STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARING

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| OUTDOOR MEDIA OF PENSACOLA, INC., | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | CASE NO. 88-5227RU |
| | ) | |
| DEPARTMENT OF TRANSPORTATION, | ) | |
| | ) | |
| Respondent. | ) | |
| _____ | ) | |

# FINAL ORDER

## INTRODUCTION AND ISSUES

By a Petition filed October 21, 1988, Petitioner sought a determination, pursuant to Section 120.56, Florida Statutes, that a non-rule policy of the Department of Transportation was a rule that: (a) was not adopted properly under Chapter 120 Florida Statutes, and (b) was an invalid exercise of delegated legislative authority.

## APPEARANCES

For Petitioner: J. Arby Van Slyke, Esquire
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Pensacola, Florida 32591

For Respondent: Vernon L. Whittier, Jr., Esquire
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## BACKGROUND AND PROCEDURE

On October 28, 1988, the undersigned Hearing Officer was assigned this case by the Director of the Division of Administrative Hearings. By Notice of Hearing issued November 2, 1988, a formal hearing was timely scheduled for November 23, 1988. Prior to formal hearing, the parties filed a joint Prehearing Stipulation whereby certain facts were admitted. Thereafter, the parties orally notified the undersigned that they would file proposed final orders and two depositions and submit the cause for determination upon these and the joint Prehearing Stipulation, without formal hearing.

Respondent's Proposed Final Order was filed November 23, 1988. Depositions of Gary Kissinger and Phil Brown were filed November 30, 1988. Petitioner's Memorandum with attachments was filed December 8, 1988. Specific rulings pursuant to Section 120.59(2), Florida Statutes, upon each party's submittal have been made in the Appendix hereto.

## FINDINGS OF FACT

1. Petitioner submitted application for state outdoor advertising permits which were received in the Department of Transportation (DOT) District Office on August 8, 1988, for a location on U.S. 90 (Scenic Highway), a federal aid primary highway in Pensacola, Escambia County, Florida. Petitioner was denied the permits on the ground that permits had been issued to another outdoor advertising company prior to July 1, 1984, for a location less than a thousand feet from Petitioner's proposed site on the same side of the highway. There have been no tags displayed or sign maintained at the earlier site since issuance of the permits.

2. It is DOT's interpretation that for permits issued prior to July 1, 1984, permittees are not required to display tags within 30 days and erect signs within 270 days as provided in Section 479.07(5)(a), Florida Statutes, effective July 1, 1984. DOT nonetheless requires pre-1984 permits to comply with sections 479.07(5)(b) and (8)(a), Florida Statutes. DOT's interpretation is not in writing and has not been promulgated as a rule pursuant to Sections 120.54 or 120.55, Florida Statutes.

3. Petitioner is in the outdoor advertising business, particularly off-premises signs, and is so licensed. The spacing impediment caused by the earlier permits is the only basis for denial of Petitioner's permit applications by DOT as Petitioner meets all other requirements. Petitioner will have to confront the agency's "interpretation" with each permit application it makes. Petitioner is currently challenging the specific above-referenced permit denials in Section 120.57(1) proceedings which both parties herein opposed consolidating with the instant rule challenge when the undersigned suggested that possibility. Respondent has not challenged Petitioner's standing to bring this rule challenge, and Petitioner has demonstrated standing to bring it.

4. The Petitioner asserts that the agency's acknowledged foregoing interpretation of the named statutes constitutes an arbitrary and capricious unpromulgated rule, applied without legislative authority and prejudicing Petitioner and all like-situated lessees of off-premises signs because it creates a perpetual grandfather clause for sign permits in existence prior to July 1, 1984, and new applicants post-1984 cannot know where earlier permits have been issued due to the lack of DOT enforcement of tag posting and sign maintenance requirements. Phil Brown, DOT Right of Way Specialist, testified by deposition that, indeed, if a pre-1984 permittee never erects a sign or posts tags, the spacing impediment can only be located through DOT records, in this case, a computer search.

5. Phil Brown relied on DOT training sessions which advised him that Section 479.07(9), Florida Statutes, requires the current agency interpretation/non-enforcement of Section 479.07(5)(a) to pre-1984 permittees, and he applied it to Petitioner's application. In so doing, he utilized Section 479.05(9) so as to count the thousand foot spacing requirement for the permit site which had been requested by the Petitioner not from a permitted sign (which is the statutory phrase contained in Section 479.09) or from a sign in existence, i.e. a sign already erected, or from a tagged erected sign, or from a displayed tag, but instead counted the thousand feet, as he had been directed, from the site described on the permit issued pre-1984.

6. Gary Kissinger, designated by DOT as its employee most knowledgeable about the application of statutes and rules to outdoor advertising, testified by deposition that pre-1984 outdoor advertising sign permits can, absent a future

law change, go into perpetuity without the holder thereof ever erecting a sign or posting a metal tag as long as they keep renewing and paying their fees, even though Mr. Kissinger understood the purpose of the 1984 amendments to be the prevention of advertisers "stockpiling" unused sites/permits from the enactment date forward. No evidence established Mr. Kissinger as the drafter of the legislation or of the agency rules promulgated thereunder, and no evidence was submitted in the form of committee minutes, notes, legislative journals or by other means to clearly establish a legislative intent either coinciding or differing from Mr. Kissinger's perception.

7. Mr. Kissinger relies for the DOT "interpretation" upon the definition of "nonconforming" signs given in Section 479.01(12), Florida Statutes. He does not rely for DOT's interpretation on the exceptions listed in Section 479.16, Florida Statutes. It is his view that notwithstanding Rule 14-10.006(1)(b)(7), Florida Administrative Code, those permits issued before July 1, 1984, are valid with or without a sign being erected or tags maintained/displayed. Even though DOT's current permit application form requires applicants such as Petitioner to state, to the best of their knowledge, the location of the permitted sign nearest to the site for which they are applying, there is no way any post-1984 applicant can find out about preexisting unutilized permits on its own without getting that information from DOT. Only after the application is submitted, does DOT run its own check and deny the new permit application if a permit for a site within the distance given in Section 479.09 exists regardless of whether there is a sign erected or a tag displayed at the earlier permit's site.

8. DOT applies its interpretation statewide and asserts that all the agency is doing is to not apply the posting and erection requirements of Section 479.07(5)(a) retroactively to pre-1984 permits, upon recognized standards of prospective statutory construction, and that the agency has not established any policy or rule thereby.

9. The statute in question came about as a substantial rewording of Section 479.07, Florida Statutes, by way of amendments contained in Chapter 84-227, Laws of Florida, which provided as follows:

> 479.07 Sign permit required.--
> (1) Except as provided in s. 479.16, no person shall erect, operate, use, maintain, or cause to be erected, operated, used, or maintained, any sign on the state highway system outside incorporated areas or any portion of the interstate or federal-aid primary highway systems without first obtaining a permit there for from the department and paying the annual fee as provided herein.
> (2) No person shall apply for a permit unless he has first obtained the written permission of the owner or other person in lawful possession or control of the site designated as the location of the sign in the permit application.
> (3)(a) Application for a sign permit shall be made on a form prescribed by the department and a separate application shall be submitted for each permit requested. A permit shall be required for each sign

facing. As part of the application, the applicant or his authorized representative shall certify in a notarized signed statement that all information provided therein is true and correct and that, pursuant to subsection (2), he has obtained the written permission of the owner or other person in lawful possession of the site designated as the location of the sign in the permit application. Every permit application shall be accompanied by the appropriate permit fee; a signed statement by the owner or other person in lawful control of the site on which the sign is located or will be erected, authorizing placement of the sign on that site; and, where local government regulation of signs exists, a statement from the appropriate local government official indicating that the sign complies with all local government requirements and that the agency or unit of local government will issue a permit to that applicant upon approval of the state permit application by the department.

(b) The annual permit fee for each sign facing shall be $25 for 20 lineal feet or less, and $35 for over 20 lineal feet.

(c) No fee may be prorated for a period less than the remainder of the permit year to accommodate short-term publicity features; however, all first-year fees may be prorated by payment of an amount equal to one-fourth of the annual fee for each remaining whole quarter or partial quarter of the permit year ending on January 15. Permit applications shall be acted on by the department within 30 days after receipt of the application by the department. Applications received after September 30 shall include fees for the last quarter of the current year and fees for the succeeding year.

(4)(a) For every permit issued, the department shall furnish to the applicant a serially numbered permanent metal tag. The permittee is responsible for maintaining a valid permit tag on each permitted sign facing at all times. The tag shall be securely attached to the sign facing or, if there is no facing, on the pole nearest the highway, and shall be attached in such manner as to be plainly visible from the main-traveled way. The permit shall become void unless the permit tag is properly and permanently displayed at the permitted site within 30 days after the date of permit issuance. If the permittee fails to erect

a completed sign on the permitted site within 270 days after the date on which the permit was issued, the permit shall be void, and the department may not issue a new permit to that permittee for the same location for 270 days after the date on which the permit became void.

(b) A permit is valid only for the location specified thereon. Valid permits may be transferred from one sign owner to another upon written acknowledgment from the current permittee and submittal of a transfers fee of $5 for each permit to be transferred. However, the maximum transfer fee is $100 for any multiple transfer between two outdoor advertisers in a single transaction.

(c) If a permit tag is lost, stolen, or destroyed, the permittee to whom the tag was issued shall apply to the department for a replacement tag Upon receipt of the application accompanied by a service fee of $3, the department shall issue a replacement permit tag.

(d) A permittee shall at all times maintain the permission of the owner or other person in lawful control of the sign site to have and maintain a sign at such site.

(5)(a) All licenses and permits expire annually on January 15, and all license and permit renewal fees are required to be submitted to the department by no later than January 15. On or before November 1 of each year, the department shall send to each permittee a notice of fees due for all permits of the permittee which were issued prior to September 30. Such notice shall list the permits and the permit fees due for each sign facing. The permittee shall, no later than January 1 of each year, advise the department of any additions, deletions, or errors contained in the notice. Permit tags not renewed shall be returned to the department for cancellation by January 15. Permit tags not renewed or returned to the department shall be accounted for by the permittee in writing, which writing shall be submitted with the renewal fee payment.

(b) If the permittee has not submitted his fee payments by January 15, the department shall, no later than February 1, send a violation notice or the permittee requiring fee payment within 30 days after the date of the notice and payment of a delinquency fee equal to 10 percent of the original

amount due, or, in the alternative to these payments, the filing of a request for an administrative hearing to show cause why his signs should not be subject to immediate removal due to expiration of his license or permit. If the permittee submits payment as required by the violation notice, his license or permit shall be automatically reinstated and such reinstatement shall be retroactive to January 15th. If the permittee does net respond to the violation notice within the 30-day period, the department shall remove the sign without further notice and without incurring any liability as a result of such removal.

(6)(a) Any sign not granted a permit by the effective date of this act shall not be granted a permit unless such sign is located at least:

1. One thousand five hundred feet from any other permitted sign on the same side of the highway, if on an interstate highway;

2. One thousand feet from any other permitted sign on the same side of the highway, if on a federal-aid primary highway; The minimum spacing provided herein shall not preclude the permitting of V-type, back-to-back, side-to-side, stacked or double faced signs at the permitted sign site.

(b) No sign shall be granted a permit pursuant to this chapter to locate on any portion of the interstate or federal-aid primary highway systems that:

1. Exceeds 50 feet in sign structure height above the crown of the main-traveled way, if outside an incorporate area; or

2. Exceeds 65 feet in sign structure height above the crown of the main-traveled way, if inside an incorporated area; or

3. Exceeds 950 square feet of sign of facing including all embellishments.

(c) Nothing in this subsection shall be construed so as to cause a sign which is conforming on the effective date of this act to become nonconforming.

(7) Commercial or industrial zoning which is not comprehensively enacted or which is enacted primarily to permit signs shall not be recognized as commercial or industrial zoning for purposes of this provision and permits shall not be issued for signs in such areas. The department shall adopt rules within 130 days after this act takes effect which shall provide criteria to determine whether such zoning is

comprehensively enacted or enacted primarily to permit signs.

10. A Reviser's Bill renumbered and made scrivener's changes in the amendatory language so that the "interpreted" portions of Section 479.07 were codified as follows:

> (5)(a) For each permit issued, the department shall furnish to the applicant a serially numbered permanent metal permit tag. The, permittee is responsible for maintaining a valid permit tag on each permitted sign facing at all times. The tag shall be securely attached to the sign facing or, if there is no facing, on the pole nearest the highway; and it shall be attached in such a manner as to be plainly visible from the main-traveled way. The permit will become void unless the permit tag is properly and permanently displayed at the permitted site within 30 days after the date of permit issuance. If the permittee fails to erect a completed sign on the permitted site within 270 days after the date on which the permit was issued, the permit will be void, and the department may not issue a new permit to that permittee for the same location for 270 days after the date on which the permit became void.
>
> (b) If a permit tag is lost, stolen, or destroyed, the permittee to whom the tag was issued must apply to the department for a replacement tag. Upon receipt of the application accompanied by a service fee of $3, the department shall issue a replacement permit tag.
>
> (6) A permit is valid only for the location specified in the permit. Valid permits may be transferred from one sign owner to another upon written acknowledgment from the current permittee and submittal of a transfer fee of $5 for each permit to be transferred. However, the maximum transfer fee for any multiple transfer between two outdoor advertisers in a single transaction is $100.
>
> (7) A permittee shall at all times maintain the permission of the owner or other person in lawful control of the sign site to have and maintain a sign at such site.
>
> (8)(a) All licenses and permits expire annually on January 15, and all license and permit renewal fees are required to be submitted to the department by no later than January 15. On or before November 1 of each year, the department shall send to each permittee a notice of fees due for all

permits which were issued to him prior to September 30. Such notice shall list the permits and the permit fees due for each sign facing. The permittee shall, no later than January 1 of each year, advise the department of any additions, deletions, or errors contained in the notice. Permit tags which are not renewed shall be returned to the department for cancellation by January 15. Permit tags which are not renewed or returned to the department shall be accounted for by the permittee in writing, which writing shall be submitted with the renewal fee payment.

(b) If a permittee has not submitted his fee payment by January 15, the department shall, no later than February 1, send a notice of violation to the permittee, requiring the payment of the permit fee within 30 days after the date of the notice and payment of a delinquency fee equal to 10 percent of the original amount due or, in the alternative to these payments, requiring the filing of a request for an administrative hearing to show cause why his sign should not be subject to immediate removal due to expiration of his license or permit. If the permittee submits payment as required by the violation notice, his license or permit will be automatically reinstated and such reinstatement will be retroactive to January 15th. If the permittee does not respond to the notice of violation within the 30-day period, the department shall remove the sign without further notice and without incurring any liability as a result of such removal.

(9)(a) A permit shall not be granted for any sign for which a permit had not been granted by the effective date of this act unless such sign is located at least:

1. One thousand five hundred feet from any other permitted sign on the same side of the highway, if on an interstate highway.

2. One thousand feet from any other permitted sign on the same side of the highway, if on a federal-aid primary highway. The minimum spacing provided in this paragraph does not preclude the permitting V-type, back-to-back, side-to-side, stacked, or double-faced signs at the permitted sign site.

(b) A permit shall not be granted for a sign pursuant to this chapter to locate such sign on any portion of the interstate or federal-aid primary highway system, which sign:

1. Exceeds 50 feet in sign structure height above the crown of the main-traveled way, if outside an incorporated area;
2. Exceeds 65 feet in sign structure height above the crown of the main-traveled way, if inside an incorporated area; or
3. Exceeds 950 square feet of sign facing including all embellishments.
(c) Nothing in this subsection shall be construed so as to cause a sign which is conforming on the effective date of this act to become nonconforming.

11. Section 479.01(12) as amended provides:

'Nonconforming sign' means a sign which was lawfully erected but which does not comply with the land use, setback, size, spacing, and lighting provisions; of state or local law, rule, regulation, or ordinance passed at a later date or a sign which was; lawfully erected but which later fails to comply with state or local law, rule, regulation, or ordinance due to changed conditions. [Emphasis supplied.]

12. The effective date(s) of Section 479.07 is significant as provided in Section 27 of Law 84-227:

This act shall take effect October 1, 1984, except that the amendments to Section 479.07 F.S. shall take effect July 1, 1984; however, any permit or license which is valid and applicable as of June 30, 1984, shall remain valid and applicable until January 15, 1985, unless the license or permit earlier expires or is revoked. [Emphasis Supplied.]

13. Likewise, the exceptions set out in Section 479.16, Florida statutes, as amended by Chapter 84-227, must be considered. They are numerous, but do not specifically enumerate "Pre-July 1, 1984 permits," in that language.

14. The new statue defines "erect" at Section 479.01(4) and "sign" at Section 479.01(14) as follows:

(4) "Erect" means to construct, build, raise, assemble, place, affix, attach, create, paint, draw, or in any other way bring into being or establish; but it does not include any of the foregoing activities when performed as an incident to the change to advertising message or customary maintenance or repair of a sign.
(14) "Sign" means any combination of structure and message in the form of an outdoor sign, display, device, figure,

> painting, drawing, message, placard, poster, billboard, advertising structure, advertisement, logo, symbol, or other form, whether placed individually or on a V-type, back-to-back, side-to-side, stacked, or double-faced display, designed, intended, or used to advertise or inform, any part of the advertising message or informative contents of which is visible from any place on the main-traveled way. The term does not include an official traffic control sign, official marker, or specific information panel erected, caused to be erected, or approved by the department.

Both of these foregoing subsections are substantially the same as their predecessors in the pre-1984 statute.

15. There appears to be no dispute that DOT has lawfully promulgated the following rules in order to facilitate its administration of Chapter 479, Florida Statutes, as amended 1984:

> Rule 14-10.004(2)(d)--The application shall be notarized and shall contain . . . The sign's distance from the right of way, the nearest permitted sign on the same side of the highway, and the nearest intersection on the same side of the highway. [Emphasis supplied.]
>
> Rule 14-10.004(6)--Permits shall be renewed in accordance with Section 479.07(5). [Emphasis supplied.]
>
> Rule 14-10.004(9)--A sign granted a permit shall be erected and thereafter maintained in accordance with Section 479.07, F.S. and this Rule Chapter. [Emphasis Supplied.
>
> Rule 14-10.004(10)--The permanent metal tag issued by the Department shall be displayed and maintained in accordance with Section 479.07(5)(a) F.S.
>
> Rule 14-10.006(1)(b)(7)--The following shall apply to signs for which the initial valid permit application was submitted after July 1, 1984: Official signs, and signs exempt under Section 479.16 and structures that are not lawfully maintained shall not be counted nor shall measurements be made from them for purposes of determining compliance with spacing requirements. [Emphasis supplied.]

Rule 14-10.007(1) provides in pertinent part:

> . . . A sign which was conforming on June 30, 1984, but which does not comply with the size, spacing, and height requirements of Section 479.07(9) F.S. shall not be considered a nonconforming sign. [Emphasis supplied.]

Rule 14-10.007(2)(e) provides in pertinent part:

> (2) The following shall apply to nonconforming signs:
> (e) A sign face which remains void of advertising matter for 12 months or longer shall be deemed an abandoned or discontinued sign and shall lose its nonconforming status. [Emphasis supplied.]

None of these duly promulgated rules has been challenged in this proceeding.

## CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause pursuant to section 120.56, Florida Statutes.

17. Section 120.52(16), Florida Statutes, defines a "rule" to mean:

> . . . each agency statement of general applicability that implements, interprets, or prescribes the organization, procedure, or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also and includes the amendment or repeal of a rule . . . .

18. In the instant situation, Section 479.07, Florida Statutes, was amended by Chapter 84-227, Laws of Florida, to require that parties obtaining outdoor advertising permits post their permit tag within thirty (30) days and erect their signs within two hundred seventy (270) days or their permits would become void. The amendment became effective July 1, 1984, and did not specify that the new condition was to be applied to permits issued prior to July 1, 1984; however, the amendments likewise did not specifically exempt permits issued before the effective date, either. See, Section 479.16, Florida Statutes.

19. The effective date of the amendments only provide that:

> . . . any permit or license which is valid and applicable as of June 30, 1984, shall remain valid and applicable until January 15, 1985, unless the license or permit earlier expires or is revoked.

20. Section 479.01(12) only makes exceptions for nonconforming "signs lawfully erected."

21. Section 479.07(9)(c) only provides that nothing in that subsection, that is, in subsection (9), pertaining to spacing requirements for permitting of new signs after July 1, 1984, may be construed to cause a sign which is conforming on the effective date of the Act to become nonconforming. See the definition or "sign" contained in Section 479.01(14) Florida statutes, and of "erect" contained in Section 479.01(4), Florida Statutes.

22. DOT interprets the amendment to Section 479.07, now codified as section 479.07(5)(a), requiring permit display and sign erection within a specified time period, to be applicable only to permits initially issued after the effective date of July 1, 1984. Therefore, the agency has not enforced that subsection against preexisting permits or against renewals after January 15, 1985, of pre-existing permits whether or not a sign has ever been erected on the permitted site. However, the agency has applied and enforced against preexisting permits all other portions of the amendments, including but not limited to the mandatory recurring uniform annual January 15 renewal date and increased renewal fee with regard to preexisting permits. The agency has taken this approach on the grounds that expirations of permits existed under the old law and only the staggered dates of expiration were made uniform by statutory amendment and that fees for permit renewals existed under the old law and only the amounts were increased by statutory amendment but that because tag and erection time limits were not provided for under the pre-1984 law, the amendments creating Section 479.07(5)(a) should not be applied to each annual renewal application after January 15, 1985.

23. If the foregoing were all that the agency "interpretation" consisted of, it might constitute only an agency's prospective application of a statute, the validity of which statutory interpretation would be subject to be re-litigated in every Section 120.57(1) proceeding. That is not, however, the case. DOT's "interpretation" does considerably more than apply Section 479.07(5)()a) prospectively. By implication, it interprets the term, "permitted signs" as used in Section 479.07(9). By consistently applying to every new application the spacing requirements of new Section 479.07(9) so as to take the measurements from the registered site of a permit issued before July 1, 1984, rather than from a "permitted sign" as clearly provided in that statutory subsection, DOT has placed an interpretation upon the statute that is not readily apparent from its literal reading. The DOT interpretation/position, is taught its right of way personnel in training sessions and is applied statewide. That position asserts that a permit preexisting 1984 need not comply with Section 479.07(5)(a) and also holds that a permit preexisting 1984 also constitute's a "permitted sign" as described in Section 479.09. This position creates rights which have the direct and consistent effect of law. Moreover, by its duly promulgated rules , DOT has camouflaged what its unpromulgated interpretation/policy is.

24. All the duly promulgated DOT rule reviewed apply to signs or structures (not permits) except for Section 14-10.004(6), Florida Administrative Code, which refers to permits. DOT argues that this usage is because the duly promulgated rules were only intended to be applied to permits issued after July 1, 1984, for which it agrees signs and tags are clearly mandated by the statute. If further asserts this is because Section 14-10.004(6), Florida Administrative Code, which provides "permits shall be issued in accordance with Section 479.07(5), Florida Statutes" [emphasis supplied], refers to the annual renewal provisions encompassing payment of fees that were numbed as paragraph 5 in

Chapter 84-227 and renumbered as paragraph 8 by the Division of Statutory Revision. However, these arguments cannot be readily verified from the Rule itself. Rule 14-10.004(10) also provides for display and maintenance of tags in accord with Section 479.07(5), Florida Statutes. Both rules encompass Subsection (5) and nowhere in the duly promulgated rules is there any distinction between pre and post-Ju1y 1, 1984 permits. DOT's interpretation therefore also attempts to modify duly promulgated rules.

25. The agency "interpretation" governs all post-1984 permit applications indefinitely into the future.

26. For all the foregoing reasons, the "interpretation" constitutes a "rule" upon the clear reading of Section 120.52(16), Florida Statutes. Whether an agency's statement is a rule which must be adopted in accordance with the statutory procedure turns on the effect of the statement and not on the agency's characterization by some application other than "rule." See, Department of Transportation v. Blackhawk Quarry Company of Florida, 528 So.2d 447 (Fla. 3rd DCA 1988), Department of Corrections v. Sumner, 447 So.2d 1388 (Fla. 1st DCA 1984), Amos v. Department of Health and Rehabilitative Services, 444 So.2d 43 (Fla. 1st DCA 1984), Department of Revenue v. U. S. Sugar Corporation, 388 So.2d 596 (Fla. 1st DCA 1980).

27. The failure to properly promulgate the "interpretation" as a rule renders it invalid as a rule, Department of Corrections v. Sumner supra, Department of Administration v. Harvey, 356 So.2d (Fla. 1st DCA 1977).

28. It is next necessary to address whether or not this interpretation is invalid on its face as inconsistent with the statute it seeks to interpret and apply or whether it is subject to application of that policy on a case by case basis. The evolution of the law is persuasive that due to the broad discretion inherent in agencies to interpret statutes, the interpretation/rule is subject to being proved up in each section 120.57(1) proceeding, which is precisely the result as if the "rule" had been found to be mcrely a statutory interpretation.

29. Agencies are now given the choice of properly promulgating policies as rules and applying them with the full force and effect of law or of fully explicating those policies and exposing them to challenge every time they are applied in an adjudicatory procedure. Presumably, this is what will transpire in the pending Section 120.57(1) proceedings. McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977), Amos v. Department of Health and Rehabilitative Services, 444 So.2d (Fla. 1st DCA 1983), Gulf Coast Home Health Services of Florida, Inc. v. State of Florida, Department of Health and Rehabilitative Services, 513 So.2d 704 (Fla. 1st DCA 1937). In Amos, p.47, supra, the agency's policy was invalidated, not solely because it had not been promulgated as a rule, but because the agency also failed to affirmatively show the reasonableness and factual accuracy of the policy.

Based on the foregoing, it is hereby ORDERED:

1. Petitioner has standing to bring this action.

2. DOT's policy that sign permits which were issued prior to July 1, 1984, shall not be subject to Section 479.07(5)(a), Florida Statutes, enforcement and shall be treated as if they constituted erected and maintained signs for purposes of Section 479.07(9), Florida Statutes, is invalid as a rule for failure to promulgate pursuant to Section 120.54, Florida Statutes.

DONE and ORDERED this 29th day of December 1988, Tallahassee, Florida.

ELLA JANE P. DAVIS
Hearing Officer
Division of Administrative Hearings
The Oakland Building
2009 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

FILED with the Clerk of the
Division of Administrative Hearings
this 29th day of December 1988.

## APPENDIX TO FINAL ORDER

The following constitute specific rulings upon the parties' respective proposed findings of fact pursuant to Section 120.59(2), Florida Statutes.

Neither of the parties numbered paragraphs or sentences of their respective proposals. Neither party divided its proposal into findings of fact and conclusions of law. Each proposal contained mixed legal argument and citation of authority absent any factual proposal.

Petitioner's Memorandum:

All factual proposals contained on unnumbered pages 1-9 are accepted in substance within the findings of fact. The remaining material is rejected as mere legal argument and citation of authority. Those relevant and material arguments are discussed within the conclusions of law.

Respondent's Proposed Final Order:

The facts alleged on page 1 are accepted in substance. The remainder of page 1 and all of page 2-3 and paragraph 1 or page 4 are covered in the introductory material to the final order or is rejected as conclusions of law, mere legal argument, citation of authority, or cumulative to the facts as found. Paragraph 2 of page 4 constitutes mixed legal argument and factual proposals. It is rejected as both as set out in the conclusions of law. The last paragraph of page 4 and pages 5, 6 and 7 are rejected as conclusions of law, mere legal argument, citation of authority, or cumulative to the facts as found. The relevant and material
arguments are discussed in the Conclusions et law.

COPIES FURNISHED:

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