

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VISHER CORPORATION,)	
)	
Petitioner,)	
)	
vs.)	Case No. 97-0431
)	
DEPARTMENT OF TRANSPORTATION,)	
)	
Respondent,)	
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RECOMMENDED ORDER

An administrative hearing was conducted on May 9, 1997, in Lakeland, Florida, by Daniel Manry, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Glen Anderson, Esquire
1128 First Street South
Post Office Box 9159
Winter Haven, Florida 33883-9159

For Respondent: Francine Ffolkes, Esquire
Department of Transportation
Haydon Burns Building, Mail Station 58
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STATEMENT OF THE ISSUE

The issue in this case is whether a directional opening Respondent constructed in the median of State Road 540 ("SR 540") at 2nd Street, Southeast, ("Second Street") in Polk County, Florida complies with the requirements of Chapters 334 and 335, Florida Statutes, and Florida Administrative Code Rules 14-96 and 97. 1/

PRELIMINARY STATEMENT

In June, 1996, Respondent modified a median opening in front of Petitioner's business by converting it from a full opening to

a directional opening. On July 10, 1996, Petitioner filed a petition for administrative hearing. Respondent referred the matter to the Division of Administrative Hearings to conduct the hearing.

At the hearing, Petitioner presented the testimony of two witnesses, and submitted one composite exhibit for admission in evidence. Respondent presented the testimony of two witnesses and submitted five exhibits for admission in evidence.

The identity of the witnesses and exhibits, and the rulings regarding each, are set forth in the transcript of the hearing filed on May 28, 1997. Petitioner timely filed its proposed recommended order ("PRO") on June 10, 1997. Respondent timely filed its PRO on June 25, 1997.

FINDINGS OF FACT

1. Petitioner is a Florida corporation wholly owned by Mr. Mr. Vivian DeSousa and Mrs. Sherry DeSousa, his wife. Petitioner is engaged in the business of operating a restaurant known as Schoop's Hamburgers ("Schoop's").

2. Schoop's is located in Winter Haven, Florida at the intersection of SR 540 and Second Street. SR 540 is an east-west, four lane, divided arterial roadway that is known locally as "Cypress Gardens Boulevard." Second Street is a north-south, two lane, residential city street. SR 540 is part of the State Highway System, while Second Street is owned by the City of Winter Haven.

3. Schoop's faces south toward the westbound lanes of SR 540 in the northwest corner of the intersection of SR 540 and Second Street. The east side of Schoop's abuts the southbound lane of Second Street.

4. Second Street intersects SR 540 approximately 300 feet west of the intersection of SR 540 and 1st Street, Southeast. ("First Street"). First Street is a four lane divided highway.

5. The southern end of Second Street forms a "T" intersection with SR 540. Second Street does not continue south of SR 540.

6. The property to the south of SR 540 (the "Outback property") houses several businesses that face north toward the eastbound lanes of SR 540 on the opposite side of SR 540 from Schoop's. The businesses include a Boston Market, an Outback Steak House (the "Outback"), a Days Inn Motel, and a Red Lobster Restaurant. The Outback is newly constructed.

7. The Outback and Days Inn are in the middle of the Outback property more or less at the intersection of Second Street and SR 540. The Red Lobster is east of the intersection, and the Boston Market is at the western end of the Outback property where SR 540 intersects First Street.

8. The median that separates the westbound and eastbound lanes of SR 540 includes an opening at the intersection of Second Street and SR 540. The median opening is immediately east of both Schoop's and the Outback. Petitioner does not have an access connection permit for the median opening.

9. Petitioner has a direct driveway connection to Second Street. Prior to modification, the median opening allowed easier access to and from Schoop's.

10. Prior to modification, the median opening was a full opening. It allowed eastbound traffic on SR 540 to turn left across the westbound lanes of SR 540 onto the northbound lane of Second Street without the protection of a left turn storage lane eastbound on SR 540. It also allowed southbound traffic on Second Street to turn left across the westbound lanes of SR 540 onto the eastbound lanes of SR 540.

11. The full median opening median opening allowed westbound traffic on SR 540 to turn left across the eastbound lanes of SR 540 into the Outback property without the protection of a left turn storage lane westbound on SR 540. Traffic leaving the Outback property could also cross the eastbound lanes of SR 540 and turn left into the westbound lanes of SR 540.

12. Respondent modified the median opening in June, 1996. The modification changed the median opening from a full opening to a directional opening. The directional opening allows westbound traffic on SR 540 to turn left into the Outback property, or to make a "U" turn, from a left turn storage lane westbound on SR 540. The directional opening prevents all other turns at the intersection of SR 540 and Second Street.

13. The directional opening prevents southbound traffic on Second Street from crossing the westbound lanes of SR 540 to turn left onto the eastbound lanes of SR 540. It prevents traffic

leaving the Outback property from crossing the eastbound lanes of SR 540 to turn left onto the westbound lanes of SR 540. It also prevents eastbound traffic on SR 540 from making "U" turns on the westbound lanes of SR 540.

14. The turns prevented by the directional opening at Second Street have been diverted to a full median opening at 3rd Street, Southeast ("Third Street") where left turn storage lanes exist in both the eastbound and westbound lanes of SR 540. Eastbound traffic from Schoop's can turn left onto SR 540 by first turning left onto Second Street and proceeding one block to Third Street. Westbound traffic from the Outback property can turn left onto SR 540 by first turning right onto SR 540 and making a "U" turn at Third Street.

15. The directional opening was reasonably necessary to eliminate traffic hazards caused by queuing at the intersection of First Street and SR 540. Queuing occurs when vehicles are backed up, one behind the other, by traffic control devices at intersections.

16. Respondent conducted a traffic operations and safety evaluation to determine whether it was safe and efficient to maintain a full median opening at the intersection of SR 540 and Second Street. The evaluation included field reviews and a review of police accident reports. The City of Winter Haven provided substantial input into the evaluation because the City has jurisdiction over the side streets impacted by the median modification.

17. The evaluation found that queuing of westbound vehicles on SR 540 created a traffic problem several times each day. Queuing of westbound traffic on SR 540 extended far enough eastward to block the intersection at Second Street during 12 of the 57 signal cycles in the noon peak hour and during 29 of the 56 signal cycles in the p.m. peak hour.

18. Queuing could not be reduced by modifying the traffic signal at First Street to add "green time" for westbound traffic on SR 540 and reduce "green time" for north-south traffic on First Street. Re-timing the traffic signal would result in increased delay for north-south traffic to unacceptable levels. The signal at the intersection at First Street and SR 540 was operating near capacity.

19. Queuing of westbound traffic on SR 540 created a traffic hazard for both westbound and eastbound traffic. Queuing did not always occur simultaneously in both westbound lanes of SR 540. Vehicles could be queued in either the curb lane or the median lane while vehicles in the other lane continued in motion.

20. The traffic hazard was greatest when queuing occurred in the median westbound lane of SR 540. Queued vehicles in the median lane tended to leave a "courtesy gap" that allowed eastbound vehicles on SR 540 to make a left turn across both westbound lanes or to make a "U" turn into the westbound curb lane of SR 540. Vehicles entering the "courtesy gap" did not have the sight distance needed to see westbound vehicles in motion in the curb lane of SR 540 and complete the turn safely.

21. Queuing of westbound traffic on SR 540 created additional traffic hazards for eastbound traffic. Left turns and "U" turns from the eastbound median lane of SR 540 frequently stopped traffic in that lane. The result was to increase queuing for eastbound traffic or to increase lane changes by eastbound vehicles not using the median opening.

22. Respondent was unable to construct a directional opening at the intersection of SR 540 and Second Street that included a left turn storage lane for eastbound traffic on SR 540. The distance between Second Street and First Street is not sufficient to accommodate a left turn storage lane. Any left turn storage lane Respondent could have included in the directional opening would not have been long enough to accomplish its purpose.

23. The additional traffic created by the addition of the Outback to the Outback property exacerbated the traffic hazards caused by the full median opening at Second Street. Those hazards are substantially reduced by diverting left turns and "U" turns to Third Street.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter. Section 120.57(1). The parties were duly noticed for the hearing.

25. The burden of proof is on Petitioner. Petitioner must show by a preponderance of evidence that the directional opening Respondent constructed at the intersection of SR 540 and Second

Street violates applicable law. Florida Department of Transportation vs. J.W.C. Company, Inc., 396 So.2d 778 (Fla. 1st DCA 1981); Balino vs. Department of Health and Rehabilitative Services, 348 So.2d 349 (Fla. 1st DCA 1977).

26. Petitioner must show that Respondent's action injured Petitioner, and that the injury is the type the statute is designed to protect. Ameristeel Corporation vs. Clark, 691 So. 2d 473 (Fla. 1997); Agrico Chemical Company vs. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2nd DCA 1981), review denied sub nom; Freeport Sulphur Company v. Agrico Chemical Company, 415 So. 2d 1359 (Fla. 1982); Fairbanks, Inc. vs. State, 635 So. 2d 58 (Fla. 1st DCA 1994). The directional opening constructed by Respondent injured Petitioner by diverting traffic from Petitioner's place of business. The issue is whether that is the type of injury the statute is designed to protect.

27. Section 335.182(2)(a) provides that every owner of property that abuts a road on the State Highway System has a right to reasonable access. The right of access is defined in Section 334.03(21) as the right of ingress from abutting land to the state highway and the right of egress from the state highway to abutting land. Section 334.044(14) authorizes Respondent to establish, control, and prohibit such points of ingress and egress.

28. The median modification constructed by Respondent does not affect Petitioner's right of access. The modification

affects traffic flow. Traffic flow is not part of Petitioner's right of access. Sections 334.03(21), 334.044(13), and 335.181(2)(a); Rule 14-96.003(5); Department of Transportation vs. Gefen, 636 So. 2d 1345 (Fla. 1994); Department of Transportation vs. Capital Plaza, Inc., 397 So. 2d 682 (Fla. 1981); Hack Corporation vs. Department of Transportation, DOAH Case No. 92-4202, Final Order (July 27, 1993), aff'd 637 So. 2d 14 (Fla. 3rd DCA 1994). See also, Racetrac Petroleum, Inc. vs. Department of Transportation, 17 F.A.L.R. 2239 (DOAH April 27, 1995) (holding in a rule challenge case that median openings are not connections).

29. Petitioner could successfully challenge the median modification constructed by Respondent if Petitioner held an access connection permit and the median modification eliminated one or more turning movements described in the permit. However, Petitioner does not hold an access connection permit for the median opening modified by Respondent.

30. Respondent has the statutory authority and responsibility to plan and implement safe and efficient highways. Section 334.044; Department of Transportation vs. Lopez-Torres, 526 So. 2d 674, 675 (Fla. 1988). However, Respondent's statutory authority is not absolute and is limited to the lawful exercise of its discretion. Lopez-Torres, 526 So. 2d at 676.

31. The technical engineering judgment that Respondent necessarily exercises in designing safe transportation facilities is a function intended by the legislature to repose in

Respondent. Courts are generally predisposed to leave such decisions to Respondent. State, Department of Transportation vs. Myers, 237 So. 2d 257, 261 (Fla. 1st DCA 1970).

32. Respondent has the statutory authority to undertake the median modification that is the subject of this proceeding. Respondent exercised its discretion in a lawful manner based on technical engineering judgment.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Respondent enter a Final Order denying Petitioner's challenge to the median modification.

DONE AND ENTERED this 24th day of July, 1997, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of July, 1997.

ENDNOTES

1/ All chapter and section references are to Florida Statutes (1995) unless otherwise stated.

2/ Unless otherwise stated, all references to rules are to rules promulgated in the Florida Administrative Code in effect on the date of this Recommended Order.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.