12-14-01

STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida

AT

JHC DMK-CLOS

FRANK C. KUNNEN, JR.,
d/b/a U.S. 19 COMMERCE CENTER,

Petitioner,

vs.

DOAH CASE NO.: 01-0009
DOT CASE NO.: 00-211

DEPARTMENT OF TRANSPORTATION,

Respondent.

_____/

FILED
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DIVISION OF ADMINISTRATIVE HEARINGS

FINAL ORDER

This proceeding was initiated by the filing of a Petition for Formal Administrative Hearing on December 21, 2000, by **Petitioner, FRANK C. KUNNEN, JR., d/b/a U.S. 19 COMMERCE CENTER** (hereinafter **KUNNEN**), pursuant to Section 120.57(1), Florida Statutes, in response to a Notice of Intent to Change Driveway Connections sent on December 11, 2000, by the **Petitioner, DEPARTMENT OF TRANSPORTATION** (hereinafter **DEPARTMENT**). On January 2, 2001, the matter was referred to the Division of Administrative Hearings (hereinafter DOAH) for assignment of an Administrative Law Judge and a formal hearing.

Formal administrative hearings were held in this case in Clearwater, Florida, on March 21, 2001, before Arnold H. Pollock, a duly appointed Administrative Law Judge, and on

September 20-21, 2001, before Daniel M. Kilbride, a duly appointed Administrative Law Judge. Appearances on behalf of the parties were as follows:

For Petitioner: James A. Helinger, Jr., Esquire
James A. Helinger, Jr., P.A.
814 Chestnut Street
Clearwater, Florida 33756

For Respondent: Robert C. Downie, II, Esquire
Assistant General Counsel
Department of Transportation
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399-0458

At the hearing the **DEPARTMENT** presented the testimony of Frank Ghadimi, P.E., an expert in the areas of highway design and engineering and safety operation; Vibert Griffith, P.E., an expert in the areas of highway design and engineering; and Julian Parsons, an engineer; and offered Petitioner's Exhibits 1 through 8, which were admitted into evidence. **KUNNEN** presented the testimony of Joseph Hitterman; David May, P.E.; and Reginald Mesimer, P.E.; and offered Respondent's Exhibits 1 through 8, which were admitted into evidence. Official recognition was taken of all relevant statutes and rules. The transcript from the March 20, 2001, hearing was filed September 12, 2001, and the transcript from the September 20-21, 2001, hearing was filed October 31, 2001. On November 19, 2001, the **DEPARTMENT** and **KUNNEN** filed their respective Proposed Recommended Orders. On December 14, 2001, Judge Kilbride issued his Recommended Order. On December 26, 2001, **KUNNEN** filed his exceptions to the Recommended Order, and the **DEPARTMENT** filed its responses to **KUNNEN'S** exceptions on December 28, 2001.

STATEMENT OF THE ISSUES

As stated by the Administrative Law Judge in his Recommended Order, the issues presented were:

> Whether Respondent, Department of Transportation ("Respondent"), has demonstrated that Petitioner, Frank C. Kunnen, Jr., d/b/a/ U.S. 19 Commerce Center's ("Petitioner"), right-out driveway to U.S. Highway 19 will present a safety and operational problem following Respondent's reconstruction of U.S. Highway 19.
>
> Whether Petitioner's access to the state highway system will be reasonable if Petitioner's existing right-out driveway is closed.
>
> Whether Respondent is legally entitled to administratively close Petitioner's driveway, pursuant to Rule 14-96.011, Florida Administrative Code, and applicable Florida Statutes.

BACKGROUND

On December 11, 2000, the **DEPARTMENT** sent **KUNNEN** a Notice of Intent to Change Driveway Connections. On December 21, 2000, **KUNNEN** filed a Petition for Formal Administrative Hearing. The matter was referred to the Division of Administrative Hearings (DOAH) on January 2, 2001, and was assigned to Arnold H. Pollock, Administrative Law Judge. The case was set for hearing and discovery ensued.

The formal administrative hearing was commenced on March 20, 2001, before Judge Pollock. During the hearing, an issue arose concerning whether the **DEPARTMENT** was proceeding under Rule 14-96.011, Florida Administrative Code, as specified in its Notice, or was actually attempting to proceed under Rule 14-96.012, Florida Administrative Code, which regulates the closure and modification of unpermitted connections. Judge Pollock granted the **DEPARTMENT** a continuance to research the issue.

The hearing was reconvened on September 20-21, 2001, before Daniel M. Kilbride, Administrative Law Judge, at which time the **DEPARTMENT** stipulated that it was proceeding under Rule 14-96.011, Florida Administrative Code, thus acknowledging for the purposes of this proceeding, that **KUNNEN'S** driveway constituted a "permitted connection." On September 13, 2001, the parties filed a written Joint Stipulation which provided:

> The Department stipulated that the Petitioner's existing right-in/right-out driveway to the existing configuration to U.S. 19 does not constitute a safety or operational problem.

KUNNEN'S EXCEPTIONS TO RECOMMENDED ORDER

KUNNEN'S first exception concerns the Administrative Law Judge not having indicated in his Preliminary Statement that **KUNNEN'S** witnesses, Joseph Hitterman, David May, and Reginald Mesimer, are professional engineers.

While the **DEPARTMENT'S** response correctly observes that the exception is irrelevant, the record does reflect that David May and Reginald Mesimer were identified as professional engineers. As such, the Preliminary Statement is amended accordingly. Although there is one record instance where Joseph Hitterman was referred to as an engineer, he was not identified, on the record, as a professional engineer.

KUNNEN'S first exception is granted in part and rejected in part.

KUNNEN'S second exception goes to Finding of Fact No. 3 and takes issue with the Administrative Law Judge's characterization of the **DEPARTMENT'S** Exhibit 5 as a study rather than a report. **KUNNEN** asserts that the exhibit did not satisfy the mandatory criteria set out in Rule 14-96.011(1)(d), Florida Administrative Code, and therefore could not constitute a study as required by the rule.

As the **DEPARTMENT** noted in its response to this exception, the characterization and weight to be assigned to the exhibit, which was admitted into evidence, is within the province of the fact finder. Brown v. Criminal Justice Standards & Training Comm'n, 667 So. 2d 977, 979 (Fla. 4th DCA 1996); Heifetz v. Dep't of Business Reg., 475 So. 2d 1277 (Fla. 1st DCA 1985). Moreover, the Administrative Law Judge properly concluded that **KUNNEN'S** objections to the exhibit at the hearing, like his complaints here, went to the weight to be given the exhibit and not its admissibility.

KUNNEN'S second exception is rejected.

KUNNEN'S third exception is directed to that portion of Finding of Fact No. 4 regarding **KUNNEN'S** failure to depose the author of the **DEPARTMENT'S** Exhibit 5. **KUNNEN** contends that his election not to depose the author is irrelevant, did not have the effect of validating the report, and did not operate as a waiver of the right to object to the exhibit at the hearing.

The **DEPARTMENT'S** response to **KUNNEN'S** third exception accurately indicates that **KUNNEN** has missed the point of Finding of Fact No. 4. The Administrative Law Judge neither sought to validate the study nor bar any objections thereto. Instead, he concluded that the timing of the study, on the instant record, did not prejudice **KUNNEN**. Inasmuch as any claim of error attributed to the timing of the study would be obviated by a lack of prejudice, the finding is indeed relevant and supported by competent, substantial evidence.

KUNNEN'S third exception is rejected.

KUNNEN'S fourth exception characterizes Findings of Fact No. 5 and 6 as "unfortunate" in their conclusions that any error attributed to the **DEPARTMENT'S** notice

regarding the change to **KUNNEN'S** driveway connection not having informed **KUNNEN** of the availability of mediation or to the purported lack of an on-site meeting did not prejudice **KUNNEN** and were, therefore, harmless.

The **DEPARTMENT'S** response succinctly observes that **KUNNEN'S** exception lacks either a factual or legal basis. **KUNNEN'S** belief that the challenged findings are "unfortunate" falls far short of the requisite showing that the findings are not supported by competent, substantial evidence or that the proceedings upon which the findings were based did not comply with the essential requirements of law. See § 120.57(1)(l), Fla. Stat. (2000).

KUNNEN'S fourth exception is rejected.

In his fifth exception, **KUNNEN'S** complaint is directed to that portion of Finding of Fact No. 10 stating that the **DEPARTMENT** has all of the right of way necessary to construct Access Road A to **KUNNEN'S** property line. In this exception **KUNNEN** also makes reference to a drainage issue he explored at the hearing.

As set out in the **DEPARTMENT'S** response and confirmed by the record, Mr. Hitterman's undisputed testimony established that the **DEPARTMENT** does in fact have all the right of way necessary to construct Access Road A to **KUNNEN'S** property line. With respect to the drainage issue **KUNNEN** would inject into Finding of Fact No. 10, the Administrative Law Judge made no finding. The **DEPARTMENT** cannot make additional findings of fact on an issue about which the Administrative Law Judge made no findings. Florida Power & Light Co. v. State, 693 So. 2d 1025, 1026-1027 (Fla. 1st DCA 1997).

KUNNEN'S fifth exception is rejected.

KUNNEN'S sixth exception goes to Finding of Fact No. 11 and essentially challenges

the finding that the traffic light at the intersection of Access Road A and Drew Street will be permanent. Rather than demonstrate an absence of competent, substantial evidence to support Finding of Fact No. 11, **KUNNEN** has, at best, shown that there is conflicting evidence. The Administrative Law Judge's resolution of evidentiary conflicts cannot properly be revisited by the **DEPARTMENT**. Brown, 667 So. 2d at 979; Heifetz, 475 So. 2d at 1281-1282.

KUNNEN'S sixth exception is rejected.

KUNNEN'S seventh exception is directed to Findings of Fact No. 19, 20, and 21, which deal with the failure of **KUNNEN'S** proposed post-construction access design (Petitioner's Exhibit 3) to meet AASHTO standards.

Like the previous exception, **KUNNEN** has simply pointed to conflicting testimony and has failed to contend, much less demonstrate, that the challenged findings are not supported by competent, substantial evidence. The **DEPARTMENT** cannot revisit the Administrative Law Judge's resolution of evidentiary conflicts nor can the **DEPARTMENT** set aside findings of fact in the absence of a showing that the findings lack the requisite record support. Brown, 667 So. 2d at 979; Heifetz, 475 So. 2d at 1281-1282.

KUNNEN'S seventh exception is rejected.

In his eighth exception **KUNNEN** challenges Finding of Fact No. 22, which speaks to the application of AASHTO on-ramp acceleration distance requirements to **KUNNEN'S** proposed access configuration.

Yet again, **KUNNEN** has failed to either contend or show that the finding is not supported by competent, substantial evidence. In addition, **KUNNEN'S** cryptic reference to "an improper standard and unfair burden," even when coupled with his citation to one aspect

of Reginald Mesimer's testimony on this issue, falls far short of satisfying the statutory criteria that would enable the **DEPARTMENT** to reject or modify Finding of Fact No. 22. See § 120.57(1)(l), Fla. Stat. (2000). Furthermore, there is competent, substantial evidence in the record to support this finding.

KUNNEN'S eighth exception is rejected.

KUNNEN'S ninth exception goes to Finding of Fact No. 23. **KUNNEN** suggests that the Administrative Law Judge is incorrect in his statement that the 965-foot AASHTO acceleration distance is for automobiles; that a proposed signal would create breaks in traffic for the right-out traffic movement; and that the **DEPARTMENT** could ban truck traffic from using the proposed right-out movement onto the service road.

The **DEPARTMENT** correctly observes in its response that Mr. Mesimer conceded that a truck would require greater acceleration time than a car. Moreover, Mr. Mesimer's subsequent testimony, cited by **KUNNEN**, did not unequivocally state that the AASHTO tables in question were not limited to automobiles. Instead, he testified that:

> Well, the tables take into consideration that the traffic on the roadway is not a hundred percent passing with cars, that there is different traffic and so forth. There is some allowance in the tables to compensate the fact that the trucks are in the traffic scheme.

(September 20, 2001, transcript of proceedings, p. 314)

The fact that there is **some** allowance for truck traffic in the tables, does not preclude a finding by the Administrative Law Judge that the 965-foot acceleration distance was for automobiles. Mr. Mesimer's testimony clearly permits a reasonable inference that the acceleration distance for cars was established with the knowledge that truck traffic might

impede an automobile's ability to accelerate to design speed. Finally, the testimony cited by **KUNNEN** concerning potential traffic breaks on the service road created by the proposed signal and the ability to ban truck traffic from using a right-out onto the service road fails to show that any aspect of Finding of Fact No. 23 is not supported by competent, substantial evidence.[1]

KUNNEN'S ninth exception is rejected.

KUNNEN'S tenth exception concerns Findings of Fact No. 24 and 25 which essentially conclude that the access alternative proposed by **KUNNEN** cannot satisfy AASHTO standards in terms of on-ramp and off-ramp design requirements.

As in prior exceptions, **KUNNEN** has failed to either contend or demonstrate that the challenged findings are not supported by competent, substantial evidence. While **KUNNEN** does contend that the finding that AASHTO standards preclude placing the on-ramp in the location he proposed is contrary to the evidence, **KUNNEN** fails to identify this "evidence." Similarly unpersuasive is **KUNNEN'S** reliance upon calculation errors in Mr. Griffith's testimony. The record clearly reflects that when these alleged "errors" are taken into consideration, **KUNNEN'S** proposal still cannot satisfy the AASHTO standards. The Administrative Law Judge's findings in this regard are supported by competent, substantial evidence.

KUNNEN'S tenth exception is rejected.

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[1] To the extent **KUNNEN** is taking the position that Finding of Fact No. 23 should be supplemented with this information, the **DEPARTMENT** cannot do so. Florida Power & Light Co. v. State, 693 So. 2d at 1026-1027.

KUNNEN'S eleventh exception goes to Finding of Fact No. 26, which ultimately concludes that the **DEPARTMENT'S** access proposal is reasonable and provides safer and more efficient access to the state highway system and direct access to east-west travel on Drew Street. **KUNNEN** argues that aspects of this finding are irrelevant or illogical.

By his exception, **KUNNEN** is in effect merely taking issue with the Administrative Law Judge's weight and credibility determinations--determinations which the **DEPARTMENT** cannot revisit. Brown, 667 So. 2d at 979; Heifetz, 475 So. 2d at 1281-1282. Moreover, **KUNNEN'S** references to evidence concerning potential severance damages to the property and the compensability of those damages does not cure **KUNNEN'S** failure to demonstrate that the finding is not supported by competent, substantial evidence. Indeed, the record establishes the contrary.

KUNNEN'S eleventh exception is rejected.

In his twelfth exception, **KUNNEN** ostensibly assaults Findings of Fact No. 27 through 32, which provide a detailed comparison between **KUNNEN'S** proposed post-construction access alternatives and that of the **DEPARTMENT**, and ultimately determine that the **DEPARTMENT'S** proposal is comparable or superior to **KUNNEN'S** proposal as well as to access afforded all other property owners in the vicinity.

Close scrutiny of his claim reveals that **KUNNEN** is merely re-arguing the evidence and, in essence, inviting the **DEPARTMENT** to substitute **KUNNEN'S** view of the evidence for that of the Administrative Law Judge. The **DEPARTMENT** cannot do so. Brown, 667 So. 2d at 979; Heifetz, 475 So. 2d at 1281-1282.

KUNNEN'S twelfth exception is rejected.

KUNNEN'S thirteenth exception is directed to Findings of Fact No. 33 through 35, which speak to the procedural and substantive aspects of the study the **DEPARTMENT** conducted pursuant to the requirements of Rule 14-96.011(1)(d), Florida Administrative Code. **KUNNEN** again takes issue with the Administrative Law Judge's characterization of **DEPARTMENT** Exhibit 5 as an engineering study for purposes of the rule.

As the **DEPARTMENT** stated in rejecting this argument the first time it was presented, the characterization and weight to be assigned to the exhibit, which was admitted into evidence, is within the province of the fact finder. Brown, 667 So. 2d at 979; Heifetz, 475 So. at 2d 1281-1282. **KUNNEN'S** complaints go to the weight to be given the exhibit and not its admissibility. Moreover, **KUNNEN** has failed to show that any of the Administrative Law Judge's findings in Findings of Fact No. 33, 34, and 35, which show that **DEPARTMENT** Exhibit 5 complies with the analysis required by the rule, are not supported by competent, substantial evidence.

KUNNEN'S thirteenth exception is rejected.

KUNNEN purports to direct his fourteenth exception to Conclusions of Law No. 38 through 40, which simply quote from controlling portions of applicable statutes. **KUNNEN** has neither suggested nor shown that these quotations are inaccurate.

KUNNEN'S fourteenth exception is rejected.

KUNNEN'S fifteenth exception addresses Conclusion of Law No. 45, which determined that the timing of the creation of the study (**DEPARTMENT** Exhibit 5) did not prejudice **KUNNEN** and that the study met the requirements of Rule 14-96.011, Florida Administrative Code. The primary thrust of **KUNNEN'S** argument is that the study "was a

belated attempt to justify Respondent's scheme to unlawfully take the Petitioner's constitutionally guaranteed property right of direct access without following its own mandatory pre-requisites."

The Administrative Law Judge's conclusion that the timing of the study did not prejudice **KUNNEN** is consistent with and indeed mandated by his findings that:

> Petitioner did not present any evidence of prejudice resulting from the timing of the creation of the study. Any prejudice which may be presumed was cured by Respondent's requesting a continuance specifically to search its records for evidence of a permit; Respondent's requesting another continuance to create that study; Petitioner's agreeing to both continuances; and Respondent's producing the study approximately one month prior to hearing. This gave Petitioner time to conduct discovery regarding the study, not to mention sufficient time to prepare for the hearing itself.
>
> * * *
>
> Normally an engineering study is prepared prior to Respondent serving its Notice of Intent to close or alter a permitted driveway connection. The engineering study documents that there is a safety or operational problem with a particular driveway connection, and ensures that Respondent has an engineering basis to seek closure or alteration of the driveway. However, at the time this case came to hearing on March 20, 2001, Respondent was not aware that Petitioner's driveway may have been permitted. That is the reason the study was conducted during a continuance of this case and delivered to Petitioner on or around August 17, 2001. Petitioner agreed to the continuance for Respondent to conduct the study, and Petitioner had adequate time to conduct any further discovery in this case after receipt of the study. Thus, any procedural error in the timing of the study was waived by Petitioner and/or cured by Respondent.

(Recommended Order, Findings of Fact No. 4 and 33) **KUNNEN'S** exceptions fail to effectively challenge any of these findings.

While an agency still retains the authority to reject or modify interpretations of administrative rules over which it has substantive jurisdiction, the agency must state with particularity its reasons for doing so and must make a finding that the substituted rule interpretation is as, or more reasonable than, that which was rejected or modified. § 120.57(1)(l), Fla. Stat. (2000). As was the case with the prejudice issue, the Administrative Law Judge made detailed findings of fact regarding the matters the study addressed. These findings also were not effectively challenged by **KUNNEN**. Specifically, the Administrative Law Judge found:

> The Study [sic] does provide safety and operational bases for Respondent's agency action in this case. The study summarizes the history of the U.S. Highway 19 improvement project, discusses the current conditions, explains the proposed improvements, and reviews the safety and operational issues specific to Petitioner's right-out driveway in the post construction condition. The study also explains why two alternative right-out driveway configurations were not acceptable to Respondent. The study contains exhibits showing traffic patterns in the existing and possible future post construction conditions. The study was signed and sealed by a professional engineer registered in the State of Florida. The study did not address the Petitioner's alternative advocated at hearing. The reason the study did not address this concept was that at the time of its creation, Respondent did not have Petitioner's Exhibit 3.
>
> * * *
>
> One other item not addressed was traffic accident data. Since the improvements of U.S. Highway 19 have not been constructed, there is no accident data for the right-out driveway in the post construction condition. Respondent stipulated that Petitioner's existing right-out driveway is safe, so any accident data relating to current conditions is not relevant.

(Recommended Order, Findings of Fact No. 34 and 35) In light of the foregoing findings, the

Administrative Law Judge's determination that **DEPARTMENT** Exhibit 5 satisfied the requirements of Rule 14-96.011, Florida Administrative Code, is reasonable, is consistent with the **DEPARTMENT'S** interpretation of its rule, and will not, therefore, be set aside.

KUNNEN'S fifteenth exception is rejected.

KUNNEN'S sixteenth exception goes to Conclusions of Law No. 46 and 47, which provided that any errors attributable to the **DEPARTMENT'S** Notice of Intent not having mentioned whether mediation was available and to the lack of and offer of an on-site meeting were harmless.

Rather than come forward with a proper legal basis for rejecting or modifying these conclusions, **KUNNEN** has done nothing more than observe, on the one hand, that their conclusions were "unfortunate," and "troubling" on the other. Conclusions of law cannot be rejected on such bases.

KUNNEN'S sixteenth exception is rejected.

In his seventeenth exception **KUNNEN** takes issue with Conclusion of Law No. 48 claiming that the **DEPARTMENT'S** choice of an access alternative was not acceptable under Pasco County v. Franzel, 569 So. 2d 877 (Fla. 2d DCA 1990), by virtue of testimony indicating that a right turnout for **KUNNEN** had never been under consideration.

KUNNEN apparently overlooked the witness' subsequent testimony clarifying his deposition response, to wit:

> Q Well, I am asking you about any construction plan that would afford Mr. Kunnen a right turnout onto a northbound parallel service road as part of this proposed project.
>
> A A right turn as you have described has not been a

part of this particular project and designed accordingly.

Q As a matter of fact, I took your deposition on March 13th of 2001. At page 15 in response to that question you answered on page 15, line 14, your answer was, "A right turnout for Mr. Kunnen has never, never ever been under consideration."

"Question: Never been under consideration."

Your answer, again, line 17, "Not by the Department. In Mr. Kunnen's mind, yes. But not by the Department. And that goes back to the P.D. and E. days. Never was."

Is that your testimony?

A It had been investigated during the P.D. and E. There were many discussions held with Mr. Kunnen. He met with the Department's staff. They explained to him as to why it was not a viable option.

So, when I stated that it has never been a part of this project, it means it has never been designed to be included in the construction of this project.

(March 20, 2001, transcript of proceedings, pp. 135-136) **KUNNEN'S** alternatives clearly had been considered and rejected. Pasco County v. Franzel, 569 So. 2d 877, requires no more.

KUNNEN'S seventeenth exception is rejected.

KUNNEN'S eighteenth exception challenges that portion of Conclusion of Law No. 49, which states that "[t]he evidence demonstrated that with or without a traffic signal at the intersection of Access Road A and Drew Street, Access Road A will function as designed." **KUNNEN** contends that the conclusion is unfounded in light of Reginald Mesimer's testimony that without a signal at the intersection, Access Road A will be level of service F -- the road would fail.

KUNNEN ignores the fact that Reginald Mesimer also gave the following testimony on cross-examination:

> Q Thank you.
>
> Let's start down here and talk about the intersection of access road A and Drew Street. Your testimony is that with or without a signal there, the right turns are okay. That is not going to fail; isn't that correct?
>
> A That is correct.
>
> Q So if we are talking about using access road A, access to state highway system is always going to be a right turn, no matter if you are going north or south, correct?
>
> A If you are trying to use access road A to get back to U.S. 19, you can always make a right from access road A on to Drew Street, yes.
>
> Q So for purposes of going to the state highway system on access road A, it's never going to fail?
>
> A Based on the capacity analysis, yes.

(September 20, 2001, transcript of proceedings, p. 282)

KUNNEN'S eighteenth exception is rejected

KUNNEN'S nineteenth and final exception is directed to Conclusion of Law No. 50 which provides that the **DEPARTMENT** met its various burdens regarding its entitlement to close **KUNNEN'S** right-out driveway connection to U.S. 19.

Rather than assert an appropriate legal basis for the **DEPARTMENT** to reject or modify this conclusion, **KUNNEN** simply claims, without any appreciable degree of particularity, that the record clearly shows that the **DEPARTMENT** "failed miserably" to carry its respective burdens. The Administrative Law Judge's findings of fact which must, on

the instant record, be accepted in their entirety demonstrate the contrary.

KUNNEN'S nineteenth exception is rejected.

FINDINGS OF FACT

After review of the record in its entirety, it is determined that the Administrative Law Judge's Findings of Fact in paragraphs 1 through 35 are based upon competent, substantial evidence. Accordingly, they are adopted 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 Chapter 120, Florida Statutes (2000), and the State Highway System Access Management Act, Sections 335.18-335.188, Florida Statutes (2000).

2. The Conclusions of Law in paragraphs 36 through 50 of the Recommended Order are fully supported in law. As such, they are adopted and incorporated as if fully set forth herein.

ORDER

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

ORDERED that the Preliminary Statement of the Administrative Law Judge's Recommended Order is amended as set forth above, and, as amended, the Recommended Order is adopted in its entirety. It is further

ORDERED that the proposed closure of **Petitioner's, FRANK C. KUNNEN, JR., d/b/a U.S. 19 COMMERCE CENTER**, right-out driveway in conjunction with the construction of improvements of U.S. Highway 19 and the construction of Access Road A, is hereby approved.

DONE AND ORDERED this 13th day of February, 2002.

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

FILED D.O.T. CLERK
2002 FEB 13 AM 7:39

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED 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 RULES OF APPELLATE PROCEDURE, BOTH WITH THE 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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