arbitrary and capricious. Claiming the changeable lighting on its sign does not use "flashing" lights to create the appearance or illusion of writing or printing, Crab Shanty asks me to remand its appeal to DILP with instructions to issue the permit. In order to resolve the issues in this case, we must first immerse ourselves in a basic course on commercial sign messaging and lighting.<sup>3</sup>

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<sup>3</sup> Neon and video board lighting are not addressed in this Decision and Order. In preparing this decision and

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order, I surveyed the law and policy on electronically changeable text copy law. The survey revealed that the regulation of electronic message reader boards and flashing signs is multifarious. The federal courts have upheld complete bans on EMCs. In a recent case, the First Circuit upheld a local ordinance containing an express, complete ban on EMCs. *Naser Jewelers, Inc. v. City of Concord*, N.H., 513 F.3d 27 (1st Cir., 2008) (citing to and quoting an unreported 4<sup>th</sup> decision, *Chapin Furniture Outlet, Inc. v. Town of Chapin*, 2006 WL 2711851, at 4 (D.S.C. Sept.20, 2006), vacated on other grounds by *Chapin Furniture Outlet, Inc. v. Town of Chapin*, 2007 WL 3193854 (4th Cir. Oct.30, 2007) (holding, in the context of EMC regulations, that "the Town's judgment that flashing or scrolling signs constitute a traffic hazard . . . is not unreasonable").

When it comes to actually regulating how long an electronically changeable message must stay and the interval for change, a studied internet survey of area jurisdictions reveals no consensus. In its regulation of illuminated permanent signs, Montgomery County, Maryland, not only bans flashing signs ("A sign must not contain or be illuminated by flashing, revolving, or intermittent lights, or lights of changing intensity"), it limits message replacements to one a day ("Signs that have characters which are changed manually or electronically must not be changed more than once each day. This includes a sign that gives the appearance or illusion of movement for a written or printed message.") Montgomery County Zoning Ordinance, Division 59-F-4. Permanent Sign - Design Elements and Limitations.

Baltimore County's 2008 amendments to the Zoning Ordinance prohibit flashing signs ("The intermittent change, whether directly or indirectly, to an illuminated sign, which exhibits a change to the natural or artificial light or color effects by any means whatsoever") and strictly control message displays for changeable copy signs ("Except for that portion of a changeable copy sign displaying time or temperature, all elements illuminating a sign shall operate at a constant intensity so that no sign has the appearance of movement or of being illuminated by flashing, blinking, strobing, oscillating or alternating lights. The message display for changeable copy signs displaying time or temperature is restricted to date, time and temperature only.") [Bill No. 106-2008]

I also consulted Professor Daniel R. Mandelker's considerable body of legal research on sign regulation. Professor Mandelker advocates using definitions to regulate electronic, changeable copy signs or reader boards. In Daniel R. Mandelker & William R. Ewald, *Street Graphics and the Law* 89 (rev. ed. 1988), the model sign ordinance defines "flashing illumination" as a "light source which, in whole or part, physically changes in light intensity or gives the appearance of such change at intervals of less than six seconds." More recently, Professor Mandelker presented a PowerPoint presentation on sign regulations at the 2009 American Planning Association Conference, "Regulating Digital Signs and Billboard." Professor Mandelker and his colleagues presented five alternative modes for regulating "dynamic signs" (including EMCs), including complete bans, permission to operate jurisdiction-wide dynamic signs subject to strict

A. Fixed Text Messaging. A sign can use internal (usually back-lit) or external (independent spotlights directed at a sign) to display a fixed message ("text copy"). To change the text, the sign face itself must be replaced. The upper portion of the original Shanty Restaurant sign cabinet was an internally illuminated sign with fixed text copy. The original text copy lettering appears to have been opaque. In the modified sign, the red and white lettering and graphics are translucent and back-lit using fluorescent lamps.

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conditions (long—20 minutes--display times and text size restrictions set by the speed limit of the road) and allowing flashy signs in selected districts. Available at [law.wustl.edu/landuselaw/.../digital%20signs%20apa%202009.ppt](http://law.wustl.edu/landuselaw/.../digital%20signs%20apa%202009.ppt). Site visited December 16, 2009. This presentation was, in part, the outgrowth of Marya Morris, Mark Hinshaw, Douglas Mace, and Alan Weinstein. Context-Sensitive Signage Design. Planning Advisory Service Report. Chicago, Ill.: The American Planning Association (2002). The report is available at <http://www.planning.org/research/signs/index.htm>.

A model sign ordinance in one treatise, P. Rohan, Zoning and Land Use Controls (2008) §53.10(2) similarly proposes regulating electronically changeable text copy through definitions. The model code defines a "flashing sign" as "[a] sign, the illumination of which is not kept constant in intensity at all times when in use, and which exhibits sudden or marked changes in lighting effects." In order to accommodate the sign display of changes in stock market quotations, movies schedules, and gas prices, the model ordinance defines a "changing sign" as "[a] sign that is capable of changing the position or format of word messages or other displays on the sign face and that can also change the visible of words, numbers, symbols and graphics by the use of a matrix of electric lamps, movable discs, movable panels, light apertures, or other methods, and such changes are actuated by a control mechanism, rather than being made manually on the face of the sign. A sign on which the message changes more than eight times per day shall be considered an animated sign . . ." "Animated sign" is defined as "[a]ny sign that uses movement or change of lighting to depict action or create a special effect or scene."

In March 2009, the United States Sign Foundation released model sign regulatory guidelines. Alan Weinstein, Ed. A Framework for On-Premises Sign Regulations. The guidelines present alternative regulatory approaches to allow jurisdictions to permit EMS while addressing concerns. Available at <http://www.usssfoundation.org/guidelines.php>. Site visited January 6, 2010.



B. Changeable Text Messaging. The sign face is replaced by changeable reader board. There are two general types of changeable text copy signs, manual and automatic, which differ in how they deploy lighting in the display of commercial messages.

- Manually changeable reader boards. The reader board display surface consists of strips attached to the face of the sign to hold removable display letters. To change text position, format and text copy, someone opens the sign cabinet and replaces letters on a panel mounted in or on a track system. The lighting on a manually changeable reader board can be internal (back-lit) or external (independent spotlights directed at a sign). The bottom section of the sign cabinet in the Crab Shanty sign originally approved in BA 98-05S utilized a manually changeable reader board with four tracks and internal back-lighting.
- Automatically changeable reader boards. The last three decades saw the introduction of a new type of changeable reader board, the automatically changeable reader board. The display letters of the manually changeable reader board are replaced by electronically activated lights. through remote electronic or other automatic means, the reader board lighting can be varied to change the format and position of text, and changes in the text copy itself.

At issue in this case is an Electronic Message Center ("EMC"), an electronically activated reader board. With an EMC, the reader board and the display letters are integrated, as the reader board is basically an illuminated LED structure. EMCs use computer programs to change illumination, and by changing illumination in varying

ways, the program determines what text copy appears, the duration of the text copy on the reader board, the time interval between one message and another and how the transition between messages occurs. The medium becomes the message, as it were. The transition time between messages may be immediate (on command), it can be slowed down by fading, repixelizing, or dissolving one message before a new message appears. The bottom third section of Crab Shanty's sign cabinet (both faces) is a 40" by 11' monochrome (red) EMC. Crab Shanty can program it to display text copy and graphics for a period of time, then transition to different text copy.<sup>4</sup>

Crab Shanty argues DILP equates the contested EMC's use of electronically programmable lighting as a means to change text copy at intermittent intervals with a prohibited lighting characteristic—flashing. In Crab Shanty's view, the Sign Code permits signs using electronically programmable illumination to change text copy so long as the lighting does not flash when the copy is changed.

There being no regulatory definition of "flashing" in the Sign Code, we must first make inquiry into the ordinary and natural meaning of "flashing." When used as a verb, to "flash" means "to give off light suddenly or in transient bursts." See Merriam-Webster On-Line Dictionary, <http://www.merriam-webster.com/dictionary/flashing>. Applying this definition to the first sentence of Section 3.508(b), an electronic reader board sign that displays text copy in sudden and transient bursts is an impermissible flashing sign. It also means, in my view, that there is no reasonable basis in the ordinary meaning of "flashing" or as this meaning is applied to Section 3.508(b), for DILP's long-standing interpretation

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<sup>4</sup> I observed a football helmet graphic on the reader board just after the Ravens/Patriots playoff game.

that an EMC or other electronic text sign or reader board does not "flash" if the text copy changes but once a day.

Still, Appellant's requested exercise in statutory construction stops short of the requisite analysis. Section 3.508(b) prohibits "blinking, flashing or fluttering lights *or* other illuminating devices which have a changing light operated as to create an appearance or illusion of writing or printing" (emphasis added.) The unambiguous use of the conjunction "or" is used inclusively to bar a broad range of sign illumination scenarios: signs that flash, blink or flutter, and also any other sign using "changing light" to create the appearance of writing or printing. The sign code therefore permits manually changeable text copy on illuminated signs, but not those signs using an electronic reader board, where the physical sign and the text copy are the same thing, changing light operated to create an appearance or illusion of writing or printing.

This reading of the plain language of the first sentence in Section 3.508(b) is consistent with the definition of "change" when used as a verb: "to make different in some particular" to "switch," to "undergo a modification of." See Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/flashing>. Because the scope of prohibited lighting is broad, extending to the modification of lighting itself to form changing text copy, Section 3.508(b) necessarily bans EMCs.<sup>5</sup>

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<sup>5</sup> During the hearing, the Appellant called our attention to the definition and interpretation of "flashing sign" in *Cartgill Quick Lube & Carwash, LLC v. Zoning Board of Appeals of the Town of Putnam*, 2009 WL 3086538 (Conn. Super. Ct. Aug. 31, 2009), an unreported lower court decision addressing a regulatory ban against "flashing or animated signs." In that case, the Board of Zoning Appeals had determined an electronic sign constituted an unlawful flashing sign based on the frequency of message changes. The sign

In my view, this interpretation of Section 3.508(b) squares with DILP's efforts to come to terms with electronic message boards. DILP's brief history of these efforts, set forth in its July 14, 2009 action letter, informs us that the Sign Code does not specifically regulate electronic text signs because it predates the rise of electronic message signs. Rather than amending the Sign Code to "outlaw electronic signs outright" DILP adopted the policy and interpretation contested in the instant case. In this same action letter, we further learn DILP derived its "once a day" message change policy from the frequency of print or writing changes made on manually changeable reader boards--back-lit, plexiglas, panel signs with plastic letters mounted in channels, which are permitted under Section 3.508(b). As DILP explained, "no one ever changed the text on such signs every few second, or even every few hours . . ." What was DILP's concern—its policy intent—for the 24-hour rule? To maintain consistency on how frequently a commercial message could change--slowly, infrequently, only as often as a manually changeable sign is

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changed a displayed message periodically, more than once a day. The court sustained the carwash appeal, concluding the board acted unreasonably because its definition of flashing sign lacked any reasonable basis in the regulations or in the common understanding of the term. What distinguishes this decision from the instant appeal is the pertinent regulatory language. The holding in Cargill was limited to the board's erroneous interpretation of the regulatory ban against "flashing signs," whereas the Howard County sign code bans not just signs with flashing lights, but also signs with changing lights that create the appearance or writing or print. In my view, the trial court, misrelied on the distinction between the definition of "flashing sign" and "changing sign" in the model sign ordinance in a notable treatise, P. Rohan, Zoning and Land Use Controls (2008) §53.10(2) (see Footnote 3). Rohan's commentary on the definition "changing sign," clarifies that the regulatory definition permitting a sign message to change eight times a day, is intended for the limited purpose of accommodating the posting of stock market quotations, updated movie schedules, or changes in gas prices. It is therefore inapplicable to commercial messages.

typically changed. The curious problem here is that DILP chose to impose control over electronic signs through an impermissible stopgap measure, the affidavit policy.

Nevertheless, DILP has not contended that an electronic message sign with a constant, illuminated, unchanged display of text copy would violate Section 3.508(b). I am therefore reversing DILP's action letter denying Appellant its sign application and remanding it to DILP, directing DILP to issue the Appellant's sign application, subject to the condition that the EMC maintain a constant intensity, illuminated unchanged text copy (message) display.

**II. The Parties' Request to the Hearing Examiner to Establish a Reasonable, Useable and Enforceable Time Frame in Which Messages can be Changed on an Electronic Display Reader Board**

At the outset of the hearing, DILP expressed its desire for an alternative rate of change in which electronic text signs could change without becoming flashing or changing lights. Based on this request, the Appellant seeks a specific, reasonable period within which its EMC could display changing illuminated messages with no further enforcement action, proposing, with DILP's agreement, a one minute interval or delay between new message displays.

The parties apparently agree I enjoy the quasi-judicial discretion to apply a duration standard to Section 3.508(b)'s ban against flashing signs or signs that use changing light to create text copy. In my view, this request exceeds my discretionary authority and it would only graft a new, equally unreasonable standard on the regulation

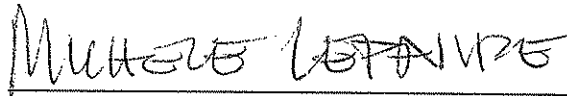
at issue. More important, given that the key factors in a non-flashing, electronic message board sign regulation--the duration and appearance of the message and the transition time to the next message--are grounded in public safety and aesthetic concerns, including a consideration of how long it takes for a reader to read the sign safely, the county legislature is the appropriate and sole body to establish the necessary standard through, in my view, regulatory definitions.

**ORDER**

Based upon the foregoing, it is this 14<sup>th</sup> day of January 2010, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of appeal of Plumtree, LLC, t/a Crab Shanty Restaurant, concerning the Department of Inspections, Licenses and Permits decision to deny the Appellant's sign application, is **REMANDED** to the Department of Inspections, Licenses and Permits. The Department is instructed to issue the permit for the sign application, subject to the condition that the electronic message center maintains a constant intensity, illuminated unchanged message display.

**HOWARD COUNTY BOARD OF APPEALS  
HEARING EXAMINER**



Michele L. LeFaivre

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Date Mailed

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.