



PRELIMINARY STATEMENT

By certified letter dated January 16, 2001, Petitioner notified Respondent that vegetation was removed at a specified location without written permission of the Petitioner. The January 16, 2001, letter did not contain a notice of rights to an administrative hearing. A second certified letter dated February 23, 2001, was sent by Petitioner to Respondent which did contain a notice of administrative hearing rights regarding the allegations contained in the January 16, 2001, letter.

Respondent timely filed a Request for Formal Administrative Hearing which was forwarded to the Division of Administrative Hearings on or about April 12, 2001. A formal hearing was scheduled for June 20, 2001. Respondent filed an Unopposed Motion for Continuance. The motion was granted and the case was rescheduled for hearing on August 20, 2001. At hearing, Petitioner presented the testimony of three witnesses, William D. Moriaty, Richard A. Bailey, and Juanice Hagan. Petitioner's Exhibits 1 through 6 were admitted into evidence. Respondent presented the testimony of three witnesses, Asher G. Sullivan, William D. Moriaty, and Juanice Hagan. Respondent's Exhibits 1 through 3 were admitted into evidence.

Official recognition was requested by the parties of Chapter 14-40, Florida Administrative Code, and Section 479.106, Florida Statutes. The request was granted.

A Transcript consisting of one volume was filed on September 4, 2001. At the parties' request, proposed recommended orders were due 20 days after the filing of a transcript. The parties timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Respondent owns and maintains an off-premise outdoor advertising sign (billboard) located along Interstate 75 in Pasco County at section 14140, milepost 13.392. The sign is maintained under the Department of Transportation's (Department's) sign permit BS-600.

2. During October 2000, Mr. Moriaty, a district roadside vegetation coordinator for the Department, noticed while driving on Interstate 75 that the subject sign, which had previously been screened from sight, could now be seen from the highway. Upon closer inspection he observed that vegetation had been removed from the Department's right-of-way at the location of the sign. The vegetation removal included the removal of many large trees. The Department placed the value of the trees that were removed to be \$41,814.74.<sup>1</sup> This

removal of vegetation was done without the Department's permission.

3. Removal of the vegetation and trees improved the view of the sign from Interstate 75, although it is not clear from the record whether it was the trees or the surrounding vegetation which obscured the sign.

4. No evidence was presented establishing that Respondent removed the vegetation or directed others to perform the removal of vegetation. The president of G and J Management Company, Mr. Jerry Sullivan, first became aware of the vegetation removal when he received the notice of the vegetation cut from the Department.

5. Mr. Sullivan purchased the billboards for the purpose of obtaining billboard permits from the Department. These permits have a value separate and apart from the ability to advertise. That is, such permits can be traded-in for vegetation cuts elsewhere or otherwise used for leverage with other billboard companies.

6. A county permit is also required prior to placing advertising on the billboard. At present, Respondent does not have the necessary county permit for advertising. However, Mr. Sullivan conceded that he believed they could get county permits if they pressed the county hard enough.

7. As of October 23, 2000, the face of the billboard was blank in that no copy was on the face of the billboard. At no time material hereto has third-party advertising copy appeared on the subject billboard.

8. As of August 17, 2001, the face of the billboard contained the words, "This sign for rent" with a telephone number. At the time of the hearing, Mr. Moriaty recalled seeing that copy on the sign for, "probably the last month or so, but I don't know exactly when that went up." Thus, the copy first appeared on the billboard around mid-July 2001.<sup>2</sup> As of August 17, 2001, regrowth had begun to occur and the vegetation partially obscured the copy on the subject billboard.

9. Mr. Sullivan did not place this copy on the billboard. He leaves such matters to his business partner, Tom Gunter. The copy was placed on the billboard so that the board would not be deemed abandoned. Mr. Sullivan, however, asserts that this was the wrong copy and furthers asserts that he is not actively marketing the billboard for advertising purposes nor has he ever actively marketed the subject billboard.

10. At the time of the vegetation removal, vegetation had been removed from six other billboards within a few miles of the location of the subject billboard. These six

billboards were owned by three other outdoor advertising companies. At least one of these sites had a billboard with third party advertising on it.

11. Originally, the Department issued violation notices for unauthorized vegetation cuts at these other six billboard sites. However, the Department later rescinded these violation notices. The Department based its decision to rescind the other notices of violation on its determination that these six other instances of vegetation cuts involved mowing and removal of non-woody brush rather than tree cutting. The Department conceded that permits are required in either case and there is no distinction between permits that are required for the removal of vegetation or the removal of trees.

#### CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case, Sections 120.569, 120.57(1), and 120.60(5), Florida Statutes.

13. Section 479.106, Florida Statutes, provides in pertinent part:

479.106 Vegetation management.--

(1) The removal, cutting, or trimming of trees or vegetation on public right-of-way to make visible or to ensure future visibility of the facing of a proposed sign or previously permitted sign shall be

performed only with the written permission of the department in accordance with the provisions of this section.

(2) Any person desiring to engage in the removal, cutting, or trimming of trees or vegetation for the purposes herein described shall make written application to the department. The application shall include the applicant's plan for the removal, cutting, or trimming and for the management of any vegetation planted as part of a mitigation plan.

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(7) Any person engaging in removal, cutting, or trimming of trees or vegetation in violation of this section or benefiting from such actions shall be subject to an administrative penalty of up to \$1,000 and required to mitigate for the unauthorized removal, cutting, or trimming in such manner and in such amount as may be required under the rules of the department. (emphasis supplied)

14. The Department bears the burden of proof in this proceeding and has the burden of going forward. Florida Department of Transportation v. J.W.C. Co., Inc., and the Department of Environmental Regulation, 396 So. 2d 778 (Fla. 1st DCA 1981). The Department seeks to impose an administrative fine of \$1,000.00. Further, if a violation of the statute is found, the Department would then seek to impose mitigation pursuant to Rule 14-40.030(2), Florida Administrative Code, as it described in its notice of violation sent to Respondent. Accordingly, the Department

must meet the clear and convincing standard. Osborne Stern & Co., v. Department of Banking and Finance, 670 So. 2d 932 (Fla. 1996).

15. The Department has not met its burden of proving that Respondent engaged in the removal, cutting, or trimming of trees or vegetation around the subject billboard. There is simply no evidence in the record establishing that Respondent engaged in the removal or cutting of the vegetation or trees.

16. The Department has not met its burden of proving that Respondent constitutes a "person benefiting from" the vegetation cut. The cut took place around October 2000. The subject board has not been rented to an advertiser and Respondent is not actively marketing the subject board for advertising purposes. Further, there is no evidence that the permit has been traded or that the sign being more visible somehow enhances Respondent's prospective ability to trade its permit.

17. In its Prehearing Statement and opening statement, Respondent cites Florida Department of Transportation v. E.T. Legg & Company, 472 So. 2d 1336 (Fla. 4th DCA 1985), arguing that the Department pursued this case against Respondent but rescinded the notices of violation originally sent to the other outdoor advertising companies, and, therefore, engaged in selective enforcement. The doctrine of selective



enforcement is one involving equal protection rights and is, therefore, outside the scope of this proceeding. Department of Revenue v. Young American Builders, 330 So. 2d 864, 865 (Fla. 1st DCA 1976) (The Administrative Procedure Act cannot and does not relegate Fourteenth Amendment questions to administrative determination.) See also Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund, 427 So. 2d 153, 158 (Fla. 1983) (Court discusses district court review of claim that an agency has applied a facially constitutional statute in such a way that the aggrieved party's constitutional rights have been violated.) Secondly, there is insufficient evidence in the record to support a conclusion that the Department engaged in inconsistent agency action in this matter.

#### RECOMMENDATION

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

#### RECOMMENDED:

That the Department enter a final order rescinding its violation notice sent to Respondent.

DONE AND ENTERED this 24th day of October, 2001, in  
Tallahassee, Leon County, Florida.

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BARBARA J. STAROS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 24th day of October, 2001.

ENDNOTES

1/ The Department presented evidence as to the value of the trees that had been removed. However, the parties stipulated that the issue to be resolved in this case was whether or not a violation of the statute had occurred, and that the value of the trees would become important as to mitigation only if a violation was found to have taken place. In any event, the value of the trees and how that value would affect mitigation does not come into play in this proceeding.

2/ The copy appeared on the billboard seven months after the notice of violation was issued by the Department.

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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.