STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CROWN OUTDOOR ADVERTISING, INC., AND TROPICAL LANDHOLDINGS,	)	
Petitioners,	)	
vs.	)	Case Nos. 04-1764
	)	04-1765
DEPARTMENT OF TRANSPORTATION,	)	04-1766
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, these causes came on for final hearing on October 7, 2004, in Tallahassee, Florida, before Fred L. Buckine, a duly-designated Administrative Law Judge of the Division of Administrative Hearings. The following appearances were entered.

APPEARANCES

For Petitioners: Carl E. Patrick, Esquire
Carl E. Patrick, P.A.
6823 Old Ranch Road
Sarasota, Florida 34241-9640

For Respondent: Erik R. Fenniman, Esquire
Department of Transportation
605 Suwannee Street
Haydon Burns Building, Mail Station 58
Tallahassee, Florida 32399-0450

STATEMENT OF THE ISSUE

The issue in these causes is whether denial of Petitioners' outdoor advertising sign site permit applications by Respondent were correctly determined under Subsection 479.111(2), Florida Statutes (2003), on the basis that the sign sites were unzoned commercial/industrial areas; and on the basis that within attending factual circumstances, the sign site did not qualify as unzoned commercial/industrial areas as defined in Subsection 479.01(23), Florida Statutes (2003).

PRELIMINARY STATEMENT

On September 8, 2003, Petitioners, Crown Outdoor Advertising, Inc., and Tropical Landholdings, filed six applications for outdoor advertising sign site permits with Respondent, Department of Transportation (Department). By Notice dated September 23, 2003, the Department denied three of the six applications.

On October 21, 2003, Petitioners filed three request for an administrative hearing contesting the three denials by the Department; and on April 19, 2004, the matter was referred to the Division of Administrative Hearings (DOAH) requesting the assignment of an Administrative Law Judge to conduct a Chapter 120, Florida Statutes (2003), proceeding.

On May 19, 2004, the Initial Order was entered, and on May 26, 2004, Respondent filed a response thereto. On June 9,

2004, an Order of Consolidation for three cases (DOAH Case Nos. 04-1764, 04-1765 and 04-2766)[1/] was entered. The consolidated cases were initially assigned to Administrative Law Judge William F. Quattlebaum.

A Notice of Hearing scheduling the final hearing for July 22, 2004, and an Order of Pre-Hearing Instructions were entered on June 9, 2004,

An unopposed motion for continuance filed by Petitioners was granted by Order dated July 1, 2004, rescheduling the final hearing for August 31, 2004. On July 16, 2004, an Unopposed Motion for Continuance filed by Respondent was granted by Order dated July 22, 2004, rescheduling the final hearing for October 7, 2004, in Tallahassee, Florida.

Pre-hearing statements were filed on September 28 and October 1, 2004, respectively, by Respondent and Petitioners. The final hearing was held, as scheduled on October 7, 2004.

At the final hearing, Petitioners presented the testimony of Lynn Holschuh, the Department's state administrator for outdoor advertising, and James Taylor Duff, part owner of Petitioner Tropical Landholdings. Petitioners' Exhibits A, B and C were admitted into evidence. Respondent also presented the testimony of its employee, Ms. Holschuh; and Respondent's Exhibits 2, 3, and 4[2/] were admitted into evidence.

Official recognition was taken of Chapter 479, Florida Statutes (2003), 23 C.F.R. 750.708, and Florida Administrative Code Rules 9J-5.003 and 14-10.0052; the City of North Port Ordinance No. 02-46, the City of North Port Comprehensive Plan; and the Final Order in DOAH Case No. 03-3682 issued on February 16, 2004, by Administrative Law Judge Barbara Staros.[3/]

The parties were directed to file proposed recommended orders within ten days from the date of the Transcript, which was filed with DOAH on October 22, 2004. The parties' joint motion for an extension of time to file proposed recommended orders 20 days from the date of the Transcript was granted, which waived the time for this Recommended Order. See Florida Administrative Code Rule 28-106.216.

On November 10 and 15, 2004, Respondent and Petitioners, respectively, timely filed their Proposed Recommended Orders which have been considered by the undersigned in preparation of this Recommended Order.

FINDINGS OF FACT

Based upon the observation of the witnesses and their demeanor while testifying; documentary materials received in evidence; evidentiary rulings made pursuant to Sections 120.569 and 120.57, Florida Statutes (2003); and the entire record of this proceeding, the following relevant and material findings of fact are determined:

1. Petitioner, Tropical Landholdings, a Florida Corporation, was created in 1998 and purchased approximately 700 to 800 acres of land comprised of residential multi-family and commercial properties along Interstate 75 (I-75) in Punta Gorda, Florida. On September 8, 2003, Petitioner, Crown Advertising, Inc., of Belleview, Florida, submitted three outdoor advertising sign site permit applications to the Department for review.

2. On September 23, 2003, the Department denied the three outdoor advertising sign site permit applications for the following reasons: (1) the sign sites were not permitted under the local land use designation of site (§ 479.111(2), Fla. Stat. (2003)); and (2) the sign sites did not qualify as unzoned commercial/industrial area. § 479.01, Fla. Stat. (2003).

3. The sign site permit application forms used by Petitioners in these causes were composed and authorized by the Department. The form required the applicant to obtain and provide information regarding the proposed sign site, what is proposed to be constructed on the site, and where the proposed construction is to occur.

4. The sign site permit applications also required the applicant to secure information from the appropriate local zoning official of the future land use designation and the current zoning of the proposed sites enacted by the local government's Comprehensive Plan and land use development

regulations. This form required information from the local government as to whether the applicant is or is not in compliance with all adopted local ordinances. Permission to erect an outdoor sign structure on the identified sign site is subject to approval by the City.

5. Petitioners complied with the requested information. The local government, the City of North Port, approved the three sign site permit applications in question and granted Petitioners permission to erect three outdoor billboard signs. This local grant of approval was then subjected to concurring approval by the Department.

6. After receiving the sign site permits that were approved by the City, the Department engaged the services of a consultant to conduct on-site review and identification of: (1) the local government's designation for each proposed sign site; (2) the permitted uses of each proposed sign site (local drainage facilities, pipeline corridors, underground communication cables, electric transmission lines, and outdoor advertising signs); and (3) a review of adjacent and surrounding parcels. The consultant reported to the Department the factual circumstances attendant the three locally approved sign sites. It should be noted that the consultant did not render an opinion regarding the Department's approval or denial of the sign site permit applications.

7. The sign sites in question were zoned under the local "land use designation" of the City of North Port's Ordinance 02-46, Section 53.146 (Ordinance 02-46), as a "utility industrial corridor." The zoned land was composed of strips of land measuring 25 to 70 feet in width on the west side and 160 to 170 feet in width on the east side.

8. The "permitted governmental uses" of a parcel zoned as a "utility industrial corridor," included such uses as underground communication cables, electric transmission lines, and outdoor advertising signs. Ordinance 02-46, under the title "Prohibited Uses and Structures," specifically prohibits "all commercial and industrial uses."

9. Based upon a review of all information provided by Petitioners, the local government, and its consultant, the Department first determined the three sign sites on which the subject signs were to be erected and located, prohibited commercial or industrial uses. The Department then determined, based upon an analysis of the materials provided by its consultant and the City of North Port, the three sign sites in question had not been zoned for commercial or industrial uses as a part of the local government's comprehensive zoning plan. Based upon (1) the prohibition of commercial or industrial uses and (2) no commercial or industrial zoning of the sign sites, the Department concluded these three sign sites were zoned

"primarily to permit outdoor advertising," a prohibited function. The denials were required.

10. Under the local land use designation of Ordinance 02-46, the City of North Port's permitted uses included local drainage facilities and a pipeline corridor.

11. Under governmental uses designation of Ordinance 02-46, the City of North Port's permitted uses included underground communication cables, electric transmission lines, and outdoor advertising. However, Ordinance 02-46 specifically prohibits all commercial and industrial uses under the governmental uses designation.

12. When questioned by Petitioners, Ms. Holschuh testified "that the Department's intent was to allow [sign] permits whenever possible and never prohibit the installation of billboards." From this specific statement of testimony, Petitioners argued that "implementing the intent the Department must look beyond the labels of the zoning and look at the actual primary uses allowed under those designations." (Emphasis added.) Ms. Holschuh disagreed with Petitioners' characterization of the Department's procedures and convincingly maintained that the Department based its denials on "sign site zoning" and factors considered for determining an "unzoned commercial/industrial area" as defined by statute.

13. Continuing with its argument, Petitioners conclude "[T]he department . . . appears to be in conflict with Judge Barbara Staros' decision of February 16, 2004, in a rule challenge proceeding, where she analyzed the Sign Permit procedure under Section 479.07, Florida Statutes." In her Final Order, Administrative Law Judge Barbara Staros made a Finding of Fact in paragraph 30, stating:

> Once the local government zoning official certifies that the proposed sign identified in the application is in compliance with the comprehensive plan adopted pursuant to Chapter 163, the Department does not go behind that certification to look factually at whether the zoning action was consistent with the comprehensive plan. Page 13.

14. The procedures followed by the Department in this proceeding complied with Judge Staros Finding of Fact in paragraph 31, where she wrote:

> The Department uses the application and the information contained therein to determine whether a proposed sign location falls within the definition of a "commercial or industrial zone." If it does, [fall within] then the Department determines whether those designations were adopted as part of the local government's comprehensive planning efforts or were "primarily" adopted to permit outdoor advertising signs on that location. Page 30.

15. Based upon it's receipt, review, and analysis of the specific facts provided by all parties of interest, the Department determined the sites where the signs were to be

erected prohibited commercial or industrial use. The Department factually determined that no local zoning identified the sites as commercial or industrial.

16. The Department concluded correctly and in accord with Florida Administrative Code Rule 14-10.0052 that these three sign sites were zoned by the City of North Port, the local governmental entity, "primarily to permit outdoor advertising" contrary to sign site permit procedures under Section 479.07, Florida Statutes (2003).

17. Based upon the evidence of record and considering the size of the sign site, the local government's zoning of the site, designated uses of the site, and prohibited uses on the site, denial of the sign applications was correctly determined pursuant to Subsection 479.111(2), Florida Statutes (2003), and Florida Administrative Code Rule 14-10.0052.

18. Based on the testimonies of Ms. Holschuh and James Duff, who testified regarding his ownership, property taxes paid, and the investors' inability to use the property in question to their economic advantage, Petitioners failed to carry the burden of producing a preponderance of credible evidence to establish that the Department incorrectly and/or wrongfully denied Petitioners' applications for three sign site permits pursuant to Subsection 479.111(2), Florida Statutes (2003), and Florida Administrative Code Rule 14-10.0052.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2003).

20. Respondent, Department of Transportation, is the state agency responsible for enforcing federal regulations of outdoor advertising pursuant to Section 479.02, Florida Statutes (2003), that authorizes the Department to:

> (1) Administer and enforce the provisions of this chapter and the agreement between the state and the United States Department of Transportation relating to the size, lighting, and spacing of signs in accordance with Title I of the Highway Beautification Act of 1965 and Title 23, United States Code, and federal regulations in effect as of the effective date of this act.
>
> (2) Regulate size, height, lighting, and spacing of signs permitted in zoned and unzoned commercial areas and zoned and unzoned industrial areas on the interstate highway system and the federal-aid primary highway system.
>
> (3) Determine unzoned commercial areas and unzoned industrial areas.
>
> * * *
>
> (7) Adopt such rules as it deems necessary or proper for the administration of this chapter, including rules which identify activities that may not be recognized as industrial or commercial activities for purposes of determination of

an area as an unzoned commercial or industrial area.

21. Federal law and regulations provide the basis and authority for Florida's requirement that signs be located within commercial or industrial areas. See 23 U.S.C. 131(d) that states, in pertinent part,

> [S]igns may be erected and maintained . . . within areas . . . which are zoned industrial or commercial under authority of State Law, or in unzoned commercial or industrial areas . . . as may be determined by agreement between the State and the Secretary. . . States shall have full authority . . . to zone areas for commercial or industrial purposes.

22. Commercial or industrial zones and unzoned commercial or industrial areas are defined in Subsection 479.01(3) and (23), Florida Statutes (2003), as:

> (3) "Commercial or industrial zone" means a parcel of land designated for commercial or industrial use under both the future land use map of the comprehensive plan and the land use development regulations adopted pursuant to chapter 163. If a parcel is located in an area designated for multiple uses on the future land use map of a comprehensive plan and the land development regulations do not clearly designate that parcel for a specific use, the area will be considered an unzoned commercial or industrial area if it meets the criteria of subsection (23).
>
> * * *
>
> (23) "Unzoned commercial or industrial area" means a parcel of land designated by the future land use map of the comprehensive

plan for multiple uses that include commercial or industrial uses but are not specifically designated for commercial or industrial uses under the land development regulations, in which three or more separate and distinct conforming industrial or commercial activities are located.

(a) These activities must satisfy the following criteria:

1. At least one of the commercial or industrial activities must be located on the same side of the highway and within 800 feet of the sign location;

2. The commercial or industrial activities must be within 660 feet from the nearest edge of the right-of-way; and

3. The commercial industrial activities must be within 1,600 feet of each other.

Distances specified in this paragraph must be measured from the nearest outer edge of the primary building or primary building complex when the individual units of the complex are connected by covered walkways.

(b) Certain activities, including, but not limited to, the following, may not be so recognized as commercial or industrial activities:

1. Signs.

2. Agricultural, forestry, ranching, grazing, farming, and related activities, including, but not limited to, wayside fresh produce stands.

3. Transient or temporary activities.

4. Activities not visible from the main-traveled way.

5. Activities conducted more than 660 feet from the nearest edge of the right-of-way.

6. Activities conducted in a building principally used as a residence.

7. Railroad tracks and minor sidings.

8. Communication towers.

23. Petitioners, as applicants for sign permits and the parties seeking affirmative relief, have the burden of proof by a preponderance of the evidence to establish that the Department wrongfully denied their applications for three sign site permits pursuant to Subsection 479.111(2), Florida Statutes (2003), and Florida Administrative Code Rule 14-10.0052. Florida Department of Transportation v. J.W.C. Co. Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

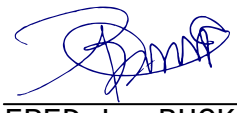
24. Petitioners failed to produce, through the testimonies of Ms. Holschuh and James Duff, a preponderance of credible evidence of record that the alleged factual basis relied upon by the Department pursuant to Subsection 479.111(2), Florida Statutes (2003), and Florida Administrative Code Rule 14-10.0052, resulted in wrongfully denying Petitioners' three outdoor sign site permit applications.

RECOMMENDED ORDER

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

RECOMMENDED that Respondent, Department of Transportation, enter a final order of dismissal of Petitioners, Crown Outdoor Advertising, Inc., and Tropical Landholdings', challenge of the denial of its three outdoor advertisement sign site permit applications.

DONE AND ENTERED this 19th day of January, 2005, in Tallahassee, Leon County, Florida.



FRED L. BUCKINE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of January, 2005.

ENDNOTES

[1/] In Case No. 04-1764, the applications denied were for Permit Nos. 54579 and 54580; Case No. 04-1765, the applications denied were for Permit Nos. 54838 and 54584; and Case No. 04-1766, the application denied were for Permit Nos. 54581 and 54582.

[2/] Respondent's Exhibit 2, 3 and 4 are applications for sign site permits at three different locations at State Road 93 (I-75) south of Toledo Blade Boulevard, Sarasota, Florida.

[3/] In Florida Outdoor Advertising Association, Inc.; Clearwater Channel Outdoor, Inc.; Koala L.L.C.; Viacom Outdoor, Inc. d/b/a/ National Advertising Company v. Department of Transportation, Case No. 03-3682RP (DOAH February 16, 2004), Petitioners, all of

whom are engaged in the business of outdoor advertising, challenged the Department proposed Florida Administrative Code Rule 14-10.0052 as an invalid exercise of delegated legislative authority. The proposed rule was found to be valid and the challenge dismissed. Petitioners appealed Administrative Law Judge Barbara Staros' Final Order and the appeal was dismissed. Florida Administrative Code Rule 14-10.0052 was a valid rule at all times material to the above proceeding.

Petitioners' arguments, both at hearing and in post-hearing submittals, that based upon "an agreement between the Department and Petitioners," as a condition of the dismissal of their appeal that the Department would amend Florida Administrative Code Rule 14-10.0052, is without merit and not considered in this proceeding by the undersigned.

COPIES FURNISHED:

Erik Fenniman, Esquire
Department of Transportation
605 Suwannee Street
Haydon Burns Building, Mail Station 58
Tallahassee, Florida 32399-0450

Carl E. Patrick, Esquire
Carl E. Patrick, P.A.
6823 Old Ranch Road
Sarasota, Florida 34241-9640

James C. Myers, Clerk of Agency Proceedings
Department of Transportation
605 Suwannee Street
Haydon Burns Building, Mail Stop 58
Tallahassee, Florida 32399-0450

Pamela Leslie, General Counsel
Department of Transportation
605 Suwannee Street
Haydon Burns Building, Mail Stop 58
Tallahassee, Florida 32399-0450

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 these cases.