

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF TRANSPORTATION,)
)
 Petitioner,)
)
 vs.) CASE NO. 95-0673
) DOT CASE NO. 95-0032
 FIRST MORTGAGE CORPORATION,)
)
 Respondent,)
 _____)

RECOMMENDED ORDER

Upon due notice, William R. Cave, Hearing Officer, Division of Administrative Hearings, held a formal hearing in this matter on August 1, 1995, in Lakeland, Florida.

APPEARANCES

For Petitioner: Francine M. Ffolkes, Esquire
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0458

For Respondent: Stephen W. Moran, Esquire
Moran & Tileston
1738 East Edgewood Drive
Lakeland, Florida 33803

STATEMENT OF THE ISSUE

1. Has Respondent's connection permit number C-16-095-93 (permit) expired under Section 335.185, Florida Statutes?

2. Has Respondent timely complied with the requirements and conditions of the permit? If not, does Respondent's noncompliance cause safety or operational problems on State Road 555 (SR 555) which would require closing Respondent's connection to SR 555?

PRELIMINARY STATEMENT

By a Notice of Permit Nonconformance - Violation of the Florida Statutes and Florida Administrative Code and Notice to Show Cause (Notice) dated December 22, 1994, the Department of Transportation (Department) advised Respondent that construction required by the permit had not been completed in that: (a) signing and pavement marking had not been placed so that the connection on State Road 655 (SR 655) is operated as ingress only; (b) site parking layout and traffic flow had not been constructed to obviate unsafe traffic operation caused by the connection on SR 555. The Notice further advised Respondent that the expiration date of the permit had not been extended by the Department and that the permit

would expire and become invalid upon receipt of the Notice. In accordance with the Notice Of Appeal Rights attached to the Notice, Respondent, by letter dated January 9, 1995, filed a petition for formal hearing in this matter. By letter dated February 14, 1995, the Department referred this matter to the Division of Administrative Hearings (Division) for the assignment of a Hearing Officer and conduct of a formal hearing.

The Department presented the testimony Michael J. Tako. Department's exhibits 1 - 7 and 10 were received as evidence. Respondent objected to the admissibility of Department's exhibits 8 and 9 on the basis that they were not relevant. A ruling on their admissibility was reserved. Upon further review of Department's exhibits 8 and 9 and a review of Michael Tako's testimony these exhibits are rejected. The Respondent presented the testimony of Dennis Davis. Respondent did not offer any documentary evidence. Sections 335.18 through 335.188, Florida Statutes, Chapter 120, Florida Statutes, Chapters 14-96 and 60Q-2, Florida Administrative Code, Article X, Section 6 of the Florida Constitution and the Partial Final Judgement, Amended Final Judgment and Second Amended Final Judgment in the case of State of Florida Department of Transportation vs. Edward M. Shaffer, et al., Case No. GCG-91-786, in the Circuit Court of the Tenth Judicial Circuit In and For Polk County, Florida (FDOT v. Shaffer) were officially recognized.

A transcript of the proceeding was filed with the Division on August 17, 1995. The Respondent timely filed its Proposed Findings of Fact and Conclusions of Law. The Department's Proposed Findings of Fact were not timely filed. A ruling on each proposed finding of fact submitted by the parties has been made as reflected in an Appendix to the Recommended Order.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made:

1. At all times pertinent to this proceeding, the Department was the state agency responsible for regulating vehicular access and connections to or from the State Highway System in accordance with Sections 335.18-335.188, Florida Statutes, known as the State Highway System Access Management Act.

2. Respondent owns the property in issue which is located on the southwest corner of the intersection of SR 555 and SR 655 in Polk County, Florida.

3. As a cure for the problem created by the eminent domain proceeding in FDOT v. Shaffer concerning the preexisting connections to SR 555 and SR 655, the Department agreed to provide connections to SR 555 and SR 655 for the property involved in the instant case. By letter dated September 27, 1993, the Department agreed to honor this agreement even though it was not included in the final order in FDOT v. Shaffer. In its letter, the Department agrees to issue a permit and construct the connections "on the condition that the remaining lands are reconstructed as shown in the attachment." The letter informs Respondent that the attachment was prepared by Reggie Mesimer for the Department and that "it appears that the settlement was based on that cure." The letter also informs Respondent that the "permit will contain limiting language to make clear that the permit has not been reviewed for compliance with DOT standards and that it is issued for replacement of preexisting access." Attached to the letter was a site plan showing: (a) the parking layout for the site which included two parallel parking spaces in front of the building, six perpendicular south to north parking spaces on the south end of the building and eight perpendicular

north to south parking spaces on the south side of the south parking area; (b) a connection to SR 655 on the north side of the building; (c) a connection to SR 555 at the front of the building; and (d) a connection to First Avenue, a side street, on the south side of the building. The site plan shows a driveway commencing at the connection to SR 655 and continuing on in front of the building to First Avenue on the south side of the building. The site plan does not show any signings or pavement markings to indicate traffic flow in and out of the site.

4. Sometime around June 1993, the agreement in *FDOT v. Shaffer* notwithstanding, the Department attempted to close the preexisting connections to SR 555 and SR 655. As a result, Respondent requested a formal administrative hearing and Department of Transportation vs First Mortgage Corporation, DOAH Case No. 93-9037 was filed with the Division. This case was later rendered moot by the issuance of the permit for the connections to SR 555 and SR 655 and the Department's agreement to construct the connections to SR 555 and SR 655.

5. By letter dated December 15, 1993, with an addendum dated December 16, 1993, the Respondent agreed "to designating two parallel parking spaces in front of the building and have the striping done immediately." In return, the Department would "agree to have the driveway installed as shown on the drawing originally submitted." In the addendum, Respondent states that the two designated parallel parking spaces in front of the building were being striped on December 16, 1993, and that the Respondent was removing the chain link fence on the south side of the building to provide additional parking. The addendum also states that the Respondent will resurface the entire area of the drive and parking areas after the Department finishes the road construction. Additionally, the Respondent agreed to substantially comply with the driveway and parking area as shown on an attachment. The attachment was a copy of site plan referred to above in Finding of Fact 3.

6. Respondent's Connection Application, number C-16-095-93, was approved by the Department on December 20, 1993, and the permit was issued. The application "requests permission for the construction of a connection(s) on Department of Transportation right-of-way. . . ." The connections are described as: "REPLACEMENT OF EXISTING CONNECTION: ONE 24 FT INGRESS ON SR 655, ONE 30 FT INGRESS & EGRESS ON US 17 (SR 555) FOR A CONVENIENCE STORE AND RESTAURANT." Although the permit provides blank spaces where the mandatory beginning and completion of construction dates are to be filled in, these spaces were left blank on the permit. Likewise, there is no expiration date shown on the permit.

7. A site plan was attached to the permit. The site plan is a copy of the site plan attached to the Department's September 27, 1993, letter referred to above with signings and pavement markings added to indicate the traffic flow in and out of the site.

8. General Provision one of the permit provides:

The permittee agrees and obligates himself to perform at his own expense the relocations, closure, alteration of the permitted connection, should the Department determine that the traffic patterns, points of connection, roadway geometrics or traffic control devices are causing an undue disruption of traffic or creating safety hazards at the exiting connections.

9. Special Provisions one through five provide:

1. This permit application has not been reviewed for compliance with DOT standards and is issued for replacement of preexisting access by the Florida Department of Transportation. The permit is subject to the limitations in Chapter 335, Florida Statutes, to the same extent as the preexisting access.

2. The permittee shall place signing and pavement marking, as indicated on the attached site plan, so that the connection on SR 655 is operated as ingress only.

3. Parking layout and traffic flow will be constructed and maintained in substantially the same manner as indicated in the attached site plan.

4. The permittee acknowledges that the attached site plan was the cure in the settlement in DOT vs. EDWARD M. SHAFFER, case number GC-G-91-786, Parcel 105.

5. The permittee acknowledges that with the issuance of this permit and the Florida Department of Transportation's agreement to construct the two connections referenced in this permit, DEPARTMENT OF TRANSPORTATION, Petitioner, vs. FIRST MORTGAGE CORPORATION, Defendant, case number 93-3037 has been rendered moot. Furthermore, the permittee agrees to make the appropriate filing with the State of Florida Division of Administrative Hearings. (Emphasis supplied).

10. The permit application was signed by Dennis G. Davis as president of First Mortgage Corporation. Dennis G. Davis also signed accepting the Special Provisions attached to the permit.

11. As to signings and pavement markings the site plan shows:

(a) a designated driveway beginning at the SR 655 connection (north end of property) and proceeding around the front of the building (east side) to the south end of the building and commencing on to the First Avenue connection;

(b) large arrows within the designated driveway indicating ingress only from SR 655 and one-way traffic around the front of the building to a point on the south end of the building where stop signs are to be located;

(c) stop signs on each side of the one-way driveway where the one-way driveway intersects a designated two-way driveway;

(d) to the south of the stop signs, arrows indicating that the one-way traffic is to move into the south side parking lot or move into the south-bound lane of the two-way driveway that exits onto First Avenue;

(e) arrows indicating that incoming traffic

from First Avenue is to move into the south side parking lot only;

(f) a No Right Turn sign on the east side of the one-way driveway just south of the stop signs where the one-way driveway intersects the two-way driveway;

(g) a No Left Turn sign on the southwest side of the south side parking lot where the south side parking lot intersects the outgoing lane of the two-way driveway that exits onto First Avenue;

(h) a stop sign just south of the southeast corner of the south side parking lot to the west of the outgoing lane of the two-way driveway just before First Avenue; and

(i) a No Exit sign on each side of the one-way driveway facing the opposite direction of the traffic flow in the one-way driveway at the northeast corner of the building.

12. As to the parking layout, the site plan shows:

(a) two parallel parking spaces running north to south in front of the building along the west side of the one-way driveway;

(b) six perpendicular parking spaces running south to north abutting the south side of the building, and

(c) eight perpendicular parking spaces running north to south abutting the south side of the property west of the two-way driveway.

13. The Department constructed the connection on SR 655 for ingress to the property from SR 655 and the connection on SR 555 for ingress to the property from SR 555 and egress to SR 555 from the property sometime in June 1993, which was before the expiration of one year after the date of issuance of the permit.

14. Respondent started to comply with the signings and pavement markings of the site plan attached to the permit as early as December 16, 1993. Respondent has complied with the signings and pavement markings for traffic flow and parallel parking as shown on the site plan attached to the permit beginning at the connection to SR 655 and up to and including the two stop signs at the south end of the one-way driveway where it intersects the two-way driveway. The Respondent has maintained these signs and pavement markings during the construction on SR 555 by restriping the pavement and replacing signs that were torn down. However, due to the wear on the striping caused by construction traffic the pavement markings for the parallel spaces and traffic flow are dim and need painting. Due to a misunderstanding as to the Department's jurisdiction over First Avenue, Respondent has not completed the signings and pavement markings from the stop signs where the one-way driveway intersects the two-way driveway over to First Avenue or over to the parking lot.

15. The Respondent has not completed the striping for the south to north perpendicular parking spaces abutting the south end of the building where there is pavement which would allow such striping. A segment of a chain link fence abuts the south end of the building preventing any further perpendicular parking abutting the south end of the building without going inside to the grassed area (green area) enclosed by the chain link fence. However, instead of parking

perpendicular to the south end of the building, customers are parking east to west, perpendicular to the existing chain link fence.

16. At the time the permit was issued, a chain link fence surrounded the green area on the south end of the property. Respondent removed the middle section of the chain link fence on the east side of the green area to provide additional parking inside the green area. Respondent has not placed signs or pavement markings around or at the entrance to the green area so that customers are made aware that the green area is available for parking. However, some customers are using the green area for parking. Although the parking layout of the site plan includes delineated parking spaces in the green area, nothing in the permit, including the site plan, specifically requires the green area to be paved. Although Respondent has indicated a willingness to stripe the designated parking spaces in the green area as shown on the site plan, striping the green area is neither feasible nor is it required under the permit. While all of the parking spaces have not been delineated by striping, there was no evidence that there were insufficient parking spaces on the site or that the lack of designated parking spaces was creating any safety or operational problem on SR 555.

17. Although the site plan does not indicate by signings or pavement markings that the connection to SR 555 is an ingress and egress connection, the permit specifically provides for ingress and egress at the SR 555 connection and nothing on the site plan prohibits such access.

18. On occasions customers park perpendicular to the front of the building ignoring the delineated parallel parking spaces in front of the building. Respondent has agreed to place a solid concrete curb along the building side (west side) of the parallel parking spaces and remove the yellow concrete stop blocks now in place that may be unintentionally inviting customers to park perpendicular to the building.

19. The Department's expert, Michael Tako, testified that perpendicular parking in front of the building could result in vehicles on SR 555 having to slow down for vehicles that are backing out of those perpendicular parking spaces onto SR 555, creating a hazard on SR 555 known as stacking. However, there was insufficient evidence to establish facts to show that stacking actually occurred or that there was any safety or operational problem being created on SR 555 by customers parking perpendicular to front of the building rather than parking in the two parallel parking spaces in front of the building.

20. There was no engineering study presented that had been conducted subsequent to the issuance of the permit substantiating any safety or operational problem on SR 555 resulting from the failure of the Respondent to comply with signings and pavement markings of the site plan or any of the special provisions of the permit or from customers parking perpendicular to the building rather than in the parallel parking spaces.

21. Construction on SR 555 had not been completed as of the date of the hearing. However, Respondent agreed that construction was at the stage where the driveway and parking area could now be resurfaced and restriped without substantial damage to the striping, pavement markings and signings due to construction activity.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings pursuant to Section 120.57(1), Florida Statutes.

22. The Department is attempting to close Respondent's access to SR 555 and SR 655 on the basis that construction required by the permit has not been completed in that signings and pavement markings have not been placed so that the connection on SR 655 is operated as ingress only and site parking layout and traffic flow has not been constructed to obviate unsafe traffic operation caused by the connection on SR 555. It is the Department's position that construction authorized by the permit was not completed within one year of the date of issuance of the permit and therefore, under Section 335.185, Florida Statutes, the permit has expired and is invalid since the Department did not extend the expiration date of the permit.

23. Section 335.185, Florida Statutes, provides;

(1) The department may issue a permit subject to any reasonable conditions necessary to carry out the provisions of this act. The department may revoke a permit if the applicant fails to comply with the conditions upon which the issuance of the permit was predicated.

(2) All permits issued pursuant to this act shall automatically expire and become invalid if the connection is not constructed within 1 year after the issuance of the permit, unless the department extends the date of expiration, for good cause, upon its own initiative or upon the request of a permittee. (Emphasis supplied)

24. Rule 14-96.008(1), Florida Administrative Code, provides:

(1) Time Limit. Substantial construction of the connection shall begin within 90 days of the effective date of the permit, unless a longer time is approved by the Department or a time extension is requested and approved by the Department. Construction shall be completed within one year of the date of issuance of the permit. As a condition of the permit, the Department may further limit construction time due to special circumstances. Failure to comply with the time limits specified in the permit shall result in an automatic expiration of the permit following written notification to the permittee. . . .(Emphasis supplied)

25. Rule 14-96.002(3) and (5), Florida Administrative Code, define "connection" and "connection permit" as follows:

(3) "Connection" as defined in Section 335.182(3)(a), Florida Statutes, means driveways, streets, turnouts or other means of providing for the right of reasonable access to and from the

State Highway System. Traffic control features and devices in the Department's right of way are not part of the connection.

. . .
(5) "Connection Permit" means a written authorization issued by the Department allowing for initiation and construction of a specifically designed connection and any specific conditions related to the subject connection to the State Highway System at a specific location generating an estimated volume of traffic. (Emphasis supplied)

26. Rule 14-96.007(3), Florida Administrative Code, concerning permit conditions provides:

(3) Permit Conditions. Any special requirements or provisions for the connection including off-site mitigation shall be clearly and specifically identified as part of the permit. Failure by the applicant or permittee to abide by the permit provisions shall be sufficient cause for the Department to initiate action to alter the connection or revoke the permit and close the connection at the expense of the permittee. . . . (Emphasis supplied)

27. Rule 14-96.011(1), Florida Administrative Code, concerning permit modification, revocation and closure of permitted connections provides:

(1) The Department can initiate action to revoke any permit if significant changes have occurred in the use, design or traffic flow of the property requiring the relocation, alteration or closure of the connection; if the connection was not constructed at the location or to the design specified in the permit; or if permit provisions were not met; or if the connection causes a safety or operational problem on the State Highway System substantiated by an engineering study signed and sealed by a professional engineer registered in the State of Florida. . . . (Emphasis supplied)

28. From the above language, it is clear that both the legislature and the Department have made a distinction between the construction of a connection on the State Highway System right of way as authorized by the permit and the conditions placed on the issuance of the permit for the construction of the connection. The evidence clearly shows that the Department agreed to construct the connections to SR 555 and SR 655. Furthermore, it is clear that the connections were completed within one year after the issuance of the permit. Therefore, Section 335.185(2), Florida Statutes, does not apply in this case. However, if the Department can show that Respondent has failed to substantially comply with the conditions of the permit within the time specified it may revoke the permit under Section 335.185(1), Florida Statutes, after the permittee is notified and given the opportunity to comply with the conditions of the permit.

29. Clearly, the permit involved in this case was issued as a result of a negotiated settlement in *FDOT v Shaffer and Department of Transportation v. First Mortgage Corporation*, Case No 93-9037. Therefore, Respondent's compliance with the conditions of the permit within a given time period needs to be viewed in light of the negotiations leading up to the issuance of the permit along with statutory and rule requirements. Although Respondent has not substantially complied with all conditions of the permit, Respondent has substantially complied with that portion of the site plan beginning at the connection to SR 655 and ending at the stop signs where the one-way driveway intersects the two-way driveway. Clearly, the Respondent would have complied with pavement markings and signings of that portion of the site plan but for the misunderstanding as to the Department's jurisdiction over First Avenue, Respondent's understanding (even though it was not stated in the permit) that total compliance with the site plan was to be accomplished upon completion of the construction on SR 555 which is buttressed by no expiration date listed on the permit, and the necessity of resurfacing the driveway and parking area that is presently paved due to the raised height of SR 555 after construction. When viewed in this manner, it does not appear that the parties through their negotiations intended for there to be strict adherence to the statutory or rule expiration date. Both parties agree that the stage of construction on SR 555 is now such that Respondent can move forward to comply with all the conditions of the permit.

30. The special provisions of the permit pertinent to the instant case are Special Provisions 2 and 3 which involve the placement of signing and pavement markings and require the parking layouts and traffic flow to be constructed and maintained in substantially the same manner as indicated in the site plan attached to the permit. Therefore, in addition to initially complying with the signings and pavement markings of the site plan, the Respondent must maintain the signs and pavement markings shown on the site plan in order for the connection to SR 555 and SR 655 to function properly.

31. The Department has failed to establish facts to show that Respondent's failure to fully comply with the pavement markings and signings of the site plan or that customers parking perpendicular to the front of the building contrary to the delineated parallel parking spaces have created any safety or operational problems on SR 555.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department enter a final order requiring the Respondent to:

- (a) comply with the placement of signs as shown on the site plan attached to the permit including those signs required for the First Avenue connection;
- (b) comply with the pavement markings for traffic flow as shown on the site plan attached to the permit, including those necessary for the First Avenue connection and direction for entrance to the green area;
- (c) pave any surface necessary to comply with the pavement markings provided for in (b) above, including that necessary for the First Avenue connection and to allow necessary pavement markings for traffic flow into the green area but not to include the green area;
- (d) restripe the parallel parking spaces in front of the building and place a solid curb on the immediate west side of the parallel parking to replace the curb stops now in place;
- (e) stripe the perpendicular parking spaces that abut the south end of the building where pavement presently exists;
- (f) place the necessary signs at the entrance to the green area so that customers will be aware of the additional parking inside the fenced green area and;
- (g) remove whatever portion of the chain link fence is necessary to allow reasonable

entrance to and exit from the green area. It is further recommended that Respondent be allowed sufficient time to complete the above, not to exceed 60 days unless the Respondent wishes to resurface the entire driveway area including the First Avenue connection and any parking area that is presently paved. In that event, it is recommended that Respondent be allowed 90 days. It is further recommended that Respondent not be required to pave any area that is to be used for parking including the green area and that adjacent to the green area that does not already have existing pavement.

RECOMMENDED this day 12th of October, 1995, at Tallahassee, Florida.

WILLIAM R. CAVE, Hearing Officer
Division of Administrative Hearings
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(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of October, 1995.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 95-0673

The following constitutes my specific rulings, pursuant to Section 120.59(2), Florida Statutes, on all of the proposed findings of fact submitted by the parties in this case.

Petitioner's Proposed Findings of Fact.

1. Proposed findings of fact 1-7, 10-13, 16-18, 20, and 21 are adopted in substance as modified in Findings of Fact 1 through 21 of the Recommended Order.
2. Proposed findings of fact 8 and 9 are covered in the Preliminary Statement.
3. Proposed findings of fact 14, 22 and 24 are rejected as not being supported by competent substantial evidence in the record.
4. Proposed findings of fact 19 and 23 are rejected as being argument rather than findings of fact.
5. Proposed finding of fact 15 goes to the weight to be given to Tako's testimony and is not a finding of fact per se.

The Respondent Proposed Findings of Fact.

The first two sentences of Respondent's introductory paragraph under "Findings Of Fact" are covered in the Preliminary Statement. The balance of the introductory paragraph and unnumbered paragraphs 2 - 6 are presented as restatements of Tako's and Davis' testimony and not as findings of fact. However, this testimony has been adopted in substance as modified in Findings of Fact 1 - 21 of the Recommended Order and where it has not been so adopted it is rejected as not being supported by competent substantial evidence in the record.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to the Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should consult with the agency that will issue the final order in this case concerning their rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.