STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAN CALABRIA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-3531
	)	
DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
CITY OF SOUTH PASADENA,	)	
	)	
Intervenor.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 30, 2002, in Clearwater, Florida, before T. Kent Wetherell, II, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Robert M. Burdick, Esquire
Department of Transportation
605 Suwannee Street
Haydon Burns Building, Mail Station 58
Tallahassee, Florida 32399-0458

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

STATEMENT OF THE ISSUES

The issues are whether 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.

PRELIMINARY STATEMENT

On June 26, 2002, the Department of Transportation (Department or Respondent) issued special use permit No. 02-K-799-0021 (Permit) to the City of South Pasadena (City) to allow the City to construct a sign on a median within the right-of-way of State Road 693. Starting on July 29, 2002, Petitioner sent several letters to the Department requesting a formal hearing on the Department's decision. On September 11, 2002, the Department finally referred the matter to the Division of Administrative Hearings (Division) for the assignment of an administrative law judge to conduct the formal hearing requested by Petitioner.

On October 7, 2002, the City filed a petition to intervene pursuant to Rule 28-106.205, Florida Administrative Code. The petition was granted by Order dated October 16, 2002.

At the hearing, Petitioner testified in his own behalf and also presented the testimony of City Commissioner Chris Burgess.[1] Petitioner's Exhibits, numbered P1 through P4 and P6 through P14, were received into evidence.[2] 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. The Department's Exhibits, numbered R1 through R13, were received 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's Exhibits, numbered I1 and I2, were received into evidence. At Petitioner's request, official recognition was taken of Sections 337.406 and 479.11, Florida Statutes.

The Transcript of the hearing was filed with the Division on November 14, 2002. The parties requested and were granted 20 days from the date the Transcript was filed to submit their proposed recommended orders (PROs). As a result, the parties waived the deadline for the submittal of this Recommended Order. See Rule 28-106.216(2), Florida Administrative Code. The Department and the City timely filed their PROs; Petitioner filed his PRO on December 9, 2002. All of the PROs were given due consideration by the undersigned in preparing this Recommended Order.

FINDINGS OF FACT

Based upon the testimony and evidence received at the hearing, the following findings are made:

A. Parties

1. Petitioner is a resident of the City. Petitioner lives in a subdivision less than one-half mile from the location of the sign at issue in this proceeding.

2. Shore Drive provides the only manner of egress from the subdivision in which Petitioner lives. Shore Drive intersects State Road 693 just south of the location of the sign at issue in this proceeding. Shore Drive becomes Matthews Road once it crosses State Road 693.

3. Petitioner drives on State Road 693 on a daily basis. However, Petitioner does not use the median cut (described more fully below) immediately adjacent to the sign.

4. The Department is the state agency charged with regulating the placement of signs, structures, and landscaping within state road rights-of-way in a manner that does not interfere with the safe and efficient movement of traffic on the roads.

5. The City is an incorporated municipality of the State of Florida. The City is located in southern Pinellas County.

6. The City is very small. It is slightly more than one mile long and approximately one-half mile wide, and it has approximately 6,000 residents.

7. The main north/south thoroughfare through the City is State Road 693. More than 33,000 vehicles per day travel through the City on State Road 693.

8. State Road 693 enters the "downtown" area of the City over a small bridge at the northern end of New Corey Causeway. The southern City limits are on the causeway, just north of the bridge across the Intercoastal Waterway to St. Petersburg Beach. The northern City limits are near the intersection of State Road 693 and Park Street.

9. There are several condominium complexes along State Road 693 between the City's southern boundary and the bridge into the City's "downtown" area. A significant portion of the City's residents live in those condominiums.

B. The Sign's Characteristics and Location

10. In October 2001, the Department gave "conceptual approval" to the City's plan to construct a "gateway" sign on a median within the right-of-way of State Road 693. In doing so, the Department indicated its willingness to make an "exception" to its policy that such signs be located at or in proximity to the City limits. The basis of the exception was that the Department believed (or was led to believe) that there was

insufficient right-of-way in the area of the City limits for such a sign and that "the first urban environment encountered is near the proposed location."

11. The general concept for the erection of a "gateway" or entryway sign appears to have come from a Vision Plan prepared by the City with the input of its citizens and others in 1999.

12. On June 12, 2002, the City formally submitted to the Department an application for a special use permit in order to erect and maintain a sign (which the City refers to as "mural") on the median within State Road 693 just north of the intersection of State Road 693 and Shore Drive/Matthews Road. The application included a map identifying the proposed location of the sign as well as drawings which showed the dimensions and appearance of the sign.

13. The sign is a large concrete structure. As built, it is more than 21 feet long, more than 15 feet high, and more than 3 feet wide. These dimensions are slightly more than the dimensions set forth in the application.

14. Both sides of the sign are covered by a mosaic depicting waves, dolphins jumping out of the water, a manatee, a sailboat, and the City's logo which includes the name of the City, the City's seal, and the City's motto ("our place in the sun").

15. The City's logo is located in a small area at the top of the sign. The City's name and motto are in dark blue and they blend into the light blue background of the sign. As a result, it is somewhat difficult to read the City's name on the sign from a distance.

16. The median on which the sign is located is surrounded by a six-inch non-mountable curb.

17. As built, the sign is located more than 13 feet from the back of the curb of the southbound travel lanes of State Road 693, and is located more than 25 feet from the back of the curb of the northbound lanes. The sign is located approximately 77 feet south of the median cut described below.

18. The sign is located in the middle of the City in what appears to be the City's "downtown" area. The sign is approximately one-half mile north of the City's southern boundary and approximately seven-tenths of a mile south of the City's northern boundary.

19. At the location of the sign, State Road 693 is a multi-lane highway divided by the median. The southbound portion of the road consists of two through lanes and dedicated right and left turn lanes. The northbound portion of the road consists of three through lanes. The posted speed limit on that portion of State Road 693 is 35 miles per hour.

20. There are traffic signals at the intersection of State Road 693 and Shore Drive/Matthews Road, which is immediately to the south of the median. A median opening (or "median cut") is located on the north side of the median. There is no signal at the median cut.

21. The median cut is used by southbound vehicles to turn left into businesses located across the northbound travel lanes of State Road 693 and to make U-turns into the northbound travel lanes. The median cut is also used by northbound vehicles (including emergency vehicles accessing the adjacent Pasadena Palms Hospital) to make U-turns into the southbound travel lanes of State Road 693 and by vehicles turning left onto southbound State Road 693 from businesses along the northbound travel lanes.

22. The sign does not affect northbound emergency vehicles which make U-turns in the median cut to facilitate their access into the hospital's entrance. In such circumstances, the sign is behind the vehicle and therefore could not interfere with the view of oncoming southbound traffic. Similarly, the location of the sign does not interfere with the ability of a southbound vehicle to see emergency vehicles that might access the hospital's entrance by turning left across southbound State Road 693 at the signalized intersection of State Road 693 and Matthews Road/Shore Drive.

23. Prior to the construction of the sign, the median was covered with large trees and other vegetation. In some areas, the vegetation was quite dense. Much of the vegetation was removed for the construction of the sign. As a result, the overall visibility through the median is better now than it was before the construction of the sign.

C. Department's Review of the Permit Application

24. After receiving the City's application, the Department staff inspected the proposed location and reviewed the application based upon the criteria for "customized place name signs" in the Department's Traffic Engineering Manual. The Department staff determined that those criteria were the most applicable because the sign was proposed to include the City's name and logo and because it was represented to be located near the City's geographic boundary.

25. Among other things, customized place name signs are required to meet the Department's clear zone requirements and safety criteria.

26. The clear zone requirements are set forth in the Department's Plans Preparation Manual. The clear zone is an area adjacent to the travel lanes of a road where no fixed objects are to be located so that a vehicle which runs off the road will be able to recover and return to the road without striking anything.

27. The width of the clear zone varies based upon the posted speed limit of the road and the presence or absence of a curb on the road. Where there is a curb, the clear zone must be at least four feet from the back face of the curb.

28. Structures are generally not permitted to be located in the clear zone, but if they are, they must be designed to break away on impact. Structures not located in the clear zone are not required to be designed to break away on impact.

29. The safety criteria applicable to the sign are the sight-distance criteria contained in Standard Index 546. The sight-distance criteria are intended to ensure that a structure or object within the right of way will not interfere with the motorists' clear line of sight necessary to permit safe and efficient use of the road. More specifically, the sight-distance criteria are intended to ensure that a vehicle turning into or across oncoming traffic will have a clear line of sight of the oncoming traffic for at least a specified minimum distance, which varies based upon the speed limit of the road.

30. The Department staff determined based upon a review of the application materials and an on-site inspection of the proposed location of the sign that the sign met the Department's requirements for a custom place name sign, including the clear zone and sight-distance requirements. Accordingly, on June 26, 2002, the Department issued the Permit to the City.

31. Despite the issuance of the Permit, the Department staff continued to review the project after the Permit had been issued. That supplemental review was in direct response to concerns raised by Petitioner through correspondence with the Department staff. Specifically, Petitioner expressed concerns that the sign would constitute a safety hazard as a result of its size, its placement in the median of a heavily-traveled road, and its location in proximity to Pasadena Palms Hospital.

32. The supplemental review resulted in additional permit conditions as reflected in a July 31, 2002, e-mail from the Department to the City's director of public works. In that e-mail, the Department directed the City to submit a sight-distance analysis prepared by an engineer and further directed the City to remove the "existing South Pasadena city limit signing heading [northbound] on S.R. 693 between the intercoastal bridge and the proposed location."

33. The sight-distance analysis was conducted by Bob Brown, a professional engineer with expertise in sight-distance calculation and analysis. Mr. Brown performed an evaluation in the field with respect to each location that might potentially be impacted by the sign from a sight-line standpoint, including the intersection of State Road 693 and Shore Drive/Matthews Road, the median cut, and northbound and southbound through traffic in the vicinity of the sign.

34. Mr. Brown's analysis determined that the only potential area of concern from a sight-line standpoint was for a southbound vehicle in the median cut making a left turn across the northbound lanes of State Road 693 or performing a U-turn into the northbound lanes. Even in the median cut, however, Mr. Brown's sight-distance analysis shows (consistent with the initial analysis conducted by the Department staff) that the location of sign provides sufficient sight-lines to meet the requirements of Standard Index 546. Stated another way, even with the sign located in the median, the available sight-lines meet the applicable Department requirements.

35. Mr. Brown's analysis is corroborated by the photographs taken from a vehicle in the median cut which were introduced at the hearing. Those photographs clearly show that a vehicle using the median cut would have a clear view of oncoming traffic beyond the signalized intersection of Shore Drive/Matthews Road and State Road 693.

36. With respect to the July 31, 2002, e-mail's reference to the existing city limit signs, there are actually two wooden customized place name signs adjacent to the northbound lanes of State Road 693. The first is located on the New Corey Causeway several hundred feet south of the bridge that leads into the City. The second is located just south of that bridge. Both of those signs are closer to the southern City limits than the sign

at issue in this proceeding. As of the date of the hearing, both signs were still in place.

37. There is also a wooden customized place name sign adjacent to the southbound lanes of State Road 693 near the intersection of State Road 693 and Park Street, which is the City's northern boundary. As of the date of the hearing, that sign is also still in place.

38. After discussions with the City, the Department changed its position, and by letter dated August 8, 2002, the "Department's Traffic Operations Unit waived the removal of the existing signs along state road 693." The rationale for that decision was not explained in the letter or at the hearing.

39. The August 8, 2002, letter also authorized the City to "proceed with construction of the mural." Thereafter, the City began construction of the sign.

40. Construction of the sign was completed in October 2002, prior to the date of the hearing.

CONCLUSIONS OF LAW

A. Jurisdiction and Scope of Proceeding

41. The Division has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes. (All references to Sections and Chapters are to the Florida Statutes (2002). All references to Rules are to the Florida Administrative Code.)

42. At the outset, it is important to note that questions regarding the wisdom of the City's decision to construct the sign (and the related expenditure of significant City funds) and the consistency of the sign with the City's 1999 Vision Plan are beyond the scope of this proceeding. Those are issues must be resolved, if at all, between the City and its citizens at the local level.

43. The scope of this proceeding (and this Recommended Order) is limited to the propriety of the Department's issuance of the Permit based upon the standards set forth in State law and the Department's rules and policies, as well as Petitioner's standing to challenge the Permit through the Chapter 120 process. The threshold issue of Petitioner's standing, which is contested by both the Department and the City, will be addressed first.

B. Standing

44. Administrative review of agency action is available to a "party" whose "substantial interests" are determined by an agency. See Section 120.569(1). Thus, Petitioner's standing to seek administrative review of the Department's decision to issue the Permit initially turns on whether he is a "party" as defined in Section 120.52(12).

45. Section 120.52(12) defines "party" to mean:

> (a) Specifically named persons whose substantial interests are being determined in the proceeding.
>
> (b) Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.
>
> (c) Any other person, including an agency staff member, allowed by the agency to intervene or participate in the proceeding as a party. An agency may by rule authorize limited forms of participation in agency proceedings for persons who are not eligible to become parties.
>
> (d) Any county representative, agency, department, or unit funded and authorized by state statute or county ordinance to represent the interests of the consumers of a county, when the proceeding involves the substantial interests of a significant number of residents of the county and the board of county commissioners has, by resolution, authorized the representative, agency, department, or unit to represent the class of interested persons. . . . .

46. Petitioner is not a specifically named person whose substantial interests are being determined by the Department; only the City is. Nor does the record reflect that Petitioner is authorized by statute or local ordinance to represent the interests of the City residents. Accordingly, Petitioner is not a party under Section 120.52(12)(a) or (d).

47. Petitioner has not argued that he has a constitutional right to seek review of the Department's decision to issue the Permit, and he does not. Similarly, Petitioner has not cited nor has the undersigned's research located any statue or Department rule which entitles him to participate in this proceeding. For example, there is no statute or agency rule requiring the Department to publish a "notice of intent" to issue the permit at issue in this proceeding. Accordingly, Petitioner is not a party under Section 120.52(12)(b) unless his "substantial interests will be affected by [the] proposed agency action."

48. The standards for determining whether a third-party has standing to challenge an agency's decision to issue a permit were set forth in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2nd DCA 1981), rev. denied, 415 So. 2d 1359 (Fla. 1982). In that case, the court explained that:

> before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Id. at 482. Accord Florida Soc. of Ophthalmology v. State Bd. of Optometry, 532 So. 2d 1279 (Fla. 1st DCA 1988).[3]

49. Subsequent cases have required the third-party to demonstrate that he or she is substantially affected in a manner different than the general public at large to establish standing. See Grove Isle, Ltd. v. Bayshore Homeowners' Association, Inc., 418 So. 2d 1046, 1047 (Fla. 1st DCA 1982), rev. denied, 430 So. 2d 451 (Fla. 1983). And cf. City of Sarasota v. Windom, 736 So. 2d 741 (Fla. 2nd DCA 1999) (holding that plaintiffs lacked standing in circuit court to challenge the placement of speed humps and tables on various city streets to reduce the volume and speed of traffic and to enhance pedestrian safety because plaintiffs lived in different neighborhoods in the city and were not required to travel on the affected streets). But cf. Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 595 So. 2d 186, 189 (Fla. 1st DCA 1992) (rejecting "special injury" requirement for purposes of establishing standing in a Section 120.57 proceeding where environmental group that requested a hearing to challenge whether proposed use of state lands was consistent with Section 253.023, Florida Statutes).

50. Petitioner failed to demonstrate that he will suffer an immediate injury as a result of the Department's decision to issue the Permit. Indeed, Petitioner failed to show that he

will suffer any injury as a result of the issuance of the Permit and the construction of sign. Although he frequently drives on State Road 693, he does not use the median cut which is the only traffic movement conceivably affected by the sign. In this regard, Petitioner's general concerns regarding the sign's impacts on the safety of traffic flow on State Road 693 (while clearly the type of injury the Department's statutory scheme is designed to prevent) are no different than the interests of the general public. See Grove Isle, supra. And cf. Boca Raton Mausoleum, Inc. v. State, Dept. of Banking and Finance, 511 So. 2d 1060, 1066 (Fla. 1st DCA 1987) (taxpayer's general concerns regarding the effect of a proposed cemetery upon the community was not sufficient to give him standing to participate in the permitting process or challenge the issuance of the cemetery permit; taxpayer's concerns are more appropriately addressed to local zoning authorities). Because Petitioner failed to demonstrate that his substantial interests would be affected by the Department's issuance of the Permit, he is not a party under Section 120.52(12)(b).

51. With respect to Section 120.52(12)(c), the Department clearly did not acquiesce to the Petitioner's participation in this proceeding. See Department PRO, at 7 ("The Department has contended from the beginning of this proceeding that [Petitioner] lacks standing to request a hearing to review the

permit decision."). The Department did, however, allow Petitioner to become involved in the permitting process. Indeed, it was Petitioner's involvement in the process which ultimately led the Department to require the City to submit a sight-distance analysis prepared by an engineer. Nevertheless, Section 120.52(12)(c) appears to require some sort of formal authorization to "participate," which Petitioner lacks in this case. See Florida Society of Opthamology, 532 So. 2d at 1288 (considering but rejecting a standard that would provide standing to persons who simply participated in the permitting process based upon a personal concern); City of Key West v. Askew, 324 So. 2d 655, 659 (Fla. 1st DCA 1975) (involving a circumstance where agency formally allowed petitioners to participate in agency proceeding). Accordingly, Petitioner is not a party under Section 120.52(12)(c).

52. Even if Petitioner were considered to be a party under Section 120.52(12)(c) based upon his participation in the permitting process, that does not automatically give him standing in this proceeding because, as noted above, standing is limited to parties whose "substantial interests" are determined by the agency. See Section 120.569(1). Stated another way, even if Petitioner were considered a party under Section 120.52(12)(c), he must still demonstrate that his "substantial interests" are determined by the Department's issuance of the

Permit. Cf. Legal Environmental Assistance Foundation, Inc. v. Clark, 668 So. 2d 982, 987 (Fla. 1996) (to have standing to appeal final agency action, person must be a party and must be adversely affected by the agency action). As discussed above, Petitioner failed to prove that his substantial interests are affected based upon the test set forth in Agrico. Accordingly, Petitioner lacks standing to challenge the Permit in this proceeding even if he were considered a party under the definition in Section 120.52(12)(c).

53. In sum, because Petitioner is not a "party" as defined in Section 120.52(12) and/or because Petitioner's "substantial interests" are not determined by the Department's issuance of the Permit, Petitioner lacks standing to seek review of the Permit under Sections 120.569 and 120.57(1).

C. Merits of Petitioner's Challenge to the Permit

54. The Department and the City argue that Petitioner has the burden to demonstrate the inconsistency of the Permit with the Department's statutes, rules, and policies. See Department PRO, at 10; City PRO, at 8. This argument appears to be based upon the premise that the Permit has been issued and the sign has been constructed and, therefore, Petitioner is the party seeking to change the status quo. This argument is correct as far as it goes.

55. If, contrary to the determination above, it is determined (either by the Department in its final order or by an appellate court) that Petitioner is a party whose substantial interests were affected by the issuance of the Permit, then the Department was obligated to provide him a point of entry to challenge it's decision to issue the Permit before it became final. See Section 120.569(1); Rule 28-106.111; Florida League of Cities, Inc. v. Administration Comm'n, 586 So. 2d 397, 413-15 (Fla. 1st DCA 1991) ("The policy behind the requirement of a clear point of entry is to assure that affected parties are not prejudiced by administrative action without being afforded an opportunity to pursue an available and adequate remedy."). Had the Department been required to provide Petitioner with notice of its intent to issue the Permit, Petitioner's challenge would have been governed by Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981), and the City would have the burden to prove its entitlement to the Permit in this proceeding. However, in light of the determination above that Petitioner was not a party, the Department was not obligated to provide him a point of entry to challenge the Permit prior to its issuance and, as a result, Petitioner has the burden of proof in this proceeding.

56. The proper allocation of the burden of proof in this proceeding is not determinative. Indeed, to the extent that the

burden was on the Petitioner to prove that the Department improperly issued the Permit based upon the criteria in Section 2.7.6 of the Department's Traffic Engineering Manual (TEM), he did so; and, to the extent that the burden was on the City to prove its entitlement to the Permit under TEM 2.7.6, it failed to do so. Specifically, as discussed below, although the preponderance of the evidence demonstrates that the sign will not interfere with the safe and efficient movement of traffic on State Road 693, the preponderance of the evidence further demonstrates that the sign fails to meet several of the requirements in TEM Section 2.7.6, most significantly the requirement in TEM Section 2.7.6(4) that the sign be located "at or in proximity" to the City limits.

57. Section 334.044 grants the Department broad authority to coordinate the state transportation system. See, e.g., Section 334.044(10) (authorizing the Department to adopt uniform standards and criteria for the construction, design, maintenance, and operation of state roads). And see Sections 316.0745 and 335.09 (authorizing the Department to adopt uniform standards for signs and other traffic control devices for the regulation, control, guidance and protection of traffic on the State Highway System); Section 337.407 (authorizing the Department to regulate the erection of signs within the rights of way of the State Highway System pursuant to Chapter 479,

Florida Statutes). While the Department has considerable discretion in exercising its authority, that discretion is not absolute. See Dept. of Transportation v. Lopez-Torres, 526 So. 2d 674, 676 (Fla. 1988); Department PRO, at 10. 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. See, e.g., Vantage Healthcare Corp. v. Agency for Health Care Admin., 687 So. 2d 306, 308 (Fla. 1st DCA 1997), and cases cited therein; Cleveland Clinic Florida Hosp. v. Agency for Health Care Admin., 679 So. 2d 1237, 1241-42 (Fla. 1st DCA 1996).

58. Neither the City nor the Department has cited any rules in the Florida Administrative Code which prescribe standards for the issuance of permits for signs such as the one at issue in this proceeding, and the undersigned's research has not located any. Compare Rules 14-10.0022 through 14-10.007 (prescribing standards for the issuance of permits for signs subject to Chapter 479, and establishing other requirements for such signs); Rule 14-40.003 (prescribing standards for highway landscape projects and including a definition of landscaping that includes man-made amenities in addition to vegetation). The Department did not evaluate the City's permit application under those rules. In light of the nature and general location

of the sign (and the City's characterization of the sign as a "gateway" or entryway sign), the Department did not abuse its discretion in evaluating the permit application based upon the policies governing "customized place name signs" rather as an outdoor advertising sign under Chapter 479[4] and Rule Chapter 14-10 or a landscaping project subject to the requirements of Rule 14-40.003.

59. TEM Section 2.7, which was received into evidence as Exhibit R6, establishes the standards for erecting place name signs on state roads. The entire TEM is not specifically incorporated by reference into any Department rule; Rule 14-15.015 incorporates only Section 2.16 of the TEM. Accordingly, the remainder of the TEM appears to be a non-rule policy which the Department must "prove up" each time it is applied. See Section 120.57(1)(e). Neither Petitioner nor the City challenged the validity of the TEM in this proceeding, so to the extent that the Department was required to "prove up" the policies in the TEM it is deemed to have has done so.

60. The sign at issue in this proceeding qualifies as a "customized" place name sign, rather than a standard place name sign which is described in TEM Section 2.7.5 as a sign having a white legend on a green rectangular background. Accordingly, TEM Section 2.7.6 applies and the sign must meet the following requirements:

(1) Customized treatment shall be considered only for city limits, incorporated municipalities, and counties on State Highways other than limited access highways or freeways.

(2) Place name signs located off the State Highway right of way shall conform to Section 479.16(12), F.S.

(3) The preferred location of customized place name signs is off the State Highway right of way, where increased lateral clearance can be used. When additional right of way is not available, the Department should authorize placement of the sign within State Highway right of way. Sufficient lateral clearance is particularly important for custom place name signs due to nonstandard designs and sizes.

(4) The sign and structure or other treatment shall be located at or in proximity to the geographical boundary of the city or county in the approach direction only.

(5) The proposed installation will not interfere in any manner with other traffic control devices in the area.

(6) Existing city limit or county boundary signs and/or nonofficial signs or structures at or near the location shall be removed.

(7) All signs and supporting structures shall be designed, constructed, and installed to meet the Department’s clear zone and safety criteria including breakaway features. The design shall be signed and sealed by a Professional Engineer registered in the State of Florida.

(8) Sign size and lettering shall be appropriate for driver readability without slowing down.

(9) Sign information shall be limited to the name of the city or county logo, the words “Welcome To”, and where appropriate, a regional designation or phrase.

(10) The sign and structure shall be completely devoid of any commercial advertising or the name of any political incumbent and of such design and color as to be considered in good taste and aesthetically pleasing.

(11) The primary location for custom place name signs shall be along the roadside behind curb and gutter sections. Medians should only be considered if other roadside locations, either on or off State Highway rights of way, are not practical nor possible.

(12) Installations in any median shall meet the Department’s appropriate clear zone and safety criteria. Signs shall not be installed in both the median and roadside at a given location.

(13) Displays shall be fixed. No flashing or colored lights nor changeable messages shall be used. However, customized treatment may include interior or exterior illumination. In the absence of lighting, signs shall be reflectorized.

(14) Upon approval of a customized place name sign request, the Department and the local government shall execute an agreement providing for the local government to install and maintain the customized sign/sign supports and all landscaping and shrubbery associated with the installation as well as to defray the cost of any electrical energy necessary for operation of the sign display. The agreement shall clearly indicate that the Department reserves the right to have the installation modified or removed from within the State

> Highway rights of way if deemed necessary for any reason.

TEM Section 2.7.6.

61. The City is incorporated, and is located along State Road 693. State Road 693 is part of the State Highway System and is not a limited access highway or freeway. Accordingly, the Sign meets the requirements of TEM Section 2.7.6(1).

62. TEM Section 2.7.6(2) applies only to signs located "off the . . . right of way." The sign at issue in this proceeding is located within the right-of-way. Therefore, TEM Section 2.7.6(2) is not applicable.[5]

63. TEM Section 2.7.6(3) provides that the "preferred location" for customized place name signs is off the right-of-way. However, that section authorizes placement of the sign within the right-of-way if sufficient lateral clearance is provided. The preponderance of the evidence demonstrates that sufficient area outside the right-of-way is not available in the vicinity of the median where the sign is located and that sufficient lateral clearance exists with the sign at its present location. In this regard, the sign is more than 13 feet from State Road 693 at its closest point. Accordingly, to the extent that the median where the sign is located is determined to be an appropriate location for the sign based upon the other criteria

in TEM Section 2.7.6 (which, as discussed below, it is not), the sign meets the requirements of TEM Section 2.7.6(3).

64. TEM Section 2.7.6(4) provides that the sign shall be located "at or in proximity to the geographic boundary of the city . . . in the approach direction." At the outset, it is not apparent which direction is the "approach direction" for the sign because it is nearly equal distance from the City's northern and southern boundaries. Because the focus of the hearing was on the impact of the sign on the sight-lines of vehicles traveling southbound and, because both sides of the sign (including the north side which faces southbound traffic on State Road 693) include a mosaic, the approach direction could be considered southbound. However, the Department apparently considers the "approach direction" to be northbound because the basis of the Department's original "conceptual approval" of the sign was that the Department assumed (incorrectly, as discussed below) that the bridge into the City's "downtown" area from the New Corey Causeway was the City limits and that the "downtown" area was the first urban area within the City encountered by a vehicle traveling northbound on State Road 693. The conclusion that northbound is the "approach direction" is bolstered by the Department's initial mandate (which was later "waived") that the City remove the existing place name signs located adjacent to the northbound lanes of State Road 693. No matter which

direction is considered the "approach direction," the sign is not "at or in proximity to" the City limits in either direction.

65. Clearly, the Sign at issue in this proceeding is not located "at" the City's geographic boundary. It is approximately seven-tenths of a mile from the City's northern boundary (State Road 693 and Park Street) and approximately one-half mile from the City's southern boundary (on the New Corey Causeway at the north end of the Intercoastal bridge to St. Petersburg Beach).

66. The TEM does not define "in proximity," so it should be given its plain and ordinary meaning. See Southwest Florida Water Management Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000). "Proximate" (from which the word "proximity" is derived) is defined to mean "immediately preceding or following" or "very near." See Mirriam-Webster's Online Dictionary, at www.m-w.com. In light of those definitions, it is clear that the sign is not "in proximity to" the City's boundaries; indeed, the sign is located approximately in the middle of the City.

67. The Department staff's decision to make an "exception" to the locational requirement in TEM Section 2.7.6(4) was erroneous as a matter of fact and law. Specifically, the Department staff was under the erroneous belief that the City's southern boundary was at the bridge between the causeway and the

City's "downtown" area and that the area around the median was the first urban area that a northbound vehicle on State Road 693 would encounter. The preponderance of the evidence at the hearing demonstrates that the City's southern boundary is approximately one-half mile south of the City's "downtown" area at the northern end of the bridge over the Intercoastal to St. Petersburg Beach (which is a different bridge than the one leading into the City's "downtown" area), and the preponderance of the evidence further demonstrates that there are several condominium complexes between the City's southern boundaries and the City's "downtown" area.

68. Moreover, as a matter of law, neither the City nor the Department has identified any legal authority which would give the Department staff authority to "make an exception" to the requirements of TEM Section 2.7.6(4). While Section 120.542 does authorize agencies to grant variances or waivers to their rules, the record fails to demonstrate that the procedures in that section were followed in this case. Accordingly, the "exception" granted by the Department staff is legally ineffective, and because the sign is not located "at or in proximity to" the City limits, it fails to meet the requirements of Section 2.7.6(4).

69. TEM Section 2.7.6(5) provides that the sign must not interfere with traffic control devices in the area. The

preponderance of the evidence demonstrates that the sign will not interfere with the traffic signals at the intersection of State Road 693 and Shore Drive/Matthews Road nor any other traffic control device in the area. Accordingly, the sign meets the requirements of TEM Section 2.7.6(5).

70. TEM Section 2.7.6(6) requires existing city limit signs "at or near the location" to be removed. There are no such signs "at" the location of the sign at issue in this proceeding. There are, however, existing place name signs on State Road 693, both north and south of the location of the sign at issue in this proceeding which are closer to the City limits. To the extent that the Department considers the sign at issue in this proceeding to be "in proximity to" the City limits, it would also have to consider the existing signs to be "near" the location of the new sign. Accordingly, TEM Section 2.7.6(6) would require those signs to be removed.[6] If, however, the Department agrees with the determination above that the sign at issue in this proceeding is not "at or in proximity to" the City's boundaries, then it follows that the existing signs are not "at or near" the current sign and they would not need to be removed.

71. TEM Section 2.7.6(7) requires the sign to be "designed, constructed and installed" to meet the Department's clear zone and safety criteria. Because the median is

surrounded by a six-inch mountable curb, the applicable clear zone requirement is four feet from the back of the curb. See Plans Preparation Manual, Section 4.1.2 and Table 2.11.8 (received as Exhibit R8). The sign is located more than 13 feet from the back of the curb at its closest point. Therefore, the sign meets the Department's clear zone requirements, and because the sign is located outside of the clear zone, it is not required to be designed to break away on impact. The preponderance of the evidence (particularly Mr. Brown's analysis in Exhibit R10) also demonstrates that the sign meets the Department's sight-distance requirements, which are the safety criteria referenced in TEM Section 2.7.6(7). Accordingly, the Sign meets the requirements of TEM Section 2.7.6(7).

72. TEM Section 2.7.6(8) requires the sign size and lettering to be appropriate for driver readability without slowing down. The lettering on the sign takes up only a small portion of the sign's face, and the location of the words on the sign and their coloring make them difficult to read (particularly in comparison to the existing place name signs depicted in Exhibit P12). In this regard, neither the City nor the Department presented any credible evidence to rebut Petitioner's testimony that the sign is difficult to read when driving past it; indeed, Petitioner's testimony is corroborated by the photographs of the sign introduced by the City and the

Department and by the hearsay statement of another City resident regarding her inability to "see the words 'South Pasadena' when passing" the sign. Accordingly, the preponderance of the evidence demonstrates that the sign fails to meet the requirements of TEM Section 2.7.6(8).

73. TEM Section 2.7.6(9) limits the information which can be displayed on a customized place name sign. The only words on the sign at issue in this proceeding are the name of the City and its motto, "our place in the sun." Accordingly, the sign meets the requirements of TEM Section 2.7.6(9).

74. TEM Section 2.7.6(10) prohibits commercial and political advertising on the sign and requires the sign to be in good taste and to be aesthetically pleasing. The sign contains no commercial or political advertisements, and Petitioner has not alleged that the sign is not aesthetically pleasing. Accordingly, the sign meets the requirements of TEM Section 2.7.6(10).

75. TEM Section 2.7.6(11) provides that the primary location for a customized place name sign is along the roadside, and further provides that "[m]edians should only be considered if other roadside locations, either on or off State Highway rights of way, are not practical nor possible." The preponderance of the evidence fails to demonstrate that another location for a customized place name sign was not practical or

possible. While there may not be any other location for a sign of the size of the sign constructed by the City, that is not the standard in TEM Section 2.7.6(11); the standard is whether other locations are practical or possible for a customized place name sign of some kind. Clearly, there are other locations for customized place name signs along State Road 693 because three such signs currently exist. Accordingly, the sign fails to meet the requirements of TEM Section 2.7.6(11).

76. TEM Section 2.7.6(12) requires structures located in medians to meet the Department's clear zone and safety criteria. As discussed above in relation to TEM Section 2.7.6(7), the preponderance of the evidence demonstrates that the sign meets the clear zone and sight-distance requirements. Accordingly, the sign meets the requirements of TEM Section 2.7.6(12).

77. TEM Section 2.7.6(13) provides that displays shall be fixed, contain no flashing lights or changeable messages, and shall be reflectorized if not illuminated. The sign clearly contains a fixed display, but the record does not reflect whether the sign is illuminated or whether it is reflectorized. However, because Petitioner did not expressly challenge the issuance of the Permit on this ground, it is unnecessary to determine whether the sign meets the requirements of TEM Section 2.7.6(13).

78. TEM Section 2.7.6(14) provides that upon approval of a customized place name sign request, the Department and the local government shall execute an agreement requiring the local government to maintain the sign and any associated landscaping. The record does not reflect whether such an agreement was entered into between the City and the Department; however, because Petitioner did not expressly challenge the issuance of the permit on this ground, it is unnecessary to determine whether the sign meets the requirements of TEM Section 2.7.6(14).

79. Finally, it is important to note that TEM Section 2.7.6(14) requires the agreement to reflect that the Department reserves the right to "have the [sign] modified or removed from within the State Highway rights of way if deemed necessary for any reason." This language put the City on notice that its sign may be subject to removal. In light of determinations set forth above that the sign should never have been permitted at its present location, the sign should be removed unless the Department grants the City an after-the-fact variance or waiver pursuant to Section 120.542 for those requirements in the TEM that the sign fails to meet.

RECOMMENDATION

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

RECOMMENDED that the Department of Transportation issue a final order which dismisses Petitioner's challenge to special use permit No. 02-K-799-0021 based upon his lack of standing.

If, however, the Department rejects that recommendation in its final order and instead determines that Petitioner does have standing, then the Department should issue a final order which:

(1) determines that special use permit No. 02-K-799-0021 was not properly issued because the sign fails to meet the requirements of Section 2.7.6 of the Department's Traffic Engineering Manual; and

(2) directs the City to remove the sign unless it obtains a variance or waiver of those requirements in Section 2.7.6 of the Traffic Engineering Manual with which it does not comply pursuant to Section 120.542, Florida Statutes.

DONE AND ENTERED this 31st day of December, 2002, in Tallahassee, Leon County, Florida.

T. KENT WETHERELL, II
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of December, 2002.

ENDNOTES

1/ Petitioner also called Robert Hicks as a witness, but Mr. Hicks was not permitted to testify because the subject-matter of his testimony (as it was represented by Petitioner) was not directly relevant to issues in this proceeding. Petitioner was given an opportunity to make a proffer of Mr. Hicks testimony for the record, but he chose not to do so.

2/ Petitioner did not formally offer Exhibit P5 as an exhibit at the hearing, and the undersigned has not considered it in preparing this Recommended Order. However, because the exhibit was discussed at length at the hearing, it is included as part of the record transmitted to the Department herewith.

3/ In Florida Society of Opthamology, the court acknowledged but rejected the broader view of standing advocated by Professor Pat Dore, a noted scholar on Florida's Administrative Procedure Act. Professor Dore suggested that standing should be afforded to:

> any person whose important or significant personal concerns will be acted on or changed in some way in a proceeding in which he makes an appearance and in which the substantial interests of a party are

> decided, settled, or resolved finally by an agency[.]

Florida Society of Opthamology, 532 So. 2d at 1288 n.10 (quoting Dore, Access to Florida Administrative Proceedings, 13 Fla. St. L. Rev. 967, 1065 (1986)). Petitioner meets that test; however, that test is not the law.

4/ Indeed, the definition of "sign" in Chapter 479 specifically excludes "an official traffic control sign, official marker, or specific information panel erected, caused to be erected, or approved by the department." See Section 479.01(17).

5/ TEM Section 2.7.6(2) is counterintuitive because it requires signs located off the right of way to conform to Section 479.16(12) which limits the size of the sign to eight square feet while imposing no similar size limitation on place name signs within the right-of-way.

6/ For the reasons discussed above in connection with TEM Section 2.7.6(4), the Department staff's purported "waiver" of this requirement is legally ineffective.

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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.