

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

NATIONAL ADVERTISING COMPANY,            )  
  )  
      Petitioner,                            )  
  )  
vs.    )     Case No. 98-4456T  
  )  
DEPARTMENT OF TRANSPORTATION,        )  
  )  
      Respondent.                         )  
\_\_\_\_\_                                      )

RECOMMENDED ORDER

Upon due notice, William R. Cave, an Administrative Law Judge for the Division of Administrative Hearings, held a formal hearing in this matter on March 16, 1999, in Dade City, Florida.

APPEARANCES

For Petitioner: Jennifer Sloane, Esquire  
Livingston and Reilly, P.A.  
Post Office Box 2151  
Orlando, Florida 32802

For Respondent: Andrea V. Nelson, Esquire  
Department of Transportation  
Haydon Burns Building  
605 Suwannee Street  
Tallahassee, Florida 32399-0458

STATEMENT OF THE ISSUE

Did the Department of Transportation (Department) properly issue the Notice of Denied Application pursuant to Chapter 479, Florida Statutes, and Rule 14-10.004(1)(d), Florida Administrative Code?

PRELIMINARY STATEMENT

On July 22, 1998, National Advertising Company (National) submitted a permit application to the Department for the south facing of an existing nonconforming outdoor advertising sign structure located at the interchange of Interstate 75 (I-75) and State Road 52 (SR 52) in Pasco County, Florida, previously permitted by the Department for the north facing some time in the early 1970's. On July 22, 1998, the Department issued the Notice of Denied Application to National for the following reasons:

1. the existing nonconforming sign structure is located within 500 feet of restricted interchange or intersection at grade, citing Rule 14-10.006(1)(b)5, Florida Administrative Code; and
2. National failed to submit local governmental approval along with its permit application.

National filed a petition on August 21, 1998, challenging the Notice of Denied Application and requested a formal hearing. By letter dated October 7, 1998, the Department referred the matter to the Division of Administrative Hearings (Division) for the assignment of an Administrative Law Judge and for the conduct of a formal hearing. This matter was initially scheduled for hearing on March 15, 1999, but was rescheduled for March 16, 1999, to accommodate the undersigned's schedule.

At the hearing, National presented the testimonies of Mike Palouian, Susan L. Rosetti, and Juanice Hagan. National's Exhibits numbered 1-9 were admitted in evidence. The Department

did not offer any oral testimony. The Department's Exhibits numbered 1-3 were admitted in evidence. Chapter 14-10, Florida Administrative Code, and Section 120.60, Florida Statutes, were officially recognized.

A Transcript of this proceeding was filed with the Division on March 29, 1999. At the close of the hearing, the parties requested an extension of time to file their proposed recommended orders which was granted with the understanding that any time constraint imposed under Rule 28-106.216(1), Florida Administrative Code, was waived in accordance with Rule 28-106.216(2), Florida Administrative Code. The parties filed their proposed recommended orders under the extended time frame.

#### FINDINGS OF FACT

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

1. The sign structure which is the subject matter of this proceeding was originally erected prior to November 11, 1971, at the intersection of I-75, an interstate highway, and SR 52, in Pasco County, Florida. Both I-75 and SR 52 are roadways under the Department's jurisdiction for purposes of enforcing and regulating outdoor advertising sign structures. The original sign structure had one sign facing which faced north.

2. The interchange of I-75 and SR 53 is located outside of the incorporated area of any town or city.

3. The Federal-State Agreement (Agreement) which provides the Department with the authority to regulate outdoor advertising was adopted in 1972.

4. When the Agreement was adopted, it contained a rule which provided, inter alia, that any sign structure located outside of the incorporated area of any town or city could not be located adjacent to or within 500 feet of a restricted interchange or intersection at grade. That rule has now been codified in Rule 14-10.006(4)(e), Florida Administrative Code.

5. At the time it was given authority to regulate outdoor advertising, the Department took an inventory of all existing sign structures. Those existing sign structures that did not conform to the rules set forth in the Agreement were "grandfathered in" as legally nonconforming signs and allowed to remain at their current locations.

6. National's sign structure, which is the subject matter of this proceeding, contained only one sign facing which faced north. National's sign was "grandfathered in" as a legally nonconforming sign structure. National's sign was nonconforming because it was not located within an incorporated town or city and was located adjacent to or within 500 feet of a restricted interchange.

7. Some time prior to 1973, National's sign was issued state permit number 1417-10. In 1973, National's sign permit

number was changed to AU061-35 which is the permit number currently assigned to National's sign structure.

8. On July 9, 1998, National submitted an application for an outdoor advertising sign permit for a proposed sign facing, which was to face south, to be constructed on the existing nonconforming sign structure under permit number AU061-35. National's existing permitted sign structure has a sign facing which faces north and is located at the intersection of I-75 and SR 52 in Pasco County, Florida. The addition of a south sign facing to the existing legally nonconforming sign structure would create a back-to-back sign structure.

9. The application as submitted by National was incomplete in that National failed to include in its application proof of local government approval. At the hearing, National produced proof of local government approval for the south side facing requested in the permit application.

10. On July 22, 1998, the Department issued a Notice of Denied Application to National citing the following reasons for the denial:

14E Site is within 500 feet of a restricted interchange or intersection at grade (S. 14-10.006(1)(b)5., FAC).

\* \* \*

14I Other -- No local government approval.

The permit application did not include local government approval at the time it was submitted to the Department. However, the Department did not return the permit application as being

incomplete. Subsequently, National obtained local government approval.

11. National's existing legally nonconforming sign structure is located within the restricted area of the I-75 and SR 52 interchange in that it is located adjacent to the on-ramp carrying traffic from SR 52 to the southbound lanes of I-75 and is within 500 feet of the interchange.

#### CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.57(1), Florida Statutes.

13. 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 (Fla. 2d DCA 1981). To meet this burden, National must establish facts to show its entitlement to the permit by a preponderance of the evidence. Section 120.57(1)(h), Florida Statutes. National has failed to meet its burden to show entitlement to the permit.

14. Chapter 479, Florida Statutes, gives the Department the authority to administer, regulate, and enforce outdoor advertising within the controlled areas of jurisdictional roadways.

15. Section 479.01(4), (6), (14), (17), (19), (20), and (21), Florida Statutes, provides as follows:

(4) "Controlled area" shall mean 660 feet or less from the nearest edge of the right-of-way of any portion of the State Highway System, interstate, or federal-aid primary system and beyond 660 feet of the nearest edge of the right-of-way of any portion of the State Highway System, interstate, or federal-aid primary system outside an urban area.

\* \* \*

(6) "Erect" means to construct, build, raise, assemble, place, affix, attach, create, paint, draw, or in any way bring into being or establish; but it does not include any of the foregoing activities when performed as an incident to the change of advertising message or customary maintenance or repair of a sign.

\* \* \*

(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.

\* \* \*

(17) "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 or automatic changeable facing, 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.

\* \* \*

(19) "Sign face" means the part of the sign, including trim and background, which contains the message or informative contents.

(20) "Sign facing" includes all sign faces and automatic changeable faces displayed at the same location and facing the same direction.

(21) "Sign structure" means all the interrelated parts and material, such as beams, poles, and stringers, which are constructed for the purpose of supporting or displaying a message of informative contents. (Emphasis furnished)

16. Section 479.02(7), Florida Statutes, provides as follows:

479.02 Duties of the Department.--It shall be the duty of the department to:

\* \* \*

(7) Adopt such rules as it deems necessary or proper for the administration of this chapter, including rules which identify activities that may not be recognized as industrial or commercial activities for purposes of determination of an area as an unzoned commercial or industrial area.

In accordance with its duty to adopt rules for the administration of Chapter 479, Florida Statutes, the Department adopted Chapter 14-10, Florida Administrative Code.

17. Rule 14-10.006(4)(e), Florida Administrative Code, provides as follows:

(e) On the interstate highway system outside incorporated towns and cities, no permit may be granted for a sign structure located adjacent to or within 500 feet of an interchange, intersection at grade, or rest area. Said 500 feet shall be measured along the interstate in the direction leading away from the crossroad from the beginning of pavement widening at the exit from the main-traveled way or the end of pavement widening at the entrance to the main-traveled way on



an interstate highway. The point of pavement widening at an exit ramp or entrance ramp shall be the point farthest from the crossroad where the outside edge of the ramp pavement first intersects with the outside edge of the pavement on the main-traveled way. (Emphasis furnished)

National is requesting a permit to place a south facing on a sign structure that has already been determined to be a legally nonconforming sign structure because the sign structure is located outside of any incorporated town or city and is adjacent to and within 500 feet of the interchange of I-75 and SR 52.

18. Rule 14-10.007(1)(a), Florida Administrative Code, provides in pertinent part as follows:

- (1) The following shall apply to nonconforming signs:
  - (a) A nonconforming sign must remain substantially the same as it was as of the date it became nonconforming. Reasonable repair and maintenance, including change of advertising message, is permitted and is not a change which would terminate nonconforming rights. . . . (Emphasis furnished)

The balance of Rule 14-10.007(1)(a), Florida Administrative Code, list examples of modification to existing sign structures none of which are applicable to this situation. However, adding the south sign facing to the legally nonconforming sign structure would be a considered a substantial change to that sign structure as it existed on the date it was determined to be a legally nonconforming sign structure.

19. Section 479.07(3)(a), Florida Statutes, provides as follows:

(3)(a) An application for sign permit must be made on a forms prescribed by the department, and a separate application must be submitted for each permit requested. A permit is required for each sign facing.  
(Emphasis furnished)

National submitted a permit application for the south sign facing.

20. Rule 14-10.004(d)3., Florida Administrative Code, provides as follows:

(d) The department will act on permit applications in order of the date of receipt of a complete application.

\* \* \*

3. Incomplete permit applications will be returned to the applicant. (Emphasis furnished)

Although National's application was considered incomplete by the Department, it was not returned to National because the Department made the determination that National's permit application would have been denied regardless of its completeness.

21. National contends that the Department violated its own rule when it failed to return the permit application to National as being incomplete. Although the Department may not have followed its own rule when it failed to return the permit application as incomplete, no purpose would have been served by returning the permit application as incomplete, since the basis for the denial of the permit could not have been cured by National resubmitting a complete permit application.

22. National also contends that Rule 14-10.006(1)(b)5, Florida Administrative Code, cited as authority for not granting National's permit application did not exist at the time the permit application was denied and therefore National was not given proper notice. Apparently, that rule was renumbered as Rule 14-10.006(4)(e), Florida Administrative Code, and it does not appear that National was prejudiced by the Department's incorrect citation of the rule. However, the Department should take advantage of having been advised of this error and review all its forms that were affected by this rule change or any other rule change.

23. Furthermore, National contends that the Notice of Denied Application was insufficient in that it did not list as a basis for its denial the prohibition against making changes to a legally nonconforming sign structure when such changes could be considered substantial when compared to the sign structure as it existed on the day it was determined to be legally nonconforming. It appears that National was able to adequately present its case in this regard notwithstanding that National was not given notice of this basis for denial at the time it received the Notice of Denied Application. It does not appear that National was prejudiced by the Department's failure to put National on notice of all the Department's reasons for denial.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department of Transportation enter a final order denying Petitioner's application for a sign permit at the location requested in the permit application previously filed by National.

DONE AND ENTERED this 25th day of June, 1999, in Tallahassee, Leon County, Florida.

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WILLIAM R. CAVE  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 25th day of June, 1999.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit 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.