12-31-02

03 MAR 31 AM 10:36
FILED
ADMINISTRATIVE HEARINGS

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

AP

DAN CALABRIA,

Petitioner,

vs.

DOAH CASE NO.: 02-3531 TKW - Closed
DOT CASE NO.: 02-116

DEPARTMENT OF TRANSPORTATION,

Respondent,

and

CITY OF SOUTH PASADENA,

Intervenor.
_____________________________________/

FINAL ORDER

This proceeding was initiated by a letter filed by **Petitioner, DAN CALABRIA** (hereinafter **CALABRIA**), on September 11, 2002, requesting a formal hearing pursuant to Section 120.57(1), Florida Statutes, in response to Special Use Permit No. 02-K-799-0021 (Permit) issued on June 26, 2002, by the **Respondent, DEPARTMENT OF TRANSPORTATION**, (hereinafter **DEPARTMENT**), to the City of South Pasadena, Florida, to allow for the construction of a sign on a median within the right of way of State Road 693. On September 11, 2002, the matter was referred to the Division of Administrative Hearings (hereinafter DOAH) for assignment of an administrative law judge and a formal hearing. On October 7, 2002, the **CITY OF SOUTH PASADENA** (hereinafter **CITY**) filed a petition to

intervene, which was granted by order dated October 16, 2002.

A formal administrative hearing was held in Clearwater, Florida, on October 30, 2002, before T. Kent Wetherell, II, a duly appointed administrative law judge. Appearances on behalf of the parties were as follows:

For Petitioner: Dan Calabria
7068 South Shore Drive, South
South Pasadena, Florida 33707

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

For Intervenor: Linda M. Hallas, Esquire
City of South Pasadena
7047 Sunset Drive, South
South Pasadena, Florida 33707

At the hearing, **CALABRIA** testified on his own behalf and presented the testimony of **CITY** Commissioner Chris Burgess. **CALABRIA** also called Robert Hicks as a witness, but Mr. Hicks was not permitted to testify because the subject matter of his testimony, as represented by **CALABRIA**, was determined by the administrative law judge not to be directly relevant to issues in this proceeding. **CALABRIA** was given an opportunity to make a proffer of Mr. Hicks' testimony for the record, but chose not to do so. **CALABRIA** offered Exhibits P1 through P4 and P6 through P14, which were received into evidence. **CALABRIA** did not formally offer Exhibit P5 at the hearing, and the administrative law judge did not consider it in preparing his Recommended Order. However, the exhibit was discussed at length at the hearing and was therefore, included as part of the record transmitted by the administrative law

judge to the **DEPARTMENT**. The **DEPARTMENT** presented the testimony of **DEPARTMENT** employees Norman Lataille, Kevin Dunn, and Chris Gregory, all of whom were involved in the review of the Permit application. The **DEPARTMENT** offered Exhibits R1 through R13, which were admitted into evidence. The **CITY** presented the testimony of William Naylor, the **CITY'S** Chief of Public Safety, and Bob Brown, a professional engineer. Mr. Brown was accepted as an expert in site distance calculation and analysis. The **CITY** offered Exhibits I1 and I12, which were admitted into evidence. Official recognition was taken of Sections 337.406 and 479.11, Florida Statutes.

The transcript from the October 30, 2002, hearing was filed on November 14, 2002. The **CITY** filed its Proposed Recommended Order on December 2, 2002, and the **DEPARTMENT** filed its Proposed Recommended Order on December 4, 2002. **CALABRIA** filed a Clarification, Restatement and Correction of the Facts as Confirmed by Actual Hearing Testimony on December 9, 2002, to which the administrative law judge responded with a Notice of Ex-Parte Communication on December 11, 2002. On December 31, 2002, the administrative law judge issued his Recommended Order. On January 9, 2003, and January 13, 2003, **CALABRIA** filed letters containing written comments/exceptions to the Recommended Order. On January 13, 2003, the **CITY** filed its Exceptions to Recommended Order, and on January 15, 2003, the **DEPARTMENT** filed the Respondent's Exceptions to the Recommended Order. On January 24, 2003, **CALABRIA** filed a Response to Respondent's Exceptions and a Response to Intervenor's Exceptions.

STATEMENT OF THE ISSUES

As stated by the administrative law judge in his Recommended Order, the issues

presented were:

> [W]hether Petitioner has standing to challenge the Department of Transportation's decision to issue special use permit No. 02-K-799-0021 to the City of South Pasadena, and whether the special use permit was properly issued by the Department.

BACKGROUND

On June 26, 2002, the **DEPARTMENT** issued Special Use Permit No. 02-K-799-0021 to **CITY**. On September 11, 2002, a letter requesting a formal hearing was filed by **CALABRIA**. The matter was referred to the Division of Administrative Hearings (DOAH) on September 11, 2002, and was assigned to T. Kent Wetherell, II, administrative law judge. On October 16, 2002, an order was issued granting the **CITY'S** petition to intervene.

A formal administrative hearing was held on October 30, 2002, before Judge Wetherell.

EXCEPTIONS TO RECOMMENDED ORDER

CALABRIA'S EXCEPTIONS

Upon review of **CALABRIA'S** exceptions, Part I, which is his letter dated January 6, 2003, it must be concluded that the statements therein are not, for the most part, written exceptions to the Recommended Order as contemplated by Section 120.57(3)(e), Florida Statutes. With the exception of two statements therein, his letter merely quotes various findings of fact and conclusions of law of the administrative law judge with which **CALABRIA** agrees and editorializes upon. As such, only the two statements that can be considered written exceptions under Section 120.57(3)(e), Florida Statutes, are addressed herein as **CALABRIA'S** first and second exceptions. Under Chapter 120, Florida Statutes,

the remainder of his letter requires no action of the **DEPARTMENT**.

CALABRIA'S first exception is to the administrative law judge's determination that he does not have standing to challenge the subject permit. In that regard, **CALABRIA** argues that the facts and evidence demonstrate that the issue of standing is effectively moot and should play no part in the **DEPARTMENT'S** "final order."

A review of the record in its entirety reveals that the administrative law judge, in Conclusions of Law 44 through 53 of his Recommended Order, accurately depicts the status of the record in this case and the law as it applies to a third party's standing to seek administrative review of agency action. Having reviewed the record in its entirety and the law in this regard, it must be concluded that the analysis and conclusions of the administrative law judge are correct and fully supported in the law.

CALABRIA also argues that as a result of the administrative law judge's subsequent legal conclusions regarding the Permit and the sign, the question of his standing to obtain an administrative hearing his moot. **CALABRIA** misapplies the legal concept of mootness. Because the administrative law judge concluded that **CALABRIA** has no standing to challenge the **DEPARTMENT'S** issuance of the Permit to the **CITY**, **CALABRIA'S** arguments regarding the Permit and its issuance are rendered moot; not vice versa. See In re Forfeiture of 40' Fiberglass Boat, 453 So. 2d 207, 208 (Fla. 4th DCA 1984)(in absence of standing, all other issues become moot).

CALABRIA'S first exception is rejected.

As his second exception, **CALABRIA** takes issue with the administrative law judge's conclusions regarding the **DEPARTMENT'S** potential issuance of a variance or wavier.

CALABRIA argues that issuance of a variance or waiver six (6) months after the fact, and despite the repeated attempts to bring facts regarding the sign to the attention of **DEPARTMENT** personnel early on, flies in the face of equitable principles and makes a mockery of long standing **DEPARTMENT** rules, requirements, and policies. The issuance of a variance or waiver, **CALABRIA** argues, would effectively reward a municipality for having successfully "gamed" the system and "snookered" **DEPARTMENT** personnel and staff.

In addressing this second exception, it is noted that, in Conclusion of Law 79 and as part of his ultimate recommendation, the administrative law judge concludes that if the **DEPARTMENT** rejects his recommendation that a final order be entered dismissing **CALABRIA'S** challenge to the **CITY'S** Permit due to lack of standing, the **DEPARTMENT** should issue a final order finding the Permit was not properly issued and requiring the sign be removed by the **CITY** unless it obtains a variance or waiver from the **DEPARTMENT**. The **DEPARTMENT** herein accepts the administrative law judge's legal conclusions regarding **CALABRIA'S** standing to challenge the **CITY'S** Permit as they are supported by the record and the law, which renders it unnecessary to address his alternate recommendations. The administrative law judge accurately references Section 120.542, Florida Statutes, regarding applications to the **DEPARTMENT** for variances and waivers. The conclusions of law forming the basis for that reference, however, are not supported in the law or by the record. Nevertheless, any error in that regard is harmless as a result of the conclusions in the Recommended Order and in this Final Order regarding **CALABRIA'S** lack of standing, as hereinafter addressed.

CALABRIA'S second exception is rejected.

By letter dated January 10, 2003, **CALABRIA** submitted "Part II" of his exceptions, which, like Part I, are, for the most part, not exceptions at all. To the extent his statements constitute written exceptions, as contemplated by Section 120.57(3)(e), Florida Statutes, they are addressed herein. Chapter 120, Florida Statutes, requires no action of the **DEPARTMENT** as to the remainder of his letter.

CALABRIA'S third exception again challenges the administrative law judge's findings and conclusions regarding standing, and the administrative law judge's reference to a **DEPARTMENT** waiver or variance. In that regard, **CALABRIA** argues that based on his summary to follow, the issue of "Standing," which under other circumstances might be applicable, is moot and NOT applicable in this case if only based on the clear, unequivocal language of provision No. 13 of the conditions mandated in Special Use Permit No. 02-K-799-0021, on the date it was issued (June 26, 2002), i.e., any "after-the-fact" waiver or variance cannot supersede the clearly identified and described violations and improprieties enumerated in the DOAH "Finding," all of which clearly and unquestionably apply to this Permit and the structure that was improperly permitted.

CALABRIA notes that of the eleven (11) specific citations in the "Finding," six (6) of them establish the incontrovertible fact that the **DEPARTMENT'S** issuance of this permit violated multiple requirements of TEM Section 2.7.6, including ". . . abuse of discretion. . .", ". . . a matter of law. . .", ". . . legally ineffective. . .", and therefore, ". . . should never have been permitted. . ." and ". . . should be removed. . ."

These six (6) specific citations, according to **CALABRIA**, must be viewed in context of the unequivocal terms of the "Special Use Permit" (Exhibit A to his letter) enumerated in

paragraphs 1 through 13. Specifically, the administrative law judge's "Finding" proves that No. 4 was violated - ". . . shall meet Department standards. . ."; No. 8 provides authority for the structure to be removed ". . . at the expense of the permittee. . ."; No. 9 - if by some form of highly unusual rationale the **DEPARTMENT** issues an "after-the-fact" waiver or variance, this paragraph will be null and void and the **DEPARTMENT** will be fully liable for any and all of the risks associated with this structure in question based on this fundamentally flawed permit, (which fact arguably will be supported by any court or jury, since if the **DEPARTMENT** issues such a waiver or variance it will have done so in spite of and with full knowledge of the administrative law judge's "finding" and "Recommendation," thereby effectively ignoring and dismissing the clear conclusions and recommendation in the administrative law judge's decision).

Finally, if nothing else, **CALABRIA** asserts, based on the language of No. 13 of the Special Use Permit the administrative law judge's "finding" proves that - regardless of any issue of "Standing" - the Permit and the sign are in ". . . **noncompliance with the Department's requirements in effect as of the approved date of this permit**. . . ." As a result, the language of No. 13 continues - ". . . **the permit is void and the facility will have to be brought into compliance or removed from the right-of-way at no cost to the Department**." (emphasis added by **CALABRIA**)

CALABRIA continues, asserting that there is no provision whatsoever for any "after-the-fact" waiver or variance in the enumerated terms and conditions of the Permit, which has clearly and repeatedly been proven to be in nonconformance with the **DEPARTMENT** requirements as revealed in the DOAH "Finding" and "Recommendation." In addition,

CALABRIA argues, clearly it is not possible to bring this structure "into compliance;" therefore it must be "removed."

CALABRIA concludes by arguing that a total of eleven (11) paragraphs in the administrative law judge's "Finding," as enumerated above, directly address each of the several and multiple deficiencies and/or violations of the **DEPARTMENT** rules, regulations, and required procedures as well as the abuse of discretion and error of fact and law all of which are described in detail and demonstrate conclusively that the Permit does not comply with Section 120.542, Florida Statutes.

For the reasons set forth above in response to **CALABRIA'S** first and second exceptions, **CALABRIA'S** third exception does not establish error in the administrative law judge's conclusions of law regarding standing. The administrative law judge accurately references Section 120.542, Florida Statutes, regarding applications to the **DEPARTMENT** for variances and waivers. The conclusions of law forming the basis for that reference, however, are not supported in the law or by the record. Nevertheless, any error in that regard is harmless as a result of the conclusions in the Recommenced Order and in this Final Order regarding **CALABRIA'S** lack of standing, as hereinafter addressed.

CALABRIA'S third exception is rejected.

DEPARTMENT'S EXCEPTIONS

The **DEPARTMENT'S** first exception is to that portion of Conclusion of Law 57 that states "Where, as here, the Department has formal written policies to guide the exercise of its discretionary authority, it must comply with those policies, and its failure to do so constitutes an abuse of discretion."

Preliminarily, it is noted that the **DEPARTMENT'S** exceptions are rendered moot by the **DEPARTMENT'S** acceptance and adoption herein of the administrative law judge's findings and conclusions regarding **CALABRIA'S** lack of standing to challenge the **DEPARTMENT'S** underlying actions in his case. In re Forfeiture, 453 So. 2d at 208. In the interest of judicial economy, however, the **DEPARTMENT'S** exceptions are addressed.

In addressing the **DEPARTMENT'S** first exception, the record and the applicability of Section 2.7.6 of the **DEPARTMENT'S** Traffic Engineering Manual to the **CITY'S** application for the Permit must be reviewed and analyzed. The record in this case unrefutedly establishes that the **DEPARTMENT** has no formal written policies or rules that could be precisely applied to the **CITY'S** application to erect the requested sign within the **DEPARTMENT'S** right of way. As such, the **DEPARTMENT** selected the closest available criteria to guide it in the exercise of its lawful discretion and chose to use criteria for "customized place name signs" as expressed in Section 2.7.6 of the **DEPARTMENT'S** Traffic Engineering Manual. (RO. 9)[1] The only competent, substantial evidence in the record establishes that none of the **DEPARTMENT'S** rules or regulations fit the **CITY'S** application, and the **DEPARTMENT** looked to the guidelines of Section 2.7.6, which came the closest to being applicable. As Kevin Dunn, the **DEPARTMENT'S** District 7 Signing Engineer, testified, the **DEPARTMENT** has "no set standards that would speak to this [the **CITY'S** permit application] specifically. The standard that I could more closely apply would be a place name

---

[1] Citations to the administrative law judge's Recommended Order will be in the form of (RO.) followed by the appropriate page number(s).

sign. I mean, it is more or less defining the name of the city. . . ." (T. 83)[2] In fact, the administrative law judge acknowledges the lack of established rules against which to review the **CITY'S** application in Conclusion of Law 58. (RO. 23-24)

The **DEPARTMENT** has broad discretion in deciding how its right of way and road system will be configured, which the administrative law judge recognizes in his Recommended Order at Conclusion of Law 57. It is also recognized by both the administrative law judge and the **DEPARTMENT** that the **DEPARTMENT'S** considerable discretion in this area is subject to the limitation that the **DEPARTMENT** may not act without authority or abuse its discretion. See Department of Transp. v. Lopez-Torres, 526 So. 2d 674, 676 (Fla. 1988). The **DEPARTMENT'S** decision to use the Traffic Engineering Manual criteria for "customized place name signs" to guide its decision on the **CITY'S** application was discretionary.

If the **DEPARTMENT** had promulgated a rule prescribing standards for the issuance of permits for signs like the one at issue in this proceeding, failure to follow the rule would be an abuse of discretion. See Vantage Healthcare Corp. v. Agency for Health Care Admin., 687 So. 2d 306, 308 (Fla. 1st DCA 1997). However, the **DEPARTMENT** has no such rule, there is no evidence of any applicable rule in this record, and the administrative law judge acknowledges that his independent research could locate no applicable rule. (RO. 23) The administrative law judge further concludes that the **DEPARTMENT** did not abuse its discretion in evaluating the **CITY'S** permit application based upon those guidelines. (RO. 24)

Generally speaking, the legislature has accorded broad discretion to public agencies and

---

[2] Citations to the transcript of the October 30, 2002, hearing will be in the form of (T.) followed by the appropriate page number(s).

Florida courts have long held that an agency's decision based upon an honest exercise of its discretion cannot be overturned absent a finding of illegality, fraud, oppression, or misconduct. See Miami-Dade County v. Church & Tower, Inc., 715 So. 2d 1084, 1089 (Fla. 3d DCA 1998). While administrative law judges, like appellate courts, may have broad powers of review over administrative action, those powers do not include the right to substitute their judgment for that of the agency on an issue of discretion. See, e.g., § 120.68(12), Fla. Stat.; Mathis v. Lovett, 215 So. 2d 490, 491 (Fla. 1st DCA 1968)("The law in Florida is clear and explicit to the effect that the Court cannot and should not, in the absence of a clear showing of fraud or abuse of discretion, interfere with the discretionary actions of an administrative agency.").

Conclusion of Law 57 properly analyzes the **DEPARTMENT'S** broad discretion when it comes to the state transportation system. The administrative law judge also properly concludes that there are no **DEPARTMENT** rules prescribing standards for the issuance of the Permit, and that the **DEPARTMENT** did not abuse its discretion in evaluating the Permit application based upon its policies governing "customized place name signs." (RO. 23-24) However, to summarily conclude, as does Conclusion of Law 57, that failure to strictly apply discretionary guidelines constitutes an abuse of discretion is erroneous as a matter of law. The mere exercise of discretion does not constitute abuse. The administrative law judge makes no findings and the record contains no competent, substantial evidence of illegality, fraud, oppression, or misconduct to support a conclusion that the **DEPARTMENT** abused its discretion in its application of the criteria of Section 2.7.6. See, e.g., Church & Tower, Inc., 715 So. 2d at 1089.

The **DEPARTMENT'S** first exception is accepted and Conclusion of Law 57 is rejected to the extent that it concludes that the mere exercise of discretionary authority constitutes an abuse of discretion.

The **DEPARTMENT'S** second exception is to Conclusion of Law 60 that the sign must meet the requirements identified in Section 2.7.6 of the **DEPARTMENT'S** Traffic Engineering Manual.

As detailed above, Section 2.7.6 of the **DEPARTMENT'S** Traffic Engineering Manual does not apply to the **CITY'S** Permit application, and the **DEPARTMENT** has broad discretion in deciding how its right of way and road system will be configured. The administrative law judge, in Conclusion of Law 60 and others, effectively eliminates all of the **DEPARTMENT'S** discretion in determining which criteria of Section 2.7.6 to look to for guidance, which to apply or not, and which to make exception to, and then substitutes his judgment as to the application of those criteria for the judgment of the **DEPARTMENT**. The mere fact that the **DEPARTMENT** exercised its discretion in determining which criteria to look to for guidance does not constitute an abuse of that discretion. The law in Florida is clear that a court cannot, and should not, in the absence of a clear showing of fraud or abuse of discretion, interfere with the discretionary actions of an administrative agency. Mathis, 215 So. 2d at 491. In order to overturn an agency's decision which has been based upon an honest exercise of its discretion, the record must contain competent, substantial evidence to support a finding of illegality, fraud, oppression, or misconduct. See Church & Tower, Inc., 715 So. 2d 1089. In this case, not only does the administrative law judge make no such findings, but there is no competent, substantial evidence in this record upon which such findings could be based.

In his request for hearing and at the hearing, **CALABRIA** generally objected to the **CITY'S** sign because he believed it would constitute a safety hazard. (RO. 11, 18) In that regard, the **DEPARTMENT** properly determined, and the competent, substantial evidence in the record establishes, that the sign meets the clear-zone and sight distance safety criteria used by the **DEPARTMENT** for evaluating the placement of signs within the right of way. (RO. 31) The **DEPARTMENT** also properly concluded that the sign will not interfere with the safe and efficient movement of traffic. (RO. 22) The record establishes that the **DEPARTMENT** satisfied its obligation to the public by ensuring that the sign will not present an unreasonable hazard to the traveling public and that the **DEPARTMENT** evaluated the safety impact of the proposed sign in the same way it evaluates other types of signs proposed to be located within the right of way.

The **DEPARTMENT'S** decision to waive, to apply, or to not apply some of the criteria which true customized place name signs must meet was not an abuse of discretion. As established by the record and recognized by the administrative law judge, those criteria are not part of any binding rules or policies governing signs similar to the **CITY'S** sign. **CALABRIA** introduced no evidence why those criteria must independently and unequivocally apply to the **DEPARTMENT'S** decision regarding the **CITY'S** sign, thereby eliminating the **DEPARTMENT'S** inherent discretion. The administrative law judge similarly failed to explain why those criteria must independently apply to restrain the **DEPARTMENT'S** discretion or how the **DEPARTMENT'S** discretion in applying those criteria has been abused. It is not enough that **CALABRIA** or the administrative law judge simply disagrees with the **DEPARTMENT** and desires to substitute his judgment for the **DEPARTMENT'S**. See §

120.68(12), Fla. Stat.; Mathis, 215 So. 2d at 491.

The **DEPARTMENT** applied the criteria and safety standards applicable to the **CITY'S** request in a reasonable and appropriate fashion. **CALABRIA** failed to show that the **DEPARTMENT'S** permitting decision was in excess of the **DEPARTMENT'S** legal authority or constituted an abuse of its discretion. Similarly, the administrative law judge's conclusions regarding the sign and the **DEPARTMENT'S** exercise of its discretion in applying those criteria are not supported by the record or the law.

The **DEPARTMENT'S** second exception is accepted and Conclusion of Law 60 is rejected.

The **DEPARTMENT'S** third exception is to Conclusion of Law 67 that the decision of the **DEPARTMENT'S** staff to make an exception to the locational requirement in Section 2.7.6(4) of the Traffic Engineering Manual was erroneous as a matter of fact and law.

For the reasons stated above in response to the **DEPARTMENT'S** first and second exceptions, Conclusion of Law 67 is not supported by the record or by the law.

The **DEPARTMENT'S** third exception is accepted and Conclusion of Law 67 is rejected.

The **DEPARTMENT'S** fourth exception is to those portions of Conclusion of Law 68 that the **DEPARTMENT** staff lacks the legal authority to make an exception to the locational requirement in Section 2.7.6(4) of the Traffic Engineering Manual, and that the exception allowed by the **DEPARTMENT** staff is ineffective.

Whether to apply or not to apply the applicable guidelines of Section 2.7.6 to the **DEPARTMENT'S** decision regarding the Permit, or whether to grant an exception to any of

those guidelines, is within the **DEPARTMENT'S** discretionary authority. The **DEPARTMENT** established that it had no written rules or policies that directly apply to the **CITY'S** sign. The **DEPARTMENT** also established that it reasonably exercised its discretion in utilizing and applying the criteria most applicable to the **CITY'S** sign. It then became **CALABRIA'S** burden to establish that the **DEPARTMENT'S** actions constituted an abuse of that discretion. No such evidence can be found in this record. For these reasons and the reasons stated above in response to the **DEPARTMENT'S** first and second exceptions, Conclusion of Law 68 is not supported by the record or by the law.

The **DEPARTMENT'S** fourth exception is accepted and Conclusion of Law 68 is rejected.

The **DEPARTMENT'S** fifth exception is to Conclusion of Law 79, to the ultimate conclusion that the sign should not have been permitted, and to the recommendation that the sign should be removed unless a waiver or variance is obtained under the provisions of Section 120.542, Florida Statutes.

The Recommended Order essentially concludes that once the **DEPARTMENT** staff chose to use the Traffic Engineering Manual criteria for "customized place name signs," the **DEPARTMENT'S** discretion was eliminated and strict application of all of the criteria was required. This conclusion goes well beyond established case law that requires agencies to abide by their rules. See generally Vantage Healthcare Corp., 687 So. 2d at 308, and cases cited therein. The statutory scheme under which the **DEPARTMENT** operates affords the **DEPARTMENT** broad discretion in deciding how its right of way and road system will be configured, and establishes that the **DEPARTMENT** must lawfully exercise that discretion to

serve public needs. See Lopez-Torres, 526 So. 2d at 676. The record establishes that the **DEPARTMENT** was not required to use the customized place name sign criteria to evaluate the **CITY'S** proposed sign. On the other hand, once the **DEPARTMENT** determined that the customized place name sign criteria were the most applicable to the **CITY'S** sign, it was within the **DEPARTMENT'S** discretion to determine which criteria to apply, which not to apply, and which to make exception to, if any, in the proper exercise of its discretion.

By concluding that **DEPARTMENT** staff could not waive or excuse compliance with any of the customized place name sign criteria, the Recommended Order improperly makes Section 2.7.6 of the Traffic Engineering Manual the **DEPARTMENT'S** rule for reviewing signs like the **CITY'S** and improperly strips the **DEPARTMENT** of all discretion in applying its guidelines. The administrative law judge's conclusion and recommendation are that the sign should not have been permitted and it should be removed. However, he makes no findings of an abuse of discretion, and offers no competent, substantial evidence to support a finding of an abuse of discretion. The administrative law judge's conclusions and recommendation in that regard are not supported by the record or the law.

The **DEPARTMENT'S** fifth exception is accepted and Conclusion of Law 79 and the recommendation in the Recommended Order that the Permit be found to have been improperly issued and that the **CITY'S** sign be removed are rejected.

CITY'S EXCEPTIONS

The **CITY'S** first exception is to Finding of Fact 24 that the proposed sign "was represented to be located near the City's geographic boundary." This statement, the **CITY** argues, is not supported by the record and is contradicted in other findings of fact and

conclusions of law contained in the Recommended Order. In that regard, the **CITY** asserts, Finding of Fact 10 states that the **DEPARTMENT** indicated its willingness to make an "exception" to its policy that such signs be located at or in proximity of the city limits. It is impossible, the **CITY** argues, for these two findings of fact to be reconciled. The **CITY** argues that the record contains no evidence that the **CITY** ever represented that the mural location was at or in close proximity to its geographic border. Had the **CITY** made such a representation, the **CITY** argues, no exception regarding proximity would have been necessary. The **CITY** recommends that the Finding of Fact be modified to eliminate that portion of the last sentence that reads "and because it was represented to be located near the City's geographic boundary."

Upon review of the record, the **DEPARTMENT** is unable to find any evidence, testimonial or documentary, that the subject sign was "represented" to be located near the **CITY'S** geographic boundary. The **CITY'S** exception to this statement appears to be not only to the fact that it is included as a finding of fact without any competent, substantial evidence to support it, but also to the inference that such a representation was made by the **CITY**. That portion of Finding of Fact 24 is not supported by the competent, substantial evidence, and its inclusion in the Recommended Order, while harmless, is nevertheless improper. § 120.57(l), Fla. Stat.

The **CITY'S** first exception is accepted and Finding of Fact 24 is rejected to the extent that it states that the subject sign was represented to be near the **CITY'S** geographic boundary.

The **CITY'S** second exception is to that portion of Conclusion of Law 75 that states "the preponderance of the evidence fails to demonstrate that another location for a customized

place name sign was not practical or possible." The administrative law judge ruled in Conclusion of Law 55 that **CALABRIA** had the burden of proving that the permit was issued improperly. Accordingly, the **CITY** asserts, the question is not whether the **DEPARTMENT** demonstrated by a preponderance of the evidence that there was no alternate location available, but whether **CALABRIA** demonstrated that there was another practical or possible location for the mural that was closer to the **CITY'S** geographic boundary. The **CITY** points to Exhibit P-11, an aerial view of Pasadena Avenue, which clearly depicts Pasadena Avenue as a Causeway with no adequate right of way south of the mural location that would be adequate for a custom entryway sign. The only witness, the **CITY** asserts, who testified regarding other possible or practical locations was Kevin Dunn of the **DEPARTMENT**. In response to cross-examination, Mr. Dunn's testimony on this point was "I'm not sure there would be an applicable location back where these condominiums are located to install something like this." (T. 74) **CALABRIA** offered no testimony regarding the size of the right of way available in any location closer to either **CITY** boundary. The **CITY** argues that **CALABRIA** did not address the location issue in his testimony, that he did not raise the issue of proximity to the **CITY'S** geographic border in his petition, and that his allegations dealt with safety issues.

The **CITY** requests that Conclusion of Law 75 be modified to state "Petitioner did not expressly challenge the Permit on this ground, it is unnecessary to determine whether the sign meets the requirements of TEM Section 2.7.6(11)." This, according to the **CITY**, would be consistent with the administrative law judge's ruling on other criteria contained in TEM Section 2.7.6 that were not raised in the Petition such as illumination and the requirement of an interlocal agreement (see Conclusions of Law 77 and 78).

In its second exception, the **CITY** properly notes that **CALABRIA** had the burden of establishing another location was practical or possible. The burden was not on the **DEPARTMENT** to establish the lack of alternative practical or possible locations for the sign. A review of the record reveals that neither **CALABRIA'S** petition nor the testimony he offered challenged the proximity of the sign to the **CITY'S** geographic border. When other criteria of the Traffic Engineering Manual were not challenged by **CALABRIA'S** petition, the administrative law judge properly determined it was unnecessary to address those criteria. (RO. 77, 78) The existence of other "practical or possible" locations was similarly not raised by **CALABRIA**, but not similarly treated by the administrative law judge. That portion of the Conclusion of Law 75 that "the preponderance of the evidence fails to demonstrate that another location for a customized place name sign was not practical or possible" is not supported in the law or by the record.

The **CITY'S** second exception is accepted and Conclusion of Law 75 is rejected to the extent it establishes a burden on the **DEPARTMENT** of demonstrating another location for the sign was not practical or possible, and finds error on the part of the **DEPARTMENT** for failing to do so.

The **CITY'S** third exception is to Conclusion of Law 72, that the preponderance of the evidence demonstrates that the sign fails to meet the requirements of TEM Section 2.7.6(8). **CALABRIA** did not raise driver readability without slowing down as an issue. In accordance with the reasoning set forth in its second exception, the **CITY** asserts that Conclusion of Law 72 should be modified to state "Petitioner did not expressly challenge the Permit on this ground, it is unnecessary to determine whether the sign meets the requirements of TEM

Section 2.7.6(8)."

In Conclusions of Law 77 and 78, the administrative law judge concluded it was "unnecessary to determine" whether certain criteria of the Traffic Engineering Manual were met, because **CALABRIA** "did not expressly challenge the issuance of the Permit on this ground." (RO. 77, 78) **CALABRIA** similarly failed to challenge the issuance of the Permit on the ground that it was unreadable at the posted speed, but the issue was not similarly treated as necessary by the administrative law judge. As such, that portion of Conclusion of Law 72 is not supported by the record or the law.

The **CITY'S** third exception is accepted and Conclusion of Law 72 is rejected to the extent that it addresses an issue not raised by the petition.

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 23 and 25 through 40 are supported by competent, substantial evidence and are adopted and incorporated as if fully set forth herein.

2. Finding of Fact 24 is not supported by competent, substantial evidence to the extent that it finds that the subject sign was represented to be at the **CITY'S** geographic boundary, and to that extent is rejected, but is otherwise 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.

2. The Conclusions of Law in paragraphs 44 through 56, 58, 59, 61-66, 69-71, 73, 74,

and 76-78 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 60, 67, 68, and 79 are not supported in law and are rejected.

4. The Conclusions of Law in paragraphs 57, 72, and 75 are not supported in the law and are rejected in part, as herein modified, and as modified are adopted and incorporated as if fully set forth herein.

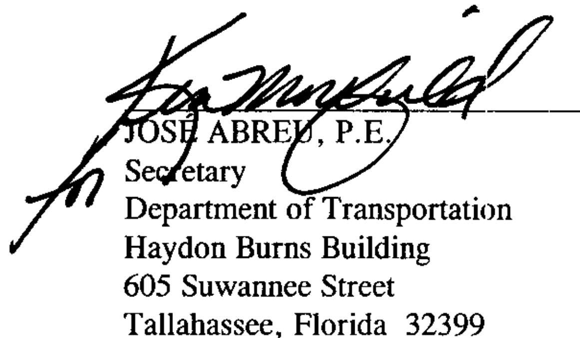
ORDER

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

ORDERED that the administrative law judge's Recommended Order, as modified herein, is adopted. It is further

ORDERED that the Permit issued to the **Intervenor, CITY OF SOUTH PASADENA,** by the **Respondent, DEPARTMENT OF TRANSPORTATION**, is hereby affirmed.

DONE AND ORDERED this 31st day of March, 2003.



JOSE ABREU, P.E.
Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

FILED D.O.T. CLERK
2003 MAR 31 AM 7:24

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:

The Honorable T. Kent Wetherell, II
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550

Robert M. Burdick, Esquire
Assistant General Counsel
Department of Transportation
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399-0458

Kenneth A. Hartmann, P.E.
District VII Secretary
11201 North McKinley Drive, D7-100
Tampa, Florida 33612-6403

Richard Vickers, Esquire
District VII General Counsel
Department of Transportation
11201 North McKinley Drive, D7-5
Tampa, Florida 33612-6403

Brian Bennett
Pinellas Maintenance Engineer
Department of Transportation
5211 Ulmerton Road
Clearwater, Florida 34020

Linda M. Hallas, Esquire
City of South Pasadena
7047 Sunset Drive, South
South Pasadena, Florida 33707

Dan Calabria
7068 South Shore Drive, South
South Pasadena, Florida 33707