

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF TRANSPORTATION,)
)
 Petitioner,)
)
 vs.) CASE NO. 86-2288T
)
 SUNSHINE PATIO SHOPS,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to Notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, K. N. Ayers, held a public hearing in the above-styled case on November 5, 1986, in Bartow, Florida.

APPEARANCES

For Petitioner: Vernon L. Whittier, Esquire
Department of Transportation
Haydon Burns Building
Tallahassee, Florida 32301

For Respondent: John A. Naser, Esquire
1349 South Florida Avenue
Lakeland, Florida 33803

By Notice of Alleged Violation dated April 18, 1986, the Department of Transportation (DOT), Petitioner, seeks removal of a sign on SR 37, 50 feet north of Brannon Road. As grounds therefor, it is alleged the sign does not have a permit.

At the hearing, Petitioner called two witnesses, Respondent called one witness and six exhibits were admitted into evidence.

Proposed findings have been submitted by the Petitioner. All of those proposed findings are accepted. Those findings not included herein were deemed unnecessary to the results reached.

FINDINGS OF FACT

1. SR 37 in the vicinity of Respondent's sign is a federal-aid highway.
2. Respondent's sign consists of panels mounted on steel pipes attached to the bed of a pickup truck which is parked daily near the intersection of Brannon Road on which Respondent's principal place of business is located. This business is not visible from SR 37 and an orange arrow on the sign points in the direction of Respondent's combined factory and store.

3. The sign and truck on which the sign is mounted, at a recent inspection, was located 74 feet north of Brannon Road and 60 feet from an existing, permitted sign on the same side of the highway facing in the same direction.

4. Prior to placing the sign on the pickup truck, Respondent had a fixed sign in the vicinity advertising and pointing to the combined factory and store where outdoor furniture is manufactured and sold. Removal of this unpermitted sign was demanded by DOT. The instant sign serves to replace the former sign. No permit has ever been issued for this sign.

5. Another sign on the same side of the highway and facing in the same direction as Respondent's sign is located within 1000 feet of Respondent's sign. This other sign is a lawfully permitted sign for which tags have been issued.

6. Respondent's owner testified that he pays the owner of the land on which he parks the truck with the sign at issue a monthly rental for the right to use the land. No written lease for use of this site has been executed.

7. The truck providing a platform for the sign at issue is driven to the site each morning and removed at dusk each evening. Respondent contends this truck serves as a retail outlet for the outdoor furniture it makes and that such furniture is sold at the site. Respondent also contends that the site is manned at least one-half of each day. However, this testimony is not credible for the reasons below.

8. Respondent has four employees--the owner, the owner's wife, a sales employee and a factory employee. It is the duty of the factory employee to place the truck on the site, place the furniture near the truck and at dusk remove the furniture and the truck from the site along SR 37.

9. Neither the owner, his wife nor the sales employee man the truck at the site. This leaves the factory employee who, presumably, is the man primarily involved in assembling the furniture to be sold, to put in one-half of each day at the pick-up taking orders for furniture.

10. Exhibit 5 consists of some 51 sales slips for furniture alleged to have been sold from the pickup from May 3 to October 25, 1986. Approximately 6 of those invoices leave blank the space headed SALESMAN. Twenty-nine of those invoices show DZ as the salesman and 17 show DS as salesman. Of those 17 sold by DS 9 sales occurred on October 11 and October 18. All of those invoices show the address of the business to be on Brannon Road.

11. No evidence was presented regarding the identities of DZ and DS. Thomas F. Zink is President of Sunshine Patio Shops.

12. Respondent presented Exhibit 6, an occupational license for a dealer in tangible personal property whose business is located at 553 Brannon Road.

13. Exhibit 4 is a photograph of the truck, sign and furniture displayed alongside the truck which was submitted by Respondent. This photograph shows the furniture all connected by a chain which presumably is fastened to the truck. This has the effect of providing security from theft of the furniture. Such security would not be needed if the site is manned while the furniture is displayed.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings.

15. Section 479.01(7), Florida Statutes, provides a person may not erect a sign on any federal-aid primary highway system without first obtaining a permit from DOT. Subsection (9)(a)(1) provides no permit shall be granted for a sign unless located at least 1000 feet from any other permitted sign on the same side of the highway if a federal-aid primary highway.

16. Section 479.16, Florida Statutes, provides the following signs are exempt from the requirement that a permit be granted:

(1) Signs erected on the premises of an establishment, which signs consist primarily of the name of the establishment, or which identify the principal or accessory merchandise, services, activities, or entertainment sold, provided, manufactured, or furnished on the premises of the establishment and which meet the minimum standards of the Southern Building Code.

17. Although Respondent contested the jurisdiction of Petitioner over the area on which this sign is located, the evidence was un rebutted that this site is alongside a federal-aid primary highway and DOT has jurisdiction.

18. The only real issue in these proceedings is whether the pickup truck constituted a retail establishment at which Respondent's outdoor furniture was sold so as to make this an on-premise sign for which no permit is required.

19. Whether or not this pickup truck constituted a retail establishment as contended by Respondent is a factual issue and not a legal issue. For the reasons contained in the facts as listed above, this factual determination is that the truck does not constitute an establishment as contemplated in Section 479.16(1) above quoted. Despite Respondent's testimony that furniture is sold at this pickup truck while alongside SR 37, the evidence of such sales is not credible.

20. The vehicle replaced a fixed sign Respondent was required to remove; the vehicle is driven to and from the site by the factory workers; no evidence was presented that any of the other three employees of Respondent manned the truck while it is alongside the highway bearing an arrow pointing to Respondent's place of business; those sales reflected in Exhibit 5 were, on the face of the exhibit, sold at the store located at 553 Brannon Road; and the salesman's initials on Exhibit 5 indicate those sales were made at the Brannon Road store.

21. From the foregoing, it is concluded that the sign in issue is not an on-premise sign and not exempt from the requirement of a permit. It is,

RECOMMENDED that Sunshine Patio Shops be directed to remove its truck and attached sign on SR 37 in the vicinity of Brannon Road.

ENTERED this 15th day of December, 1986, in Tallahassee, Florida.

K. N. AYERS
Hearing Officer
Division of Administrative Hearings
The Oakland Building
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Tallahassee, Florida 32301
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Filed with the Clerk of the
Division Administrative Hearings
this 15th day of December, 1986.

COPIES FURNISHED:

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