STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION

DEPARTMENT OF TRANSPORTATION,

Petitioner, DOAH CASE NO.: 99-2863T
DOT CASE NO.: 99-0176

vs.

AK MEDIA GROUP, INC.,

Respondent.
_________________________________/

FINAL ORDER

This proceeding was initiated by the filing of a petition for a formal administrative hearing on June 15, 1999, by Respondent, AK MEDIA GROUP, INC., (hereinafter AK MEDIA) in response to the notice issued by Petitioner, DEPARTMENT OF TRANSPORTATION, (hereinafter DEPARTMENT) that outdoor advertising permits issued to AK MEDIA by the DEPARTMENT are void for AK MEDIA'S failure to erect a "completed outdoor advertising sign at the proposed site within 270 days of the date of permit issuance by the [DEPARTMENT]." On June 15, 1999, the matter was referred to the Division of Administrative Hearings (DOAH).

A hearing was scheduled and held by video teleconference between Tallahassee and Ft. Lauderdale, on" September 2, 1999, before Claude B. Arrington, Administrative Law Judge. Appearances on behalf of the parties were as follows:

For Petitioner: Sheauching Yu, Esquire
Department of Transportation
Haydon Burns Building
Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0458

For Respondent: Mark S. Ulmer, Esquire
Biscayne Center
119000 Biscayne Blvd., Suite 612
Miami, Florida 33181

At the hearing, the DEPARTMENT presented the testimony of two employees of the DEPARTMENT and offered three exhibits, which were admitted into evidence. AK MEDIA presented the testimony of one witness and offered exhibits 1-10, 12-25, 27-37 (renumbered

as composite exhibit 44), and 38 through 43, all of which were accepted into evidence. Official recognition was taken of all relevant statutes and rules. The transcript of the proceeding was filed on October 1, 1999. On October 22, 1999, the DEPARTMENT filed a Proposed Recommended Order and on October 26, 1999, AK MEDIA filed a Proposed Recommended Order. On December 28, 1999, Judge Arrington issued his Recommended Order. On January 12, 2000, the DEPARTMENT filed its exceptions to the Recommended Order and AK MEDIA filed its responses to the DEPARTMENT'S exceptions on January 22, 2000.

STATEMENT OF THE ISSUE

As stated by the Administrative Law Judge in his Recommended Order, the issue presented was: "Whether Respondent's outdoor advertising permits BU 839 and BU 840 became void pursuant to the provisions of Section 479.07(5)(a), Florida Statutes."

BACKGROUND

On August 18, 1998, the DEPARTMENT issued to AK MEDIA two state outdoor advertising permits, BU 839 and BU 840, to build and maintain a two-faced outdoor advertising sign at a specified location on the west side of State Road 5 in Palm Beach County. On May 21, 1999, the DEPARTMENT issued a notice to AK MEDIA that the two permits were void because a completed sign had not been erected at the permitted location within 270 days from the issuance of the permits. In making that determination, the DEPARTMENT relied on the provisions of Section 479.07(5)(a), Florida Statutes. AK MEDIA claimed its failure to timely complete construction of the signs was due to an intervening cause, the actions of Palm Beach County, and the doctrine of collateral estoppel or equitable tolling should prevent the DEPARTMENT from revoking its permits and from requiring AK MEDIA to remove the subject sign.

On September 2, 1999 a hearing was held, and on December 28, 1999, the Administrative Law Judge entered his Recommended Order. On January 12, 2000, the DEPARTMENT filed its exceptions to the Recommended Order, and AK MEDIA filed a response to the DEPARTMENT'S exceptions on January 22, 2000.

DEPARTMENT'S EXCEPTIONS TO RECOMMENDED ORDER

The DEPARTMENT first makes a general exception to those portions of the Administrative Law Judge's conclusions and recommendations that are contrary to the clear language of the statute. The DEPARTMENT argues that the Administrative Law Judge failed to properly apply the language of the statute which is

clear and unambiguous, and must be given its plain and ordinary meaning. City of Miami Beach v. Galbut, 626 So. 2d 192, 193 (Fla. 1993).Section 479.07(5)(a), Florida Statutes, unequivocally provides that when a "permittee fails to erect a completed sign on the permitted site within 270 days after the date on which the permit was issued, the permit will be void . . . . " The Administrative Law Judge specifically found that AK MEDIA failed to erect a completed sign within the statutory time limit. Having made the finding, the statute demands a conclusion that the permits became void on the 271st day. "It is not the court's function to rewrite clearly written statutes for the purpose of producing a certain result by resorting to what a particular judge may perceive to be fair and the more reasonable interpretation of the statute." Fletcher v. Fletcher, 573 So. 2d 941, 945 (Fla. 1st DCA 1991)(Judge Zehmer's dissent). Moreover, while the Administrative Law Judge may sympathize with the plight AK MEDIA has created for itself, it is not within the province of an Administrative Law Judge to rewrite statutes, much less rewrite them contrary to their plain meaning. Hawkins v. Ford Motor Co., 24 Fla. L. Weekly 5480, 5482 (Fla. October 14, 1999). Although there may be disagreement with the wisdom of imposing any deadline upon applicants, the issue must be addressed by the legislature and not the courts or the Division of Administrative Hearings. Id.

The Administrative Law Judge erred in failing to apply the plain language of the statute and in failing to conclude that the permits became void after he properly found that evidence clearly established that the sign was not complete at the end of 270 days. If the sign is not completed in 270 days, the permits become void, and the sign becomes illegal and must be removed in accordance with Chapter 479, Florida Statutes.

Void permits are no longer effective or operative, and are incapable of ratification. The Administrative Law Judge did not provide any authority, statutory or otherwise, which prevented the subject permits from becoming void on May 16, 1999, the day AK MEDIA'S 270 day limit expired. No statutory authority allows the DEPARTMENT to waive or extend the statutory deadline or revive the permits which became void on May 16, 1999. The Administrative Law Judge's sympathy for AK MEDIA does not constitute a legal basis for the DEPARTMENT to exercise discretion which the legislature has not provided to the DEPARTMENT. While the record reflects that AK MEDIA expended certain sums to construct the subject sign, such facts are not relevant to the issue under review because there is no legal authority for the DEPARTMENT to waive the statutory requirements for any reason - sympathy, economic harm, or otherwise. The record establishes that the DEPARTMENT has not waived the statutory deadline since the statute came into effect. The

DEPARTMENT cannot provide relief where the authority to do so has not been granted by law. The DEPARTMENT has no authority to determine on a case by case basis what might constitute economic harm to any particular sign company and use such a determination to excuse noncompliance with the statute.

The DEPARTMENT'S first exception is accepted.

The DEPARTMENT'S second exception is to the inconsistency in the Administrative Law Judge's Conclusions of Law No. 21 and 24. In Conclusion of Law No. 21 the Administrative Law Judge determined that AK MEDIA did not establish the elements of collateral estoppel. Yet, the DEPARTMENT argues, in Conclusion of Law No. 24, the Administrative Law Judge concludes that the DEPARTMENT should have considered the harm and inequity resulting to AK MEDIA if the permits are indeed void and the sign must be removed.

The doctrines of equitable/collateral estoppel and equitable tolling require a showing of different elements. Dolphin Outdoor Adv. v Dep't of Transp, 582 So. 2d 709 (Fla. 1st DCA 1991); Machules v. Dep't of Admin., 523 So. 2d 1132 (Fla. 1988). AK MEDIA failed to establish the elements of collateral estoppel, and the Administrative Law Judge so found. However, because the elements are different for equitable tolling than for collateral estoppel, the Administrative Law Judge's Conclusions of Law No. 21 and 24 are not inconsistent.

The DEPARTMENT'S second exception is rejected.

The DEPARTMENT'S third exception is to the Administrative Law Judge's Conclusion of Law No. 23, and his suggestion that an administrative body should exercise its discretion to apply the doctrine of equitable tolling under compelling circumstances and that this case presents such compelling circumstances. These conclusions are not supported by the record or the law.

The DEPARTMENT has no legal authority to exercise discretion in applying the statute and the Administrative Law Judge misapplied the principle of equitable tolling. The concept of equitable tolling was developed to permit, under special circumstances, the initiation of a judicial or quasijudicial proceeding that otherwise would be barred. Machules v. Dep't of Agriculture, 523 So. 2d 1132, 1134 (Fla. 1988). This tolling doctrine "focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant." Id. at 1134 (quoting Cocke v. Merrill Lynch & Co., 817 F. 2d 1559, 1561 (11th Cir. 1987)). In Machules, the Court allowed the petitioner to proceed with his belatedly filed employment claim before the Division of Administration. The

Court did so "for two reasons: petitioner was misled or lulled into inaction by his Employer, and his appeal to DOA raised the identical issue raised in the original timely claim filed in the wrong forum. " Machules, 523 So. 2d at 1134. Machules opines that the doctrine "serves to ameliorate harsh results that sometimes flow from a strict, literalistic construction and application of administrative time limits contained in statutes and rules." Id.

Machules and its progeny have applied the doctrine of equitable tolling to excuse the otherwise untimely initiation of administrative proceedings. However, a failure to timely construct a complete sign in this case is not comparable to the type of "judicial or quasijudicial proceeding" contemplated by Machules. See Vantage Healthcare Corp. v. Agency for Health Care Admin., 687 So. 2d 306 (Fla. 1st DCA 1997). In Vantage, the court rejected an expansion of the doctrine to AHCA's certificate of need application process. The issue in Vantage was the one-day late receipt of a notice of intent. Id. The court distinguished the application process from quasijudicial proceedings in which equitable tolling had been applied. Id. at 308. AK MEDIA, like the aggrieved party in Vantage, chose to wait until the eleventh hour to do that which had to be done. Unlike the DEPARTMENT in this case, ACHA argued that it "should be permitted to make a case by case determination regarding when to accept late filed letters of intent." Id. The court rejected the agency's position. Id. As in Vantage, this case is not about a missed deadline to initiate a judicial or quasijudicial proceeding. The 270 day statutory deadline is absolute, no exceptions are made for failure to comply, the DEPARTMENT is without authority to ignore the law, and the doctrine of equitable tolling cannot be expanded to apply to this case.

The Administrative Law Judge erred in concluding that as a matter of law compelling circumstances exist in this case to justify application of the doctrine of equitable tolling. Machules notes that "Generally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights in the wrong forum." Machules, 523 So. 2d at 1134 (citations omitted). Those cases cited by the Machules court for that proposition are based on circumstances where parties were lulled or misled into inaction. The only examples of being extraordinarily prevented from asserting rights to which the Machules court cites are instances of war. Id. (citing Frabutt v. New York. Chicago & St. Louis R.R. Co., 84 F. Supp. 460 (W.D. Pa. 1949) and Osbourne v. United States, 164 F.2d 767 (2d Cir. 1947)).

The Administrative Law Judge uses the phrases "compelling circumstances" and "an extraordinary circumstance" to support application of the doctrine to the facts of this case. However, the showing of "compelling circumstances" in this case, to support application of the doctrine of equitable tolling is a far cry from the standard established and the cases relied upon by Machules to develop that standard. The so-called compelling circumstances or extraordinary circumstance to which the Administrative Law Judge refers is the "intervention" of Palm Beach County. However, unlike war, the circumstances leading to the county's intervention were within the control of AK MEDIA. The county's intervention began with the issuance of its stop work order, i.e., the "red tag." The Administrative Law Judge made a factual finding that the red tag issued by the county did not cause AK MEDIA to fail to construct a completed sign prior to the statutory deadline. The overwhelming evidence and the Administrative Law Judge's findings regarding AK MEDIA'S work at the site, the expiration of AK MEDIA '-S building permit before materials necessary to construct the sign were even ordered, and the illegal blockage of traffic by AK MEDIA'S contractor, belie that this is a case of compelling or extraordinary circumstances.

Machules requires the focus of an equitable tolling argument to center on a party's "excusable ignorance of the [applicable] limitations period. " Machules, 523 So. 2d at 1134. Even if the statutory deadline to erect a "completed sign" is the type of limitation period to which Machules could be applied, AK MEDIA was not ignorant of the 270 day requirement; AK MEDIA simply failed to meet the deadline, and the Administrative Law Judge so found. In applying the doctrine, the focus is on AK MEDIA, the aggrieved person "with reasonably prudent regard for his rights." Id. (citation omitted). AK MEDIA disregarded its own best interests and was not reasonably prudent in protecting its rights when it failed to promptly begin construction, failed to ensure its contractor would comply with the law, failed to ensure compliance with county requirements by properly posting its building and sign permits, and failed to obtain advertisers for the sign's facings until the eleventh hour. Application of the doctrine of equitable tolling is not supported by competent, substantial evidence in the record or the law in this case because "Palm Beach County's intervention" is neither extraordinary nor the type of extraordinary circumstance envisioned by the doctrine.

Section 479.07(5)(a), Florida Statutes, provides 270 days in which an applicant must complete the sign for which it sought a permit. The record is undisputed that AK MEDIA waited to begin construction of the sign structure, and to begin seeking advertisers for the two facings. The record also reflects that the public purpose behind the 270 day statutory deadline, Section

479.07(5)(a), Florida-Statutes, is to allow other outdoor advertising companies to have an opportunity to obtain the location if the original permittee fails to maintain a permit in accordance with the law.

AK MEDIA'S failure to post its permit and plans on the job site, and the failure of AK MEDIA or its contractor to obtain a right-of-way permit for a crane which impeded traffic during the sign's construction, were active violations of law and negligent acts of AK MEDIA or attributable to AK MEDIA, and prompted issuance of the red tag by Palm Beach County. While AK MEDIA argued that Palm Beach County was actively trying to impede AK MEDIA'S efforts and to force AK MEDIA to miss its completion deadline, no findings were made by the Administrative Law Judge in that regard. Moreover, even if true, this is an issue to be addressed with Palm Beach County.

AK MEDIA was issued a permit on August 18, 1999. AK MEDIA offered no evidence that the sign was completed within the 270 days allowed under the statute and the Administrative Law Judge properly found as much. The statute provides clear and unambiguous notice that 270 days and only 270 days are allowed to erect a completed sign. Even if the DEPARTMENT had the authority and discretion to enforce the statute on a case by case basis, the facts in this record do not establish that AK MEDIA was "in some extraordinary way . . . prevented from asserting [its] rights." Machules, 523 So. 2d at 1134.

The DEPARTMENT'S third exception is accepted.

The DEPARTMENT'S fourth exception is to the Administrative Law Judge's Conclusion of Law No. 24 and his conclusion that "Palm Beach County's intervention should be considered an extraordinary circumstance that justifies application of the doctrine of equitable tolling . . . ." The Administrative Law Judge determined that the sign was not "completed" on-the 270th day. AK MEDIA'S permits became void by operation of law on the 271st day. AK MEDIA was not excusably ignorant of the statute's limitation that a completed sign must be erected within 270 days.

The Administrative Law Judge's conclusion that "Palm Beach County's intervention should be considered an extraordinary circumstance justifying application of the doctrine of equitable tolling" is not supported by competent, substantial evidence. The result in this case is due to the actions and inactions of AK MEDIA, not Palm Beach County. In fact, AK MEDIA admitted that Palm Beach County's intervention in its construction activity was not unexpected. The record is replete with AK MEDIA'S admission of a continuing adverse relationship with Palm Beach County. If the actions of Palm Beach County were a deliberate attempt to

frustrate AK MEDIA'S construction efforts in order to cause AK MEDIA to miss the statutory deadline and lose its permits for the sign as AK MEDIA suggested at the hearing, that issue is beyond the purview of this proceeding. The record establishes that AK MEDIA failed to post its permit and plans on the job site, and failed to assure that its contractor would comply with the law and acquire a right-of-way permit for a crane which could impede traffic. Although the Administrative Law Judge characterizes Palm Beach County's intervention as coming "at the very end" of the sign's completion, AK MEDIA controlled the scheduling of construction and the actual construction of the sign. AK MEDIA'S failure to exercise reasonable caution to actively pursue the timely completion of the sign to protect its own interests is the reason the county's intervention came at the end of the time limitation. Moreover, despite AK MEDIA'S troubles with the county and its belief the county was on a mission to prevent completion of the sign, AK MEDIA never informed the DEPARTMENT of the county's intervention or its belief that the county was deliberately attempting to block its construction efforts.

The Administrative Law Judge's conclusion that AK MEDIA expended considerable sums on the sign is not relevant to this proceeding. The Administrative Law Judge is also wrong as a matter of law to recommend that the DEPARTMENT consider the harm to befall AK MEDIA if the doctrine is not applied. Economic harm is not an element of equitable tolling. No authority has been offered and none has been found to authorize application of the doctrine of equitable tolling to avoid economic harm. Marchules is not about economic harm.

AK MEDIA did not prove equitable tolling should be applied in this case. The Administrative Law Judge erred in concluding that to require AK MEDIA to remove the sign structure would be an inequitable result justifying application of the doctrine. Further, whether the provisions of Chapter 479, Florida Statutes, that require removal of illegal signs serves a valid public purpose is a matter for the legislature, not DOAH or the DEPARTMENT to decide.

The DEPARTMENT'S fourth exception is accepted.

The DEPARTMENT'S fifth exception is to the Administrative Law Judge's Findings of Fact No. 6, 7, and 8, as not being relevant to this proceeding. These findings pertain to work performed prior to the issuance of the DEPARTMENT'S permits to AK MEDIA. As found in Findings of Fact No. 1, the permits were issued to AK MEDIA on August 18, 1998. As such, findings which pre-date the permits' issuance are irrelevant to this proceeding.

The DEPARTMENT'S fifth exception is accepted.

The DEPARTMENT'S sixth exception is to the Administrative Law Judge's Finding of Fact No. 10 regarding the duration of Palm Beach County's building permit. The undisputed evidence in this record is that Palm Beach County building permits are issued for 180 days not 160 days. It is apparent that the Administrative Law Judge's reference to 160 days is a scrivener's error.

The DEPARTMENT'S sixth exception is accepted.

The DEPARTMENT'S seventh exception is to the Administrative Law Judge's Finding of Fact No. 11 and the statement that the "Petitioner placed orders for the sign construction in February 1999."

This finding is erroneous because the DEPARTMENT is the Petitioner in this case. If this finding is intended to refer to the activities of AK MEDIA it must be rejected because the record is undisputed that AK MEDIA could not establish when the sign materials were ordered and AK MEDIA'S witness admitted that he did not know when AK MEDIA ordered construction of the sign. If this finding was obtained from AK MEDIA'S Proposed Recommended Order, which cites to (T. 71) as support, there is no such testimony at transcript page 71 or otherwise. The finding that AK MEDIA placed orders for the sign construction in February 1999 is not supported by competent, substantial evidence.

The Administrative Law Judge also erred in that part of Finding of Fact No. 11 that once the "superstructure of the sign was lifted onto the steel monopole by crane and installed, thereby completing construction of the two-faced sign." Although the Administrative Law Judge cites to definitions in Sections 479.01 (6), (17), and (21), Florida Statutes, it is clear that the lifting of a "superstructure" onto a "steel monopole" does not constitute a "completed sign" for the purposes of Section 479.07(5)(a), Florida Statutes. Moreover, "completing construction" does not constitute a "completed sign" under the statute. Thus, although the placing of the "superstructure" onto the "steel monopole" may have completed the construction activities, such a finding is irrelevant to the issue of whether the completed sign was erected in the requisite 270 days and the Administrative Law Judge concluded that it was not completed in 270 days.

The DEPARTMENT'S seventh exception is accepted.

The DEPARTMENT'S eighth exception is to the Administrative Law Judge's Finding of Fact No. 14 regarding AK MEDIA'S efforts to enter into contracts with advertisers believing the red tag issue with Palm Beach County had been resolved.

The record does not reflect that AK MEDIA entered into contracts with advertisers "believing that the red tag issue with Palm Beach County had been resolved." The record simply reflects that AK MEDIA did not seek advertisers until after the middle of April, 1999. As such, the first sentence of Finding of Fact 14 is not supported by competent, substantial evidence.

The DEPARTMENT'S eighth exception is accepted.

FINDINGS OF FACT

1. After review of the record in its entirety, it is determined that the Administrative Law Judge's Findings of Fact in paragraphs 1 through 5, 9, 10, 12, 13, 15, and 16, and the second sentence of Finding of Fact No. 14 of the Recommended Order are supported by the record and are accepted and incorporated as if fully set forth herein.

Z. Findings of Fact in paragraphs 6 through 8, and 11, and the first sentence of Finding of Fact No. 14 of the Recommended Order are rejected as irrelevant or not supported by competent substantial evidence.

3. The Finding of Fact in paragraph 10 of the Recommended Order is accepted as modified hereinabove, and incorporated as if fully set forth herein.

CONCLUSIONS OF LAW

1. The DEPARTMENT has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Chapters 120 and 479, Florida Statutes.

2. The Conclusions of Law in paragraphs 17 through 22 of the Recommended Order are fully supported in law. As such, they are adopted and incorporated as if fully set forth herein.

3. The Conclusions of Law in paragraphs 23 and 24 of the Recommended Order are rejected as not supported in law.

ORDER

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

ORDERED that those portions the Administrative Law Judge's Recommended Order, as modified, are adopted. The remaining portions of the Recommended Order, including the recommendation that the Petitioner, DEPARTMENT OF TRANSPORTATION, apply the

doctrine of equitable tolling and declare permits BU 839 and BU 840 valid, are rejected. It is further

ORDERED, the permits issued to Respondent, AK MEDIA GROUP, INC., for the subject sign are declared void by operation of law and the subject sign is illegal and must be removed. It is further

ORDERED that Respondent, AK MEDIA GROUP, INC., shall remove the subject sign within thirty (30) days of the date of this Final Order. It is further

ORDERED, that should Respondent, AK MEDIA GROUP, INC., fail to remove the subject and any debris associated with said removal within the thirty (30) days herein provided, the Petitioner, DEPARTMENT OF TRANSPORTATION, or its contractor shall remove the subject sign and all costs associated with such removal are hereby assessed against Respondent, AK MEDIA GROUP, INC. It is further

ORDERED that the petition for administrative hearing filed by Respondent, AK MEDIA GROUP, INC., is dismissed.

DONE AND ORDERED this 22nd day of March, 2000.

THOMAS F. BARRY, JR.
Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY ANY PARTY PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULE OF APPELLATE PROCEDURE, BOTH WITH TEE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS, HAYDON BURNS BUILDING, 605 SUWANNEE STREET, M.S. 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER.

Copies furnished to:

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