

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARION B. HILLIARD,)
)
 Petitioner,)
)
 vs.) Case No. 97-0971RP
)
 DEPARTMENT OF TRANSPORTATION,)
)
 Respondent.)
)
 _____)
 WILLIAM C. JONSON,)
)
 Petitioner,)
)
 vs.) Case No. 97-0972RP
)
 DEPARTMENT OF TRANSPORTATION,)
)
 Respondent.)
)
 _____)
 FLORIDA OUTDOOR ADVERTISING)
 ASSOCIATION, ELLER MEDIA)
 COMPANY, 3M NATIONAL)
 ADVERTISING COMPANY,)
 AK MEDIA/FLORIDA, UNIVERSAL)
 OUTDOOR ADVERTISING, and)
 WHITECO OUTDOOR ADVERTISING,)
)
 Petitioners,)
)
 vs.) Case No. 97-1504RP
)
 DEPARTMENT OF TRANSPORTATION,)
)
 Respondent.)
)
 _____)

FINAL ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings, by its duly designated Administrative Law Judge, Diane Cleavinger, on February 3, 1998, in Tallahassee, Florida.

APPEARANCES

For Petitioner: William D. Brinton, Esquire
Hilliard Allen, Brinton and Simmons, P.A.
Suite 3200
One Independent Drive
Jacksonville, Florida 32202-5026

For Petitioner: Linda C. Ingham, Esquire
Jonson Marks, Gray, Conroy and Gibbs
Post Office Box 447
Jacksonville, Florida 32201

For Petitioners: Gerald S. Livingston, Esquire
FOAA, et al. Gerald S. Livingston, P.A.
Post Office Box 2151
Orlando, Florida 32802

For Respondent: Paul Sexton, Esquire
Department of Transportation
Mail Station 58
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399-0458

STATEMENT OF THE ISSUE

Whether Petitioners, Jonson and Hilliard, have standing to challenge portions of the proposed amendment to Chapter 14-10, Florida Administrative Code.

PRELIMINARY STATEMENT

On March 6, 1997, Petitioners, William C. Jonson and Marion B. Hilliard filed separate Petitions challenging portions

of the proposed amendment of Chapter 14-10, Florida Administrative Code. The two Petitions were essentially the same and were assigned Case Nos. 97-0972RP and 97-0971RP, respectively. On March 27, 1997, Petitioners, Florida Association of Outdoor Advertising; Eller Media Company; 3M National Advertising Company; AK Media/Florida, Universal Outdoor Advertising; and Whiteco Outdoor Advertising (FOAA et al.), filed a Petition challenging portions of the proposed amendment of Chapter 14-10, Florida Administrative Code. The case was assigned Case No. 97-1504RP. All three cases were consolidated for purposes of hearing. By agreement of the parties all three cases were abated pending further rulemaking proceedings by the Department.

Prior to hearing, the issues raised in the Petition filed by FOAA, et al., were made moot by changes to the proposed rule amendment. At the beginning of the hearing, FOAA, et al., asked to Intervene in the Hilliard and Jonson portion of the case. Intervention was granted. Additionally, portions of the Hilliard and Jonson Petitions were resolved by changes in the proposed rule amendment. However, challenges to proposed rules 14-004(2) and 14-10.007(1)(d), Florida Administrative Code, remain unresolved.

At the hearing, Petitioner Hilliard and Jonson testified in their own behalf on the issue of standing. None of the parties offered any exhibits into evidence, but did submit a Prehearing

Stipulation and a Joint Stipulation containing agreement on several facts.

After the hearing, Petitioners and Respondent filed Proposed Final Orders on February 13, 1998, and February 18, 1998.

FINDINGS OF FACT

1. On February 14, 1997, the Department published a Notice of Rulemaking to amend Chapter 14-10, Florida Administrative Code, in the Florida Administrative Weekly.

2. After public hearings and comment, the Department on July 3, 1997, January 16, 1998, and January 23, 1998, published a Notice of Changes to the proposed amendment of Chapter 14-10, Florida Administrative Code, in the Florida Administrative Weekly.

3. As a result of the Notice of Changes to the proposed amendment of Chapter 14-10, Florida Administrative Code, the only remaining issues in this hearing concerned the validity of proposed rule 14-10.004(2) and 14-10.007(1)(d). The proposed amendments involve the validity of the Department's approval of signs with automatic changeable facings which meet certain criteria for message changes and the validity of the Department's method for determining when a nonconforming sign is destroyed and may not be repaired or reerected. The proposed rules state:

14-10.004(2) A permit shall be granted for an automatic changeable facing provided:

(a) the static display time for each message is a minimum of six seconds,

(b) the time to completely change from one message to the next is a maximum of two seconds,

(c) the change of message occurs simultaneously for the entire sign face, and

(d) the application meets all other permitting requirements. Any such signs shall contain a default design that will freeze the sign in one position if a malfunction occurs.

14-10.007(1)(d) A nonconforming sign which is destroyed may not be reerected. "Destroyed" is defined as when more than 50% of the upright supports of a sign structure are physically damaged such that normal repair practices of the industry would call for, in the case of wooden sign structures, replacement of the broken supports and, in the case of a metal sign structure, replacement of at least 25% of the length above ground of each broken, bent or twisted support. However, in the event that such damage occurs, a sign will not be considered destroyed if the sign owner shows that replacement materials costs to reerect the sign would not exceed 50% of the value of the structural materials in the sign, immediately prior to destruction. The following shall be applicable in determining whether the replacement materials costs to reerect the sign exceed 50% of the value of the structural material:

1. Structural materials shall not include the sign face, any skirt, any electrical service, electrical lighting or other non-structural items. Structural materials shall include any support brackets for the face, any catwalk, and any supporting braces or members of the sign structure.

2. The value of the structural materials in the sign immediately prior to destruction shall be based on the cost of all structural materials contained in the sign as it was configured just prior to damage, and the cost of such materials shall be based on normal

market cost as if purchased new on or about the date of destruction, without regard to any labor costs or special market conditions.

3. The materials to be included in the replacement materials costs to reerect the sign shall be all materials that would be used to return the sign to its configuration immediately prior to destruction and shall not include any material that is repaired on-site, but shall include any material obtained from a source other than the sign itself, whether used, recycled or repaired. The repairs to the sign shall be with like materials and shall be those reasonably necessary to permanently repair the sign in a manner normally accomplished by the industry in that area. The cost of such materials shall be as described in paragraph (2)(c)2.

4. The Department's rulemaking authority is provided by Sections 334.044(2), 479.02 (2) and (7), Florida Statutes. Chapter 479, Florida Statutes, federal law and federal regulations define the regulatory jurisdiction of the Department. Sections 479.01(1) and (14) define automatic changeable facings and nonconforming signs, respectively. Sections 479.01(1) and (14) state:

(1) "Automatic changeable facing" means a facing which through a mechanical system is capable of delivering two or more advertising messages and shall not rotate so rapidly as to cause distraction to a motorist.

* * *

(14) "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.

5. Both Petitioners asserted standing based on each being a Florida taxpayer, a user of Florida's highways and each having an intense personal interest in the beauty of Florida's highways. Both have engaged in numerous social and political activities related to the regulation of highway signs. Because of each Petitioner's interest, both were invited by either the Department or the Governor to participate in the rulemaking process. None of these characteristics affords a basis for standing in this proceeding.

6. Neither Petitioner owns any outdoor advertising signs. Nor do they own any land upon which such signs are located or land adjacent to or near enough to such signs as to permit the conclusion that either Petitioner's property rights might be impaired. Petitioners like all motorists in Florida, simply drive down roads on which these signs may be located. Neither Petitioner is significantly impacted by these proposed rules or impacted differently than the general population. In short, neither Petitioner has demonstrated facts sufficient to confer standing on them in this proceeding.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over this subject matter of and the parties to this proceeding. Section 120.54, Florida Statutes.

8. In order to have standing to challenge a proposed rule a Petitioner must establish he or she will suffer a real and sufficiently immediate injury in fact and/or that the Petitioner's alleged interest is arguably within the zone of interest to be regulated by the proposed rules. Ward v. Board of the Internal Improvement Trust Fund, 651 So. 2d 1236 (Fla. 4th DCA 1995); and Televisual Communications, Inc. v. Florida Department of Labor and Employment, 667 So. 2d 372 (Fla. 1st DCA 1995).

9. In this case the proposed rules deal with the manner of changing sign facings so that such signs do not cause a distraction to motorists and the repair of nonconforming signs. Petitioner's speculation about highway safety was nothing more than that of the general public's speculation about such subjects. More importantly, such speculation on the possibility of injurious highway events is too remote to demonstrate a sufficiently immediate injury in fact or that either party has a sufficiently real interest which falls within the zone of interest regulated by the proposed rule. Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1973); State Board of Optometry v. Florida Society of Ophthalmology, 538 So. 2d 878 (Fla. 1st DCA 1988); and Florida Department of Offender Rehabilitation v. Jerry, 353 So. 2d 1230 (Fla. 1st DCA 1978).

10. The record in this case demonstrates that neither Petitioner's interest in outdoor advertising signs is

significantly different from the interests of the general population. Similarly, neither Petitioner demonstrated any sufficiently immediate impact on them different from the general population. Moreover, the record does not show that the invitation by the Department or the Governor to Petitioners to participate in the development of these rules was in recognition of any legally significant status on their part. The invitation does not lead to the conclusion that either Petitioner is substantially affected for purposes of standing. Therefore the Petitions filed by Hilliard and Jonson should be dismissed.

ORDER

Based upon the findings of fact and conclusions of law, it is

ORDERED:

That the Petitions are DISMISSED.

DONE AND ORDERED this 3rd day of April, 1998, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (904) 921-6847

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of April, 1998.

COPIES FURNISHED:

William D. Brinton, Esquire
Allen, Brinton and Simmons, P.A.
Suite 3200
One Independent Drive
Jacksonville, Florida 32202-5026

Linda C. Ingham, Esquire
Marks, Gray, Conroy and Gibbs
Post Office Box 447
Jacksonville, Florida 32201

Gerald S. Livingston, Esquire
Gerald S. Livingston, P.A.
Post Office Box 2151
Orlando, Florida 32802

Paul Sexton, Esquire
Department of Transportation
Mail Station 58
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399-0458

Thomas F. Barry, Secretary
Department of Transportation
Mail Station 58
Haydon Burns Building
Tallahassee, Florida 32399-0450
Pamela Leslie, General Counsel
Department of Transportation
Mail Station 58
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399-0450

Carroll Webb, Executive Director
Joint Administrative Procedure Committee
120 Holland Building
Tallahassee, Florida 32399-1300

Liz Cloud, Chief
Bureau of Administrative Code
The Elliott Building
Tallahassee, Florida 32399-0250

NOTICE OF RIGHT TO APPEAL

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of the notice of appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.