

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DISCOUNT AUTO PARTS REPAIR )  
STORE NUMBER 228, )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 95-2794  
 ) DOT CASE NO. 95-126  
FLORIDA DEPARTMENT OF )  
TRANSPORTATION, )  
 )  
Respondent, )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Upon due notice, William R. Cave, Hearing Officer, Division of Administrative Hearings, held a formal hearing in this matter on August 14, 1995, in Lakeland, Florida.

APPEARANCES

For Petitioner: Douglas E. Polk, Jr., Esquire  
BROWN CLARK & WALTERS, P.A.  
1819 Main Street, Suite 1100  
Sarasota, Florida 34236

For Respondent: Francine M. Ffolkes, Esquire  
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STATEMENT OF THE ISSUE

Should Petitioner's connection application No. C-16-010-95 for a connection permit be denied?

PRELIMINARY STATEMENT

By a Notice of Intent to Deny dated April 5, 1995, the Department of Transportation (Department) advised Petitioner of its intent to deny Petitioner's permit application no. C-16-010-95 on the basis that: (a) the proposed connection did not meet spacing requirements and; (b) there is reasonable access to the site from Sixth Street NE (Sixth Street). By letter dated May 1, 1995, the Petitioner requested an informal hearing but disagreed with the facts set out in the Notice of Intent to Deny. Because there was a dispute as to material facts, the Department, by letter dated May 31, 1995, referred the matter to the Division of Administrative Hearings (Division) for the assignment of a Hearing Officer and conduct of a formal hearing.

Petitioner presented the testimony of Dennis Wood. Petitioner's exhibits one through five were received as evidence. The Department presented the testimony of Michael J. Tako. Department's exhibits one through seven, nine and ten were received as evidence. Department's exhibit eight was rejected. Chapter 120, Sections 335.18 through 335.188 and Section 338.001, Florida Statutes, and Chapters 14-96, 14-97 and 60Q-2, Florida Administrative Code were officially recognized.

A transcript of the proceeding was filed with the Division on September 1, 1995. The Department filed an Unopposed Motion For Extension Of Time to file its Proposed Recommended Order. The motion was granted and an order entered with the understanding that any time constraint for the entry of a Recommended Order imposed under Rule 28-5.402, Florida Administrative Code, was waived in accordance with Rule 60Q-2.031(2), Florida Administrative Code. Petitioner timely filed its Proposed Findings of Fact and Conclusions of Law. The Department elected not to file any Proposed Findings of Fact and Conclusions even under the extended time frame. A ruling on each proposed finding of fact submitted by the Petitioner 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 through 335.188, Florida Statutes, known as the State Highway System Access Management Act.

2. The property which Petitioner filed an application for an access connection to US Highway 17 (SR 35) is located on the southeast corner of the intersection of SR 35 and Sixth Street in Fort Meade, Polk County, Florida.

3. Petitioner's property abuts the east right-of-way of SR 35, with frontage of approximately 235 feet and the south right-of-way of Sixth Street, with frontage of approximately 235 feet.

4. SR 35 has been designated as an intrastate system route.

5. The segment of SR 35 involved in this proceeding has been assigned an Access Management Classification of Four with a design speed of 50 miles per hour and a posted speed of 40 miles per hour. Also, this segment of SR 35 has a "non-restrictive median" as that term is defined in Rule 14-97.002(23), Florida Administrative Code.

6. The distance between all cross streets running east and west which intersect SR 35 within Fort Meade, Florida, including Sixth Street, is approximately 440 feet. (See Petitioner's exhibit 2, Department's aerial photo of the area)

7. Petitioner's application proposes a full movement access connection to be located south of Sixth Street on SR 35 with a connection spacing between Sixth Street and the proposed connection of 190 feet. This distance was determined by measuring from the south edge of the pavement of Sixth Street to the north edge of pavement of proposed access in accordance with Rule 14-

97.002(19), Florida Administrative Code. The centerline of the proposed connection on SR 35 is located approximately 220 feet south of the centerline of Sixth Street.

8. Petitioner's application also proposes an access connection to Sixth Street which would give Petitioner indirect access to SR 35 through Sixth Street. The centerline of the proposed connection on Sixth Street is located approximately 135 feet east of the east curb of SR 35 presently in place.

9. Petitioner's proposed access connection to SR 35 is located immediately north of a crest of a rise over which SR 35 traverses. Both south and north of the crest is a depression through which SR 35 traverses. The point where Sixth Street intersects SR 35 is located approximately at the bottom of the depression north of the crest.

10. A motorist attempting to enter SR 35 from the proposed access connection would have a full view of any vehicle moving north through the depression to the south of the crest or moving south through the depression to the north of the crest.

11. A motorist attempting to enter SR 35 from the east on Sixth Street would have only a partial view of a vehicle moving north through the depression to the south of the crest but a full view of any vehicle moving north through the depression north of the crest.

12. Both Dennis Wood and Michael Tako testified that each had viewed the traffic moving north through the depression south of the crest from a point where Sixth Street intersects SR 35. They also testified that each had, from a point where Sixth Street intersects SR 35, at least a partial view at all times of the vehicles moving north through the depression south of the crest. Based on the above and their assumption that the distance between cross streets along SR 35 was 600 to 700 feet rather than approximately 440 feet as indicated in Petitioner's exhibit 2, Department's aerial photo of the area, Wood believed and Tako concluded that there was minimum clear sight distance that would allow a motorist exiting Sixth Street to cross SR 35 safely, or turn left to enter the southbound lane of SR 35 safely or turn right to enter the northbound lane of SR 35 safely.

13. Because of the continuous partial view of the vehicles moving north through the depression south of the crest from a point where Sixth Street intersects SR 35 it may appear that there was minimum clear sight distance in that area. However, there is insufficient evidence to establish facts to show that a minimum clear sight distance was established because the height of the originating clear sight line above the pavement or the height of the clear sight line above the pavement at the vehicle observed, which are required to establish a minimum clear sight distance (See Department's exhibit 10), were not established. Also, the estimate of the distance between the originating point of the clear sight line and the ending point of the clear sight line at the vehicle observed was flawed due to the use of incorrect distances between the cross streets.

14. There is insufficient evidence to show that a motorist looking south from the point where Sixth Street intersects SR 35 would have the required minimum clear sight distance as calculated by Department, as shown in Department's exhibit 10, to allow a motorist to cross SR 35 safely or turn left to enter the southbound lane of SR 35 safely or turn right to enter the northbound lane of SR 35.

15. Presently, there are three access connections of approximately 20 feet in width on SR 35 where Petitioner's property abuts SR 35. These access connections were constructed before Petitioner had ownership of the property. However, since there will be a change in land use, these access connections will be closed if the site is developed whether this access permit is granted or denied. Petitioner plans to close two of these access connections and extend the opening to the third one if the application is approved.

16. SR 35 is a moderate volume road with approximately 17,000 average daily trips (ADT's), increasing approximately 500 ADT's annually over the past five years. Sixth Street has approximately 100 to 150 ADT's at present with the ADT's projected to increase to approximately 300 if the site is developed and Petitioner's application for the access connection to SR 35 is denied. However, the number of vehicles entering SR 35 which constitutes traffic utilizing Petitioner's establishment will be the same no matter where this traffic enters SR 35.

17. Without the direct access connection to SR 35 there will be problems with internal customer traffic flow and with the movement of semi-tractor trailers that Petitioner uses to make deliveries to its store.

18. Although the present site plan design may be modified so as to utilize the indirect access to SR 35 through Sixth Street, the modification of the site plan design would create problems that would most likely result in the City of Fort Meade not approving the modified site plan design.

19. Although using Sixth Street as an indirect access to SR 35 from the site may provide a safe ingress and egress to and from SR 35, the lack of a minimum clear sight distance notwithstanding, the Petitioner's proposed access connection would provide a much safer ingress and egress to and from SR 35 because of a better clear sight distance.

20. Although the indirect access to SR 35 through Sixth Street may provide safe ingress and egress to and from SR 35, the indirect access does not provide reasonable access to the site as the term "reasonable access" is defined in Rule 14-96.002(22), Florida Administrative Code.

21. The primary purpose of limiting access to SR 35 is to provide safer conditions for vehicles utilizing SR 35.

#### CONCLUSIONS OF LAW

22. 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.

23. The Department issued its Notice of Intent To Deny Petitioner's Connection Application Number C-16-010-95 on the basis that: (a) the proposed connection does not meet spacing requirements and; (b) there is reasonable access to the proposed site from Sixth Avenue. The Department's position is that the connection as proposed does not meet the minimum connection spacing requirements as provided in Rule 14-97.003(1), Figure 2, Florida Administrative Code. Therefore, a nonconforming permit is the only type of permit that can be issued. However, the issuance of a nonconforming permit requires a showing by the Petitioner that there is no other reasonable access, direct or indirect, to the proposed site other than the proposed connection. The Department contends

that since the proposed site abuts Sixth Street Petitioner has a reasonable access from the proposed site to SR 35 through Sixth Street without the connection on SR 35 as proposed by Petitioner and, therefore, the application for connection permit should be denied.

24. Petitioner agrees that its proposed access connection does not meet the "minimum connection spacing" as that term is defined in Rule 14-97.002(19), Florida Administrative Code, with the minimum spacing distances being determined in accordance with Rule 14-97.003(1), Figure 2, Florida Administrative Code. Furthermore, Petitioner agrees that should the Department approve Petitioner's connection application it would require the Department to issue a nonconforming permit. However, contrary to the Department's position, Petitioner contends that Sixth Street does not provide Petitioner's proposed site with "reasonable access" from SR 35.

25. Rule 14-97.002(19), Florida Administrative Code, provides:

(19) "Minimum Connection Spacing" means the minimum allowable distance between conforming connections, measured from the closest edge of pavement of the first connection to the closest edge of pavement of the second connection along the edge of the traveled way.

26. In accordance with the authority granted to the Department by the legislature under Section 335.188, Florida Statutes, to, among other things, adopt access management standards and an access management control system, the Department adopted Rule 14-97.003(1), Figure 2, Florida Administrative Code. This rule requires a minimum connection spacing of 440 feet for a road such as the segment of SR 35 involved in this proceeding with an Access Management Classification (Access Class) of Four, a design speed of 50 mile per hour (MPH) and a posted speed of 40 MPH. Since the distance between Sixth Street and Petitioner's proposed connection is only 190 feet measured in accordance with the Department's rule, the Petitioner's proposed connection does not meet the minimum spacing distance. Petitioner's proposed connection having failed to meet the minimum spacing distance, the connection application must be denied unless it can be shown there are grounds for issuing a nonconforming permit.

27. Section 335.187(3), Florida Statutes, provides:

(3) The department may issue a nonconforming access permit after finding that to deny an access permit would leave the property without a reasonable means of access to the State Highway System. . . .

28. Rule 14-96.002(22), Florida Administrative Code, provides:

(22) "Reasonable Access" means the minimum number of connections, direct or indirect, necessary to provide safe ingress and egress to the State Highway System based on Section 335.18, Florida Statutes, the Access Management Classification, projected connection and roadway traffic volumes, and the type and intensity of land use.

29. Without question, the denial of Petitioner's connection application would not require a new connection to SR 35 which is certainly a minimum number of connections. However, minimum number of connections is not the only criteria for determining safe ingress and egress to SR 35. Limiting the number of connections to SR 35 is important but, limiting the number of connections should not be at the expense of safe ingress and egress to SR 35 from the proposed site.

30. Likewise, minimum clear sight distance is not the only criteria to be considered in determining safe ingress and egress to SR 35 or to any roadway in the state's highway system. However, minimum clear sight distance is certainly an important one that should be given great weight. The record is not clear whether a motorist would have minimum clear sight distance when entering SR 35 from Sixth Street, notwithstanding that the motorist may have a partial view of a vehicle at all times while the vehicle is moving north through the depression south of the crest. However, assuming arguendo that a motorist would have minimum clear sight distance when entering SR 35 from Sixth Street; a motorist entering SR 35 from the proposed connection would have a much clearer view of the traffic moving north on SR 35 and a much safer entrance to SR 35 from the proposed connection than the motorist entering SR 35 from Sixth Street. Although it may be argued that the Sixth Street access gives safe ingress and egress to SR 35, notwithstanding the absence of a minimum clear sight distance, the proposed connection gives a much safer ingress and egress to SR 35 than does the Sixth Street access. Additionally, the proposed connection provides much better conditions for the internal flow of customer traffic and semi-tractor trailers making deliveries to Petitioner which also contributes to a safer ingress and egress to SR 35.

31. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778 (2d DCA Fla. 1989). To meet this burden the Petitioner must establish facts to show, by a preponderance of the evidence, that the Department's denial of the connection application would be denying the Petitioner "reasonable access" to its property from SR 35. The Petitioner has met this burden.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department of Transportation enter a final order granting Petitioner's Connection Application Number C-16-010-90 and issuing Petitioner a nonconforming permit for the construction of the access connection to SR 35 as designed and shown in the site plan attached to the application with conditions deemed appropriate by the Department and provided for under Rule 14.96.009, Florida Administrative Code.

RECOMMENDED this day 30th of October, 1995, at Tallahassee, Florida.

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WILLIAM R. CAVE, Hearing Officer  
Division of Administrative Hearings  
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1230 Apalachee Parkway  
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(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of October, 1995.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 95-2794

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 Petitioner in this case.

Petitioner's Proposed Findings of Fact.

Proposed findings of fact 1 through 16 are adopted in substance as modified in Findings of Fact 1 through 21.

The Respondent elected not file any proposed findings of fact.

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.