STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FRANK C. KUNNEN, JR., d/b/a U.S. 19 COMMERCE CENTER,	)	
Petitioner,	)	
vs.	)	Case No. 01-0009
DEPARTMENT OF TRANSPORTATION,	)	
Respondent.	)	

RECOMMENDED ORDER

A formal administrative hearing was held in this case in Clearwater, Florida, before Arnold H. Pollock, Administrative Law Judge, on March 20, 2001, and Daniel M. Kilbride, Administrative Law Judge, on September 20 through 21, 2001.

APPEARANCES

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

For Respondent: Robert C. Downie, II, Esquire
Department of Transportation
605 Suwannee Street
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STATEMENT OF THE ISSUES

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.

PRELIMINARY STATEMENT

On December 11, 2000, Respondent sent Petitioner a notice of intent to change driveway connections. On December 21, 2000, Petitioner filed a petition for formal administrative hearing. On January 2, 2001, the Petition was referred to the Division of Administrative Hearings ("DOAH") and the case 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 Administrative Law Judge Arnold H. Pollock. During the hearing, an issue arose concerning whether Respondent 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 Respondent a continuance to research the issue of whether Petitioner's subject driveway connection was a "permitted connection" under Rule 14-96.011, Florida Administrative Code, or an "unpermitted connection" under Rule 14-96.012, Florida Administrative Code.

The hearing was reconvened on September 19 and 20, 2001, before Administrative Law Judge Daniel M. Kilbride at which time Respondent stipulated that it was proceeding under Rule 14-96.011, Florida Administrative Code, thus acknowledging for the purposes of this proceeding, that Petitioner's driveway constituted a "permitted connection." The parties also filed a written Joint Stipulation dated September 13, 2001, 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.

At the formal administrative hearing, Respondent 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. Petitioner presented the testimony of Joseph Hitterman, David May, and

Reginald Mesimer. Respondent offered 8 exhibits into evidence. Petitioner offered 8 exhibits into evidence.

At the end of the final hearing, the parties ordered a transcript of the final hearing, and the parties were given 20 days from the filing of the transcript to file proposed recommended orders. The Transcript from the March 20 hearing date was filed on September 12, 2001, and the Transcript from the September 20 through 21 hearing dates was filed on October 31, 2001. Each party filed its Proposed Recommended Order on November 20, 2001. Respondent filed a corrected proposed order on November 26, 2001. Each party's proposals have been give careful consideration in the preparation of the Recommended Order.

FINDINGS OF FACT

1. Petitioner is the owner of real property located within the city limits of Clearwater, in Pinellas County, Florida, which property abuts U.S. Highway 19 (State Road 55). It has a right-in and right-out driveway connection to U.S. Highway 19. Petitioner's current right-in, right-out driveway does not create a safety or operational problem with the existing configuration of U.S. Highway 19.

2. Respondent is an agency of the State of Florida created pursuant to Chapter 20, Florida Statutes. Respondent regulates access to the state highway system.

3. Respondent initially cited Rule 14-96.011, Florida Administrative Code, in the Notice as authority for the intended agency action. This Rule pertains to closure or modification of permitted driveways. At hearing on March 20, it was discovered that Respondent had intended to cite Rule 14-96.012, Florida Administrative Code, which pertains to closure or modification of unpermitted driveways that had been in existence since before July 1, 1988, the effective date of the State Highway System Access Management Act. The Rule refers to these driveways as "grandfathered." As of March 20, Respondent was not aware that Petitioner's driveway might have been permitted. In order to provide Petitioner all due process to which he was entitled, Respondent requested that the hearing be continued. After reviewing its files, Respondent indicated to Petitioner on June 28, 2001, that Respondent would be requesting an additional continuance to conduct an engineering study pursuant to Rule 14-96.011, Florida Administrative Code.[1] Petitioner agreed to both continuances. The study was dated August 20, 2001, and was delivered to Petitioner's counsel just after that date. This study was presented as Respondent's Exhibit 5 at the resumption of the hearing on September 20, 2001. The Study sets out the essential safety and operational bases for Respondent's agency action in this case and was signed and sealed by a professional engineer registered in the State of Florida.

4. Prior to the reconvened hearing, Petitioner did not seek to depose the author of the engineering study nor did he request documents utilized in creating the study. Petitioner decided to wait until the hearing and make a series of objections to the study's admissibility. Prior to and after the study was admitted into evidence, Petitioner's counsel conducted extensive cross-examination of the engineer who signed and sealed the study, Vibert Griffith, P.E., and his assistant in the creation of the study, Julian Parsons. 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.

5. The Notice did not state whether mediation was available in this case. However, the lack of mention of mediation in the Notice was of no prejudice to Petitioner in light of the fact that that Petitioner proposed several alternative driveway designs to Respondent, and that these

alternatives had been closely studied and considered. Petitioner did not present any evidence that he had asked whether mediation was available or was denied an opportunity to mediate this case. Accordingly, any error in the lack of information regarding mediation in the Notice was harmless, and any prejudice was cured.

6. Petitioner elicited testimony with respect to a third procedural point in this case. Rule 14-96.011(1)(e), Florida Administrative Code, states that if Respondent seeks to close a driveway, Respondent will offer to meet with the property owner or his representative on-site. As Petitioner's counsel stated during his opening remarks, however, there is a long history of litigation between Petitioner and Respondent, including two pervious mediations. Again, the unrebutted testimony at hearing was that over the last several years Respondent evaluated three alternative designs submitted by Petitioner for access to U.S. Highway 19. Petitioner did not present any evidence of prejudice in not being able to meet on-site with Respondent in this case. Any error in relation to this issue was harmless.

7. U.S. Highway 19 runs north-south through Pinellas County, Florida and is a part of the Florida Intrastate Highway System. In the vicinity of Petitioner's property, U.S. Highway 19 has three lanes of traffic each for northbound and southbound traffic (total of six lanes). As part of the reconstruction of

U.S. Highway 19, Respondent has plans to create "grade separated intersections" or "urban interchanges" at the cross street to the south and north of Petitioner's property. The cross street to the south is Drew Street, and the cross street to the north is Coachman Road. Also, just to the north of Petitioner's property, U.S. Highway 19 is elevated over railroad tracks, and will continue to be so elevated after reconstruction.

8. In its reconstructed state, vehicles will reach mainline U.S. Highway 19 by a series of frontage roads and on and off ramps. Vehicles that stay on mainline U.S. Highway 19 will not have to stop for signals at intersections with cross streets because the mainline will travel over the cross streets. The effect of U.S. Highway reconstruction will be to create a more efficient transportation facility by improving safety and capacity. The overall improvements to U.S. Highway 19 are necessary.

9. Although Respondent is closing Petitioner's right-out driveway to mainline U.S. Highway 19, Respondent is not acquiring any property from Petitioner. Accordingly, Respondent provided Petitioner with notice of the intended agency action and right to an administrative hearing (the "Notice").

Respondent's Proposal

10. Respondent proposes, as part of its planned improvements to U.S. Highway 19, to provide Petitioner a right-

in only entrance from a frontage road running adjacent to and parallel to U.S. Highway 19. Respondent also proposes to build a new two-way road, referred to as Access Road A, which runs north-south, parallel to U.S. Highway 19, intersects Drew Street, and from that point provides vehicles the option of traveling either north or south on mainline U.S. Highway 19, or east or west on Drew Street. Petitioner's northerly neighbor, a maintenance yard owned by Pinellas County, would also send all of its traffic, including large trucks and emergency vehicles, out Access Road A to Drew Street. Other properties, including several car dealerships, to the south of Petitioner's property would also have access to Access Road A. No other property owner, including Pinellas County, objected to Respondent's proposed access system. It is undisputed that Respondent has all of the right-of-way necessary to construct Access Road A to Petitioner's property line.

11. During construction, the City of Clearwater will install a temporary traffic signal at the intersection of Access Road A and Drew Street. Based on a traffic study conducted by the Pinellas County MPO and endorsed by the City of Clearwater and Pinellas County, the traffic light will become permanent when construction is completed. Even if the temporary light is removed after construction, Access Road A will function properly for right turns onto Drew Street which will provide access to

the northbound and southbound mainline lanes of U.S. Highway 19. This is true, even assuming that all of Petitioner's neighbors send all of their traffic out Access Road A. In addition, Petitioner's neighbors to the south have several alternate means of access to travel west on Drew Street and either north or south on U.S. Highway 19.

12. Respondent is closing Petitioner's right-out driveway to U.S. Highway 19 because, post-construction, the driveway would be located on an on-ramp. The frontage road and on-ramp, as currently designed by Respondent, would prevent placement of a right-out driveway in such a location.

13. It is Petitioner's position that Respondent could have designed the frontage road and on-ramp in front of Petitioner's property in such a way as to allow the safe operation of a right-out driveway in the approximate location of Petitioner's current right-out driveway.

Petitioner's Proposal

14. In support of his contention that Respondent could have designed a right-out driveway, Petitioner offered an aerial map and overlay (Petitioner's Exhibit 3), which purported to show that Respondent could have designed an on-ramp from Drew Street and an off-ramp to Coachman Road to the north in such a way as to allow Petitioner a right-out driveway. Petitioner's Exhibit 3 was a concept based upon what was referred to as the

"Lochner Study" at hearing. The "Lochner Study" was a study performed by the engineering firm H. W. Lochner, and showed a right-in, right-out driveway from Petitioner's property onto a frontage road/on-ramp in approximately the same location as Petitioner's current driveway. In the past Petitioner had proposed other alternatives for access to U.S. Highway 19. Petitioner withdrew from consideration at this hearing all other alternative designs for a right-out driveway for Petitioner.

15. The Lochner Study was undertaken with the specific purpose of determining whether needed improvements to U.S. Highway 19 could be safely constructed within right-of-way already owned by Respondent. The Lochner Study concluded that placing a driveway for Petitioner in the location shown in the study would provide "substandard operation and is very undesirable from a safety stand point." The primary reason for this conclusion was that the physical separation of northbound mainline U.S. Highway 19 and the frontage road ended south of the driveway's location. This lack of physical separation would allow vehicles on northbound mainline U.S. Highway 19 to cross over the frontage road and enter Petitioner's property, creating unsafe traffic movements. Petitioner's witnesses agreed that this lack of separation would be a safety problem.

16. Petitioner's Exhibit 3, prepared and testified about by Reginald Mesimer, attempted to alleviate this admittedly

unsafe aspect of the Lochner plan by extending the physical separator between northbound mainline U.S. Highway 19 and the frontage road/on-ramp to a point just beyond the location of where Petitioner's driveway would be. The area of physical separation is the "gore" area. In effect, this extension also would shift the beginning of the on-ramp to the point of Petitioner's driveway. Thus, the issue raised was whether the location of the on-ramp could be safely designed to co-exist with the location of the off-ramp for the next interchange at Coachman Road. The standards for determining whether this design is safe are set by the American Association for State Highway and Transportation Officials ("AASHTO"), who publish these standards in the "Green Book," known as the "Bible" of transportation engineers.

17. In examining Petitioner's Exhibit 3, as well as the requirements of AASHTO submitted in this case, it is clear that the requirements for an on-ramp followed by an off-ramp are: (1) an acceleration area for the on-ramp; (2) a weaving area for vehicles going from the on-ramp to mainline, and for vehicles going from mainline to the off-ramp; (3) a deceleration area for the off-ramp, and (4) a queue area for vehicles at the terminus of the off-ramp.

18. Petitioner's Exhibit 3 shows the start of the acceleration area for the on-ramp at the location of

Petitioner's right-out driveway, which indicates that the on-ramp for vehicles leaving Petitioner's property would begin at his driveway. Petitioner's Exhibit 3 shows a 2,000-foot weave area, also beginning at the location of Petitioner's right-out driveway.

19. Placing the start of the acceleration area and the weave area at the same point on an on-ramp is contrary to AASHTO design standards. The beginning of the weave area should be near the end of the acceleration area, which, on Petitioner's Exhibit 3, is supposed to be where vehicles on the on-ramp are traveling at the design speed of the highway they are attempting to enter. AASHTO places the beginning of the weaving area where the outside lane of the mainline and the inside lane of the on-ramp are separated by two feet. The weave area extends to a point where there is a twelve-foot separation of the mainline and off-ramp lanes at the next interchange.

20. The design speed of U.S. Highway 19 is 55 miles per hour. It is uncontested that vehicles leaving Petitioner's property will be in a stopped condition prior to entering the on-ramp. Thus, looking at Petitioner's Exhibit 3, the beginning of the weave area should be placed approximately 965 feet to the north of the current location shown on Petitioner's Exhibit 3. In turn, this forces the deceleration area for the off-ramp to Coachman Road shown on Petitioner's Exhibit 3 to be shifted 965

feet to the north. Petitioner's expert testified that the off-ramp deceleration area at Coachman Road could be shifted between 300 and 400 feet to the north. Assuming this to be correct, this places the start of the off-ramp deceleration area approximately 965 feet to the north of its current location, which is 565 to 665 feet beyond the farthest point Petitioner's expert testified it could be moved.

21. Respondent's experts also examined Petitioner's Exhibit 3 under the dictates of AASHTO. Unlike Petitioner, Respondent assumed a design speed of 50 miles per hour, and assumed that shorter distances for acceleration, weaving, and deceleration could be applied in this situation under AASHTO. Respondent's findings demonstrate that under the "Petitioner's best case scenario" the off-ramp at Coachman Road would still have to be moved approximately 600 feet to the north, which is at least 200 feet past the farthest possible shift testified to by Petitioner's expert. Moving the off-ramp would obviously require redesign and delay of the Coachman Road project to the north, already designed and funded for construction.

22. Further, Petitioner's Exhibit 3 also did not take into account any need for increased acceleration distance on the on-ramp due to the grade of the road. For certain portions of the acceleration area of the on-ramp in Petitioner's Exhibit 3 the grade is steeper that 3 percent, and averages over 2 percent.

AASHTO does not require an increase in acceleration distance where the grade is "less that two percent." AASHTO requires an increase when the grade is more than 3 percent. This is, according to Petitioner's witness, a "gray area" in AASHTO. In this situation, while AASHTO may not require a multiplier be applied to the entire acceleration distance, it would be safer for the traveling public to apply the multiplier at least to the portions above 3 percent and perhaps to the entire acceleration distance, and to acknowledge that the grade of the road militates against application of strict minimum AASHTO standard distances. Adjusting at all for grade would result in a longer on-ramp and require pushing the off-ramp at Coachman even further north, which makes Petitioner's Exhibit 3 alternative even less viable.

23. Another factor that Petitioner's Exhibit 3 did not take into account was that a significant amount of traffic leaving the proposed right-out driveway would be fully-loaded heavy trucks both from Petitioner's property and the Pinellas County maintenance yard. The AASHTO acceleration distance of 965 feet shown in that Exhibit is for automobiles. Knowing that heavy, fully loaded trucks would be utilizing this driveway on a regular basis, the acceleration distance for such trucks reaching 55 or even 50 miles per hour would be longer than for a normal passenger vehicle.

24. Petitioner's alternative proposal was fatally flawed in its misplacement of the weave area, and was defective in other respects such as not considering the slower heavy truck traffic or the grade of the road. Thus, it is apparent that under any interpretation of the AASHTO standards, Respondent could not safely design an on-ramp from the Drew Street area and an off-ramp to the Coachman Road interchange and provide Petitioner a right-out driveway in the approximate location of his existing right-out driveway.

25. Based upon all the evidence presented at hearing, Respondent demonstrated that AASHTO standards preclude moving the on-ramp to the location proposed by Petitioner. Therefore, closing Petitioner's right-out driveway to reconstructed U.S. Highway 19 is mandated for safety and operational reasons.

Access-Reasonableness Issues

26. Following the reconstruction of U.S. Highway 19, the access proposed by Respondent for Petitioner's property is reasonable. An objective comparison of the alternative proposed by Petitioner and Respondent's proposal reveals that Respondent's design results in safer and more efficient access to the state highway system for Petitioner and direct access to east and west travel on Drew Street.

27. One measurable point of comparison is the relative distance a vehicle would have to travel to reach the state

highway system under Respondent's proposal versus Petitioner's. Prior to Petitioner's withdrawing from consideration all alternatives other than what was represented in Petitioner's Exhibit 3, Respondent presented testimony regarding two of Petitioner's earlier alternative concepts. These previous alternatives were referred to as Proposal One and Proposal Two. Proposal One was basically a right-out driveway in the form of an on-ramp that would have tied in to mainline U.S. Highway 19 prior to the railroad tracks. Proposal Two was a right-out driveway/on-ramp that tied into the off-ramp for Coachman Road. As far as comparing relative travel distances, both Proposals One and Two are similar to the alternative in Petitioner's Exhibit 3. For vehicles to travel north from Petitioner's property on U.S. Highway 19 in Respondent's design, vehicles travel south on Access Road A, west on Drew Street, and then south on the frontage road/on-ramp. This is a distance of .44 miles. To reach the same point using the access provided in Proposal One, Proposal Two, or Petitioner's Exhibit 3, a vehicle must travel north to the Coachman interchange, and double back south, a distance of approximately 1.45 miles. Thus, when added together, the distances for vehicles to travel north and south on U.S. Highway 19 in Respondent's design total 1.12 miles, or .33 miles less than the 1.45 miles to reach the same points using any of Petitioner's alternative driveway proposals. In

addition, for vehicles that wish to travel east or west on Drew Street from Petitioner's property, Respondent's alternative is much shorter. It is .32 miles to reach Drew Street along Access Road A, and 1.6 miles to reach Drew Street from Proposal One, Proposal Two, or Petitioner's Exhibit 3.

28. Another measurable point of comparison are conflict points, places such as intersections and merge areas where vehicles can be expected to change lanes. In Respondent's design, there are four or five conflict points to travel north on U.S. Highway 19, three or four to travel south on U.S. Highway 19, and one to travel east or west on Drew Street. Petitioner's Exhibit 3 shows two conflict points to travel north (right-out turn to on-ramp and merge to mainline), six or seven to travel south on U.S. Highway 19, and seven or eight to travel east or west on Drew Street (same as south on U.S. Highway 19 plus turn from off-ramp). For vehicles traveling north and south on U.S. Highway 19 from Petitioner's property, the number of conflict points in either Respondent's design or Petitioner's alternative are essentially even, but when travel on Drew Street is included in the comparison Respondent's design is clearly safer.

29. A third point of comparison is that Petitioner's alternative provides one way in and one way out. Respondent's design provides two ways in and one way out. Respondent's

design provides reasonable access to Petitioner's property. In comparison to Petitioner's alternative, Respondent's design provides for shorter combined travel distances. In regard to conflict points, Respondent's design is as safe as Petitioner's alternative, and safer if travel on Drew Street is included in the comparison. Finally, Respondent's design provides an additional point of ingress.

30. Both witnesses called by Petitioner opined that the access proposed by Respondent was not reasonable, primarily because the access is not "direct." The basis of that opinion was limited to their belief that a "better" access plan, the alternative shown in Petitioner's Exhibit 3, was viable. Neither of Petitioner's witnesses knew the relative travel distances, nor did either witness testify about actual conflict points or any other possible objective points of comparison. Petitioner's witnesses' view are flawed because the alternative shown in Petitioner's Exhibit 3 is not viable.

31. Assuming, arguendo, that Petitioner's Exhibit 3 reflected a safe design, and assuming that this access is reasonable, it would be contrary to logic to conclude that Respondent's design results in unreasonable access. The only "advantage" in Petitioner's Exhibit 3 versus Respondent's proposal is a right-out "direct" connection to U.S. Highway 19 via the on-ramp. However, comparing travel distances, conflict

points, and points of ingress, Respondent's design is comparable if not superior, and thus, reasonable.

32. Petitioner stressed that all other property owners along the U.S. Highway 19 corridor have right-in and right-out driveways on frontage roads, and that Petitioner is the only property owner required to use a facility like Access Road A for egress. Even if true, this circumstance does not in and of itself change Respondent's designed access for Petitioner's property into unreasonable access. Based upon objective criteria, Respondent's design is comparable or superior to Petitioner's alternative, and Respondent's design is comparable or superior to the access enjoyed by all other property owners in this vicinity.

Engineering Study

33. Pursuant to Rule 14-96.011, Florida Administrative Code, Respondent conducted an engineering study to examine the closure of Petitioner's right-out driveway. 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.

34. The Study 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 discuss 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.

35. 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.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

37. Respondent regulates, among other things, access to the state highway system pursuant to Sections 335.18 through 335.188, Florida Statutes, the State Highway System Access Management Act. Respondent is also the state agency charged with construction, operation, and maintenance of the state highway system. Respondent had plenary authority with respect to the state highway system and must exercise its discretion according to its enabling statutes to serve the public need. Department of Transportation v. Lopez-Torres, 526 So. 2d 674 (Fla. 1988).

38. Section 334.044(14), Florida Statutes, provides in pertinent part, as follows:

> Department; powers and duties.--The department shall have the following general powers and duties:
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> * * *
>
> (14) To establish, control, and prohibit points of ingress to, and egress from, the State Highway System, the turnpike, and other transportation facilities under the department's jurisdiction as necessary to ensure the safe, efficient, and effective maintenance and operation of such facilities.

39. Section 335.181, Florida Statutes, provides in pertinent part, as follows:

> (1) It is the finding of the Legislature that:
>
> (a) Regulation of access to the State Highway System is necessary in order to protect the public health, safety, and welfare, to preserve the functional integrity of the State Highway System, and to promote the safe and efficient movement of people and goods within the state.
>
> * * *
>
> (2) It is the policy of the Legislature that:
>
> (a) Every owner of property which abuts a road on the State Highway System has a right to reasonable access to the abutting state highway but does not have the right of unregulated access to such highway. The operational capabilities of an access connection may be restricted by the department. However, a means of reasonable access to an abutting state highway may not be denied by the department, except on the basis of safety or operational concerns as provided in s. 335.184.
>
> (b) The access rights of an owner of property abutting the State Highway System are subject to reasonable regulation to

> ensure the public's right and interest in a safe and efficient highway system. This paragraph does not authorize the department to deny a means of reasonable access to an abutting state highway, except on the basis of safety or operational concerns as provided in s. 335.184.
>
> * * *
>
> (7) Nothing in this act prohibits the construction of service roads along a highway on the State Highway System so long as such service roads provide reasonable access to such highway. A property owner whose land abuts a service road is entitled to reasonable access to such service road pursuant to s. 335.184. However, nothing in this act requires that a property owner whose land abuts a service road be given direct access across the service road to the state highway served thereby.

40. Section 335.184(3), Florida Statutes, provides as follows:

> (3) A property owner shall be granted a permit for an access connection to the abutting state highway, unless the permitting of such access connection would jeopardize the safety of the public or have a negative impact upon the operational characteristics of the highway. Such access connection and permitted turning movements shall be based upon standards and criteria adopted, by rule, by the department.

41. 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. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). To meet this burden, Respondent must establish facts upon which its allegations are based by a

preponderance of evidence. Section 120.57(1)(j), Florida Statutes. If Respondent makes a prima facie showing of reasonable assurances, the burden shifts to Petitioner to present evidence of equivalent quality. J. W. C. Co., 396 So. 2d at 788.

42. Respondent seeks to close Petitioner's right-out driveway to mainline U.S. Highway 19 as party of a major reconstruction project of that facility. In order to close the driveway, Respondent must comply with Rule 14-96.015, Florida Administrative Code, which provides:

> (3) Where connections are to be closed or substantially re-located as part of a Department improvement project, and the Department is not planning to acquire any portion of the property for the project, the Department will provide notice and opportunity for an administrative proceeding pursuant to rules 14-96.011 or 14-96.012 and Chapter 120, Florida Statutes.

43. Rule 14-96.011, Florida Administrative Code, applies to closure of permitted driveways, and Rule 14-96.012, Florida Administrative Code, applies to closure of "grandfathered" driveways. The parties agreed that Rule 14-96.011, Florida Administrative Code, would apply in this case.

44. Rule 14-96.011(1)(d), Florida Administrative Code, provides as follows:

> . . . The Department may initiate action to revoke or modify any permit or existing permitted connections if:

* * *

> (d) Such revocation or modification is determined to be necessary because the connection poses a current or potential safety or operational problem on the State Highway System. This problem must be substantiated by an engineering study signed and sealed by a professional engineer registered in the State of Florida qualified in transportation engineering. Such engineering study shall consider, but not be limited to, the following:
>
> 1. Accident or operational analysis directly involving the access points or similar access points, or a traffic conflicts analysis of the site.
> 2. Analysis of the impact the closure, modification, or relocation will have on maintenance, or safety of the Public Road System.
> 3. Analysis of the impact [sic] closure, modification, relocation will have on traffic patterns and circulation on the Public Road System.
> 4. The principles of transportation engineering as determined by generally accepted Professional Practice.

45. The timing of the creation of the study was of no prejudice to Petitioner. The study provides safety and operational bases for Respondent's proposed agency action in this case, 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 configurations are 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 engineering study performed by Respondent meets the requirements of Rule 14-96.011, Florida Administrative Code.

46. Rule 28-106.111, Florida Administrative Code, and Section 120.573, Florida Statutes, both provide that a notice of agency action inform an affected party of whether mediation is available in a particular case. With respect to the Notice not mentioning whether mediation was available in this case, there is no evidence that this prejudiced Petitioner in any way, and, thus, any error was harmless.

47. Rule 14-96.011(1)(e), Florida Administrative Code, states that Respondent will offer to meet on-site with a property owner and take into consideration documents, reports, studies and alternative solutions proposed by the property owner. With respect to Respondent not offering to meet on-site, no evidence of prejudice was presented. In fact, it was testified to by both sides that for several years prior to this hearing Respondent and Petitioner had been discussing alternatives. Further, no testimony was provided that the parties did not comply with the Order of Prehearing Instructions issued July 23, 2001, which required the parties to meet at

least 15 days prior to hearing and discuss the possibility of settlement. Any error with respect to the lack of on-site meeting was harmless.

48. At hearing, Respondent demonstrated that following the planned improvements to U.S. Highway 19 there is no acceptable way to construct Petitioner a right-out driveway in the location of Petitioner's current right-out driveway. The alternatives considered and rejected by Respondent prior to hearing and the alternative presented for the first time at hearing (Petitioner's Exhibit 3), indicate that the action by Respondent to close Petitioner's right-out driveway is proper. Petitioner's preference for a right-out cannot outweigh the Respondent's acceptable route determination. See Pasco County v. Franzel, 569 So. 2d 877, 879 (Fla. 2d DCA 1990) ("a landowner cannot force a taking authority to select the landowner's preferred route when the authority has carefully selected an acceptable alternative route . . . ."). Based upon the evidence, Respondent is authorized to close Petitioner's right-out driveway.

49. Respondent's action will not deny Petitioner access to his property. Further, Respondent's action will result in reasonable access to Petitioner's property. Rule 14-96.002(22), Florida Administrative Code, defines "reasonable access" as follows: "[T]he minimum number of connections, direct or

indirect, necessary to provide safe ingress and egress to the State Highway System based on Section 335.18, Florida Statutes, the Access Management Classification, projected connection and roadway traffic volumes, and the type and intensity of the land use." Respondent is providing Petitioner reasonable ingress to his property via the frontage road and Access Road A. Respondent is providing reasonable egress from Petitioner's property via Access Road A. The 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. The local governments with jurisdiction over the intersection will keep a traffic signal after construction is completed. Thus, Petitioner will have reasonable access to his property.

50. The record is clear that Respondent has met its burden to show that Petitioner's right-out driveway connection to U.S. Highway 19, after the constructed improvements, will create a safety and operational problem, and that Respondent has been given safe and reasonable access to U.S. Highway 19 via the frontage road and Access Road A. Respondent has also met its burden to show that the prospective closing of Petitioner's driveway connection is in compliance with the State Highway System Access Management Act, Sections 335.18 through 335.188, Florida Statutes, and Chapter 14-96, Florida Administrative Code.

RECOMMENDATION

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

RECOMMENDED that the Florida Department of Transportation enter a final order approving the closure of Petitioner's right-out driveway as part of the future constructed improvements to U.S. Highway 19 and the construction of Access Road A.

DONE AND ENTERED this 14th day of December, 2001, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of December, 2001.

ENDNOTE

1/ Respondent filed a Motion for Continuance on June 29, 2001, which recited the chain of events that led up to the decision to conduct the engineering study as the basis for a continuance. Respondent was authorized to represent that Petitioner had no objection to the Motion. The full text of the Motion is as follows:

> Respondent, Department of Transportation (Department), hereby requests a continuance in the above-styled matter, and in support states:

1. The original continuance in this case was granted on March 20, 2001, in part, so that the Department could search its files for any permits which may have been issued to Petitioner for an access connection/driveway to U.S. 19 in Pinellas County, Florida.

2. On April 12, 2001, the Department communicated to counsel for Petitioner that the Department had searched its records for an access management/driveway permit for Petitioner's property and had found a permit dated December 7, 1982, which appeared to authorize placement of fill material and removal of a curb rail within the Department's right of way. At that time, and based upon that document alone, the Department took the position that Petitioner did not have a driveway permit as contemplated by Section 335.187, Florida Statutes, and Rule 14-96.011, Florida Administrative Code.

3. Within the last week, the Department has found another document relevant to this issue, a letter dated September 16, 1980, from the Department to Petitioner. Based upon this letter, together with the above-referenced permit, the Department is reevaluating whether Petitioner had an access permit, and if so whether that access permit was in effect or valid as of July 1, 1988. However, in order to accord Petitioner all rights to which he may be entitled, the Department is going to prepare an engineering study pursuant to the requirements of Rule 14-96.011, Florida Administrative Code. When completed, the Department will immediately deliver Petitioner's counsel a copy of the study. The Department anticipates that Petitioner may at that time wish to engage in further discovery.

4. The Department requests that this case be continued until such time as the parties are again ready to proceed. Based upon witness availability at this time the parties do not anticipate the hearing

commencing until late September, 2001. Frank Ghadimi, the Department's witness who was testifying when this case was continued on March 20, 2001, will be out of the country for all of August and the first fifteen days of September, 2001.

5. The Department is authorized to represent that Petitioner has no objection to this requested continuance.

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.