

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NATIONAL ADVERTISING COMPANY,)
)
 Petitioner,)
)
vs.) Case No. 02-4739
)
DEPARTMENT OF TRANSPORTATION,)
)
 Respondent.)

)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held a formal administrative hearing in this case on February 7, 2003, in Orlando, Florida.

APPEARANCES

For Petitioner: Gerald S. Livingston, Esquire
Livingston & Reilly, P.A.
Post Office Box 2151
Orlando, Florida 32802

For Respondent: J. Ann Cowles, Esquire
Department of Transportation
605 Suwannee Street
Haydon Burns Building, Mail Station 58
Tallahassee, Florida 32399-0458

STATEMENT OF THE ISSUE

Whether the billboard structure owned by Petitioner, National Advertising Company, located adjacent to U.S. 1/State Road 5, at mile marker 87.5, City of Islamorada Village of

Islands, Islamorada, Monroe County, Florida, is in violation of the provisions of Rule 14-10.007, Florida Administrative Code, or Chapter 479, Florida Statutes.

PRELIMINARY STATEMENT

On June 26, 2002, Respondent, Department of Transportation, directed a Notice of Violation to Petitioner advising that "[T]he nonconforming outdoor advertising sign referenced by the permits listed above is in violation of Rule 14-10.007, Florida Administrative Code, for the reasons listed below:

14-10.007(2) No more than 50% of the structural materials of a nonconforming sign may be replaced within a 24 month period;

14-10.007(4) A nonconforming sign may not be disassembled and re-erected at the same location; and

14-10.007(6)(a) A destroyed nonconforming sign may not be re-erected. "Destroyed" means that 50% of the upright supports (for a wooden sign) of the sign are damaged such that replacement is necessary.

The Notice of Violation further advised, "it would appear that your sign has lost its nonconforming status and is now illegal."

On July 15, 2002, Petitioner filed a petition with Respondent seeking an administrative hearing appealing the final agency action as a result of the Notice of Violation received by Petitioner on July 3, 2002, regarding Petitioner's outdoor advertising sign (billboard), which is located on U.S. 1 in the

City of Islamorada Village of Islands, Islamorada, Monroe County, Florida.

On December 5, 2002, Respondent forwarded the Petition to the Division of Administrative Hearings requesting an administrative hearing. On December 6, 2002, an Initial Order was sent to both parties. On December 13, 2002, the case was scheduled for final hearing on February 7, 2003, in Orlando, Orange County, Florida.

The final hearing was conducted as scheduled on February 7, 2003. Respondent presented three witnesses, Lynn Holschuh, Mark Johnson, and Charles Baldwin. Respondent offered seven exhibits, which were received into evidence and marked Respondent's Exhibits 1 through 7. Petitioner presented two witnesses, John Harrison and Hector Rivera. Mr. Rivera was qualified as an expert in construction, maintenance, repair and cost of repair of billboards. Petitioner offered one exhibit, which was received into evidence and marked Petitioner's Exhibit 1.

The Transcript of Proceedings was filed on March 22, 2003. On April 4, 2003, the parties jointly moved to extend the time for filing proposed recommended orders; the motion was granted. Both parties filed Proposed Recommended Orders, which were thoughtfully considered by the undersigned Administrative Law Judge.

FINDINGS OF FACT

Based on the evidence and the testimony of witnesses presented and the entire record in this proceeding, the following findings of fact are made:

1. Petitioner is the owner and operator of an outdoor advertising sign ("billboard") located adjacent to U.S. 1/State Road 5, at mile marker 87.5, City of Islamorada Village of Islands, Islamorada, Monroe County, Florida.

2. In the immediate area of where the billboard's location, U.S. 1/State Road 5 is a U.S. Federal Aid Primary Highway, over which Respondent has jurisdiction.

3. The billboard is permitted pursuant to state sign permit numbers AS788 and AS789.

4. The billboard is 570 feet from the nearest permitted billboard. Respondent considers the billboard to be nonconforming because it is not in compliance with the current spacing requirements on the Federal Aid Primary Highway System.

5. In 1984, the spacing of billboards on Federal Aid Primary Highways changed from 500 feet to 1,000 feet. When the spacing requirements changed, there was a savings provision in Subsection 479.07(9)(c), Florida Statutes (1984), that allowed signs that were conforming in 1984 did not become nonconforming because of the change in the spacing requirement.

6. The billboard was permitted on August 26, 1986. Petitioner's Application for Outdoor Advertising Sign Permit, Tag No. AS788, indicates that the billboard is "500+" feet from the nearest permitted sign and that the method of marking site is that it was an "existing sign," which suggests that the billboard existed prior to the subject permit. If the billboard was built in 1986, it should not have been permitted because the spacing requirement in 1986 was 1,000 feet.

7. This permit information is based upon a document produced as a result of a statewide billboard inventory prepared by a subcontractor of Respondent. There were mistakes in the statewide inventory. Tag numbers AS788 and AS789 could be original tags or replacement tags.

8. The billboard was a ten-foot by 40-foot structure with a two-foot by 38-foot A frame; five poles; and six stingers horizontal made by two-foot by six-foot by 20-foot lumber.

9. On July 21, 2001, a storm came through the City of Islamorada Village of Islands, which caused the five vertical poles that held the billboard erect to be broken. As the storm blew through, the upper structure of the billboard was blown over and rested on the ground. The upper structure of the billboard suffered little damage; importantly, the structural members of the billboard, with the exception of the five vertical poles, were intact and could be reused.

10. Petitioner was prevented from re-erecting the billboard by the City of Islamorada Village of Islands. On June 18, 2002, Petitioner and the City of Islamorada Village of Islands entered into an agreement that allowed Petitioner to remove the billboard and avoid a fine in the amount of \$100.00 per day.

11. The value of the structural materials in the billboard immediately prior to the July 21, 2001, storm was \$1,353.60. The cost of materials to repair the billboard immediately after the July 21, 2001, storm was \$536.50. The replacement materials constitute 39.7 percent of the value of the materials in the sign prior to the storm damage. The only new materials needed to re-erect the billboard are the five vertical poles.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction of the parties and the subject matter. Sections 120.569 and 120.57, Florida Statutes.

13. Respondent has the burden of proof of establishing by a preponderance of the evidence the allegations of its Notice of Violation:

[T]he nonconforming outdoor advertising sign referenced by the permits listed above is in violation of s. [sic] 14-10.007, Florida Administrative Code, for the reasons listed below:

14-10.007(2) No more than 50% of the structural materials of a nonconforming sign may be replaced within a 24 month period;

14-10.007(4) A nonconforming sign may not be disassembled and re-erected at the same location;

14-10.007(6)(a) A destroyed nonconforming sign may not be re-erected. "Destroyed" means that 50% of the upright supports (for a wooden sign) of the sign are damaged such that replacement is necessary.

Florida Department of Transportation v. J.W.C. Company, Inc.,
396 So. 2d 778 (Fla. 1st DCA 1981).

14. In the event Respondent establishes that the nonconforming billboard was "destroyed," as defined in Rule 14-10.007(6)(a), Florida Administrative Code, Petitioner has the burden of proof of establishing by a preponderance of the evidence that it comes within the "exception" established in Rule 14-10.007(6)(a)2, Florida Administrative Code.

15. Rule 14-10.007(6)(a)2, Florida Administrative Code, reads as follows:

2. If the permittee demonstrates that the replacement materials cost to re-erect the sign would not exceed 50% of the value of the structural materials in the sign, immediately prior to destruction. The following shall be applicable in determining whether the replacement materials cost to re-erect the sign would not exceed 50% of the value of the structural materials in the sign:

a. Structural materials are all those materials incorporated into the sign as load-bearing parts, including vertical supports, horizontal stringers, braces, bracing wires, brackets, and catwalks. Structural materials do not include the sign face, any skirt, any electrical service, or electric lighting, except in cases where such items have been incorporated into the sign as load-bearing parts.

b. The value of the structural materials in the sign immediately prior to destruction shall be based on the cost of all structural materials contained in the sign as it was configured just prior to damage, and the cost of such materials shall be based on normal market cost as if purchased new on or about the date of destruction, without regard to any labor costs or special market conditions.

c. The materials to be included in the replacement materials costs to re-erect the sign shall be all materials that would be used to return the sign to its configuration immediately prior to destruction, and shall include any material obtained from a source other than the sign itself, whether used, recycled, or repaired, but shall not include any material from the sign itself that is repaired on-site. The repairs to the sign shall be with like materials, both in type and size, and shall be those reasonably necessary to permanently repair the sign in a manner normally accomplished by the industry in that area. The cost of such materials shall be as described in paragraph (6)(a)2.b.

16. Respondent successfully established that all five poles that held the billboard erect were destroyed by the storm and, therefore, met the definition of "destroyed" contemplated by Rule 14-10.007(6)(a), Florida Administrative Code.

17. Petitioner successfully established that it met the "exception" established in Rule 14-10.007(6)(a)2, Florida Administrative Code, as it clearly showed that the cost of structural replacement materials did not exceed 50 percent of the value of structural materials in the sign immediately prior to the storm.

18. In 1984, the Florida legislature enacted Subsection 479.07(9)(a), Florida Statutes (1984), which reads as follows:

A permit shall not be granted for any sign for which a permit had not been granted by the effective date of this act unless such sign is located at least:

1. One thousand five hundred feet from any other permitted sign on the same side of the highway, if on an interstate highway.

2. One thousand feet from any other permitted sign on the same side of the highway, if on a federal-aid primary highway.

19. At the same time the legislature extended the spacing between billboards from 500 feet to 1000 feet, it passed the following "saving" legislation in Subsection 479.07(9)(c), Florida Statutes (1984):

Nothing in this subsection shall be construed so as to cause a sign which is conforming on the effective date of this act to become nonconforming.

20. The evidence presented leaves questions as to whether or not the billboard is "nonconforming." Had the billboard been

first erected in 1986, or between the effective date of the legislation referenced in paragraph 18 and August 26, 1986 (the permit date), it should not have been permitted as it was 570 feet from an existing sign and would not have met the 1000 feet minimum requirement of Subsection 479.07(9)(a), Florida Statutes (1984). The Application for Outdoor Advertising Sign Permit, Tag No. AS788, indicates that the billboard is "500+" feet from the nearest permitted sign and that the method of marking site is that it was an "existing sign," which suggests that the billboard existed prior to the 1986 permit. One is left to conclude that the billboard existed prior to the 1984 legislation and was permitted in 1986 in accordance with Subsection 479.07(9)(c), Florida Statutes (1984).

RECOMMENDATION

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

RECOMMENDED that Respondent, Department of Transportation, issue a final order rescinding its Notice of Violation and allowing Petitioner, National Advertising Company, to re-erect its billboard at the same location and in the same configuration as previously permitted.

DONE AND ENTERED this 14th day of May, 2003, in
Tallahassee, Leon County, Florida.

JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of May, 2003.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.