STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAMAR ADVERTISING OF FT. WALTON BEACH,	)	
Petitioner,	)	
	)	Case No. 06-3255
vs.	)	
DEPARTMENT OF TRANSPORTATION,	)	
Respondent.	)	

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was convened in this cause on November 17, 2006, in DeFuniak Springs, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: James E. Moore, Esquire
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For Respondent: Susan Schwartz, Esquire
Department of Transportation
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STATEMENT OF THE ISSUE

Whether the Florida Department of Transportation (FDOT) properly denied application(s) for an advertising sign permit.

PRELIMINARY STATEMENT

On September 27, 2005, Petitioner, Lamar Advertising of Ft. Walton Beach (Lamar), filed two applications for outdoor advertising sign site permits, seeking permits from Respondent for one site location for a two-faced outdoor advertising sign. By notice dated October 18, 2005, the application was denied.

On August 28, 2006, Petitioner filed an Amended Request for Administrative Hearing, which was referred to the Division of Administrative Hearings the same day.

On September 15, 2006, the case was noticed for a November 17, 2006, final disputed-fact hearing.

At the hearing, Joint Exhibit A, the parties' Joint Pre-hearing Stipulation, was admitted in evidence, as were Joint Exhibits 1 through 10.

Petitioner presented the oral testimony of Billy Wayne Strickland, Chad Pickens, and Tim Durbin. Petitioner's Exhibits 1 and 2 were admitted in evidence. Respondent presented the oral testimony of Lynn Holschuh, and Billy Wayne Strickland.

Official recognition was taken of Chapter 479, Florida Statutes, and of Florida Administrative Code Chapter 14-10.

A Transcript was filed on December 26, 2006, and the parties timely filed their respective Proposed Recommended Orders on January 16, 2007.

On January 19, 2007, Respondent filed a Motion to Strike Petitioner's Proposed Recommended Order. Petitioner's Response in opposition thereto was filed on February 1, 2007. Upon consideration, an Order denying the Motion to Strike was entered on February 1, 2007.

Each party's proposal has been considered, and their relevant written stipulations of fact and law have been adopted, with some modifications for clarity and standard format.

FINDINGS OF FACT

1. On September 27, 2005, Petitioner Lamar submitted two permit applications (Nos. 55595 and 55596) to FDOT for two signs to be attached to one monopole, one sign to be facing north and one sign to be facing south. The applications stated that the proposed location of the monopole is the west side of State Road 85 (SR 85), 200 feet (or .042 miles) south of Barnes Road in Okaloosa County, Florida. SR 85 is a Federal-aid primary highway. (See Stipulated Facts 1 and 4.)

2. The proposed sign structures met the size, height, and spacing requirements of Section 479.07, Florida Statutes. (See Stipulated Fact 3.)

3. The proposed sign location is in an unincorporated area of Okaloosa County, Florida. (See Stipulated Fact 5.) Okaloosa County is the only local entity involved herein.

4. The 42.5 acre parcel of land for the proposed billboard has significant frontage on SR 85, north of Crestview, Okaloosa County. A residence is located on a portion of the parcel.

5. The permit application form used by Petitioner was composed and authorized by FDOT. Petitioner's submitted application was complete, and the appropriate fee was paid to FDOT. (See Stipulated Fact 2.)

6. Upon request, FDOT provides a published "Instruction" pamphlet to assist applicants for outdoor advertising sign permits. Pages 12-13 thereof provide, in pertinent part, as follows:

> **Land Use/Zoning:** Outdoor advertising signs must be located in areas where the land use category allows properties which lie within 660 feet of the controlled road and which are within the contiguous land use designation area to be developed with primarily commercial or industrial uses. This information is found in the Land Development Regulations and on the Future Land Use Map of the City or County's Comprehensive Growth Management Plan.
>
> The City or County or other local government must certify that the current zoning (Land Development Regulations) and the Future Land Use Map designation allow for commercial/industrial uses and that outdoor advertising signs are allowed for that designation.

> When the Land Development Regulations [zoning] or the Future Land Use Map do not specifically designate the parcel as commercial or industrial, but allow for multiple uses on the parcel, including commercial or industrial, a "use test" will be employed to determine whether an outdoor advertising permit may be issued. The use test requires that there be a minimum of three (3) conforming businesses within 1600 feet of each other, and that the sign be on the same side of the highway and within 800 feet of one of the businesses.
>
> The Department will not approve an outdoor advertising sign permit when local regulations prohibit outdoor advertising at the proposed location. (Emphasis supplied.)

7. In preparation of Petitioner's application(s), Chad Pickens, Petitioner's Lease Manager, read FDOT's Instruction pamphlet as guaranteeing Petitioner a "use test" if either the County land use map or the zoning for this parcel provided for mixed or multiple uses. He conducted extensive site location and ownership searches; made contacts with the potential lessor; submitted photographs of three businesses within 1600 feet of the proposed outdoor advertising sign location; filled out the permit application; proceeded to the appropriate Okaloosa County government officials for County approval; surveyed and staked out the proposed outdoor advertising sign location; and took photographs of the proposed site. He then submitted this information on FDOT-approved forms, along with a letter of authorization and the application fee.

8. Petitioner Lamar leased the property site from the owner, with no lease payments due from Petitioner to the landowner unless FDOT approved its sign permits.

9. At the time of the application, the three commercial businesses closest to the proposed sign location were:

> (a) Dogwood Veterinary Clinic - approximately 118 feet south of the proposed sign site. This business specializes in treating house pets. The clinic makes no farm calls, but horses may be treated if brought into the clinic. This business also contains a retail outlet;
>
> (b) Billy's Trade Store, approximately 463 feet south of the proposed sign site, is a convenience store; and
>
> (c) Plantation Farms Pet Grooming, approximately 780 feet northeast of the proposed sign site. This business, in addition to retail sales of pet items and food, incorporates a section for the grooming and boarding of household pets. This business does not handle livestock. (See Stipulated Fact 9.)

10. These three business establishments, submitted by Petitioner for FDOT’s application of a "use test," were businesses one could actually walk into and purchase goods or services.

11. In addition to information regarding the proposed sign site, the proposed construction on the site, and where the proposed construction was to occur, the permit application required the applicant to secure Okaloosa County’s local

certification of the proposed site's future land use designation and its current zoning, which Petitioner did.

12. Although FDOT requires that local government entities sign off on advertising sign applications to FDOT, the State Agency does not rubber stamp those approvals. Ultimately, FDOT administers State statutes and regulations in conjunction with its Federal agreement. The State is not bound by the County's permitting of signs.

13. In January, 1972, the State of Florida entered into an agreement with the Federal Highway Administration, in which the State agreed to implement and carry out the provisions of Section 131 of Title 23, United States Code (1965), commonly referred to as "The Highway Beautification Act." Through this agreement, Florida agreed to limit the permitting of outdoor advertising signs adjacent (within six hundred sixty feet of the nearest edge of right-of-way) to Interstate or Federal-aid primary highway systems, to areas which are zoned industrial or commercial or are located in unzoned commercial or industrial areas. Failure of FDOT to comply with the terms of this agreement could result in a loss of 10 percent of federal-aid highway funds.

14. Lynn Holschuh, FDOT Outdoor Advertising Administrator, testified that since the January 1972, agreement with the Federal Department of Transportation, Florida local governments

have been required to “zone” all property. Therefore, the 1972 Agreement’s use of the term, “unzoned commercial or industrial areas,” is an anachronism, because all Florida property should now be zoned. Still, the term remains in the Florida Statutes, and FDOT uses this term to grapple with areas where specific land use is not very well defined.

15. Zoning designations arise from county land development regulations, i.e. zoning ordinances. Future land use designations come from a Land Use Plan, adopted by the local entity or entities, pursuant to Chapter 163, Florida Statutes, and placed on a future land use map.

16. The proposed sign location is on a parcel with a land use designation of “Agricultural 1” (AA1). (See Stipulated Fact 6.) In other words, the parcel is zoned for agriculture.

17. Okaloosa County Code 8.02.02 provides that permanent off-site outdoor advertising signs are a permitted use within agricultural areas. (See Stipulated Fact 7.) Counties may allow off-site advertising along county roads, but interstate and federal primary-aid highways, such as SR 85, are within FDOT’s jurisdiction.

18. The applicable Future Land Use Map designates the proposed site for “rural mixed land use” (RMU). (See Stipulated Fact 8.)

19. This multiple use future land use map designation includes residential and non-residential uses. Non-residential uses may include commercial or business uses, although the parcel being designated “rural” suggests otherwise.

20. There is no evidence herein that the terms used in the current zoning or on the future land use map do not comport with the same or similar terms used in Chapter 163, Florida Statutes, or in 23 C.F.R. Section 750.703(a) or 750.708.

21. At all times material, Billy Wayne Strickland, Florida Department of Transportation Outdoor Advertising Senior Agent, processed all outdoor advertising applications, statewide, on behalf of FDOT. He testified that if the current land development regulations (current zoning) and the future land use designation (future land use map) differ, FDOT considers both. If the current zoning and future land use map are both a "mixed use" designation, FDOT performs its own use test, sometimes delegated to an outside consultant.

22. Ms. Holschuh testified that “agriculture” is a “rather specific” zoning term/designation. However, if a zoning category authorizes more than one use, FDOT looks at the current primary uses of the parcel. FDOT’s intent is not to go by the label that has been applied to the zoning category, but “to go beyond the label to determine whether or not the area really has the characteristics of a commercial or an industrial area,” and

that with regard to the characteristics of commercial zoning, the use test would be employed to determine if there were bona fide commercial or industrial activities within the specified footage of a proposed sign location.

23. In processing the application(s) in this case, Mr. Strickland accepted the future land use designation “AA1”, for “agricultural,” as certified by Planner Tim Durbin on behalf of Okaloosa County. He also researched Okaloosa County’s land development regulations, which described the permitted uses for property designated "agricultural."

24. The Okaloosa County Land Development Code specifically designated three zoning categories as “Commercial.” They are “Business Retail,” Business General,” and “Business Tourism”.

25. In the Code, commercially zoned areas, under the categories of "Business Retail" and "Business General," states: "[t]his is a Commercial (C) and Mixed Use Development (MU) Future Land Use Map Category." Under the category of "Business Tourism," the Code states: "[t]his is a High Density Residential (HDR), a Commercial (C), and a Mixed Use Development (MU) Future Land Use Map Category." Each of these business categories allows for traditional commercial uses such as retail stores, filling stations, banks, restaurants and mini-warehouses.

26. The Okaloosa County Land Development Code specifically designated two zoning categories as “Industrial.” They are “Protected Industrial Districts” and “Airport Industrial Park Districts.”

27. The Okaloosa County Land Development Code, under “Industrial” uses, has zoning categories of "Protected Industrial Districts" and "Airport Industrial Park Districts." The Code provides: "[t]his is an Industrial (I) Future Land Use Map Category."

28. No similar reference to either “commercial” or “industrial” zoning is made under the zoning for “agricultural” areas. The agricultural zoning does not mention “filling stations.”

29. The Okaloosa County Land Development Code lists the following (with some restrictions not material to these proceedings) in areas zoned “agricultural”:

> **Permitted Principal Uses and Structures:**
> -Dwellings
> -Commercial and non commercial agricultural [structures]
> -Sawmills
> -Places of worship, schools, publicly owned and operated community structures and land, nursing homes, charitable or philanthropic institutions; public or private golf courses; public lands; public or private cemeteries, private lodges and fraternal orders.
> -Privately operated day nurseries, pre-schools, and kindergartens.
> -Private airstrips

-Private Airports
-Public or private fishing clubs, and other similar enterprises.
-Recreational areas for public use, campgrounds, travel trailer parks, including golf driving ranges, swimming pools, fishing lakes, and similar recreation uses.
-Public or private stables
-Commercial kennels and the raising of other small animals for sale
-Community residential homes
-Radio, television and commercial towers and antennas.
-Terminals for petroleum products
-Public Utility Structures
-Municipal solid waste transfer stations and recycling facilities.

Permitted Accessory Uses and Structures:
Uses and structures which are customarily accessory and clearly incidental and subordinate to permitted or permissible uses and structures. Home Occupations.

Special Exception Uses and Structures:
Activities that are agricultural or support agricultural activities and are in keeping with the rural character of the area
Public or privately operated gun clubs
Borrow Pits
Construction and Demolition Debris landfills

Prohibited Uses and Structures:
Any use or structure not of a character indicated under permitted accessory uses and structures, or permitted as a special exception.
Class I, II and III landfills are prohibited, along with other types of solid waste disposal facilities except as identified in Permitted Uses and Special Exceptions. [Boldface in original; underlining supplied]

30. Mr. Strickland opined that a terminal for storing petroleum products, transported to that location in tanker

trucks, for use by machinery on a farm, which use is allowed by the County's zoning code to be located on land zoned agricultural (see Finding of Fact 29), would not be the same as a gas/filling station for cars, permitted under the County's commercial or industrial classification. Mr. Strickland's interpretation is reasonable, and it was not credibly refuted by Mr. Durbin, the County's planner, whose testimony that the County would allow a filling station on the parcel in question did not comport with the clear designations under the County's zoning. (See Findings of Fact 24-29 and 35-36.)

31. In processing the applications in this case, Mr. Strickland reasonably interpreted the current zoning to permit only commercial uses "tied to agriculture" on this parcel.

32. Mr. Strickland also used the Okaloosa County Tax Appraiser's records. The County Appraiser listed the parcel whereon the signs were intended to be erected as improved agricultural land containing a single family dwelling for which a homestead exemption was taken/granted. A residential use clearly is not a commercial use. Mr. Strickland took this to mean that the "rural mixed use" for that parcel implied a "residential" use, as opposed to a "non-residential" and potentially commercial use, under the RMU designation on the future land use map.

33. FDOT never permits billboards on residential property unless the parcel is currently zoned commercial and the parcel merely contains a private residence that has been grandfathered-in.

34. On October 18, 2005, FDOT, through Mr. Strickland, issued a Notice of Denied Application stating:

> Location is not permittable under land use designations of the site [s. 479.111(2), FS]
>
> Location does not qualify as unzoned commercial/industrial area [s. 479.01(23), FS]

At the same time, FDOT returned Petitioner's application fee checks. (See Stipulated Fact 10.)

35. At hearing, County Planner, Tim Durbin, testified that based upon Okaloosa County's current zoning and future land use, the proposed sign site met Okaloosa County standards and would support an outdoor advertising sign. He further testified that the County no longer considers "AA1", which once referred to parcel size, "to have any significance," and that the County plans, in the future, "to remove that designation from its Land Development Code." According to Mr. Durbin, the County now considers all agricultural land to be "AA." However, as of the date of hearing, more than a year after the sign permit application review by FDOT, the County still has not changed its AA1 category.

36. According to Mr. Durbin, Okaloosa County currently would permit the following non-residential uses of the parcel at issue: "small scale agricultural, civil uses of churches and houses of worship, public or private primary or secondary schools, small scale neighborhood commercial or business uses, general commercial uses. Small scale neighborhood commercial and business includes neighborhood-serving offices, neighborhood-serving retail activities." He opined that any classification that contains "residential" and "non-residential" uses, as do both the AA1 zoning category and the land use map "RMU-rural mixed uses" designation, may contain commercial projects within the "non-residential" areas. He equated "filling stations" with "terminals for petroleum products."

37. Herein, because the zoning and land-use map designations were not identical, Mr. Strickland did not consider, in making his decision to deny the sign permit, the three businesses listed near the parcel. He did try to discover how the actual parcel in question was currently regarded locally. In doing so, he used reasonable methods. He denied the sign application(s) on the basis of the future land use designation (rural mixed use-residential) and the agricultural zoning current when these applications were submitted and considered between September 27, 2005, and October 18, 2005, (AA1-agricultural). Petitioner has not demonstrated that any

change in the zoning or land use designation has occurred since that time.

38. However, when asked at hearing how he would consider those three nearby businesses (a veterinary, a convenience store, and a pet groomer), which had been submitted for a use test, Mr. Strickland testified that he would consider the veterinary and the store to be commercial uses and would consider Plantation Farm Pet Grooming to be not commercial because it contained a family residence with a homestead exemption. Petitioner did not refute that the pet groomer's building primarily constitutes a residential use.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding, pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2006). (See Stipulated Law Paragraph 1.)

40. Petitioner herein has standing as the applicant. (See Stipulated Law Paragraph 2.)

41. As the party seeking a State sign permit, Petitioner bears the duty to go forward and the burden of proof by a preponderance of the evidence. Florida Dept. of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

42. FDOT is the State Agency with the authority to regulate outdoor advertising and issue permits for signs located along interstate and Federal-aid primary highways, pursuant to Chapter 479, Florida Statutes, and Chapter 14-10, Florida Administrative Code.

43. Section 479.111, Florida Statutes, provides that only signs in commercial-zoned and industrial-zoned areas or commercial-unzoned and industrial-unzoned areas may be permitted along the interstate and Federal-aid primary highway system. (See Stipulated Law Paragraph 3.)

44. Section 479.01 (3), Florida Statutes, defines “commercial or industrial zone” as 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. 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 Section 479.01(23). (See Stipulated Law Paragraph 4.)

45. Section 479.01(23), Florida Statutes, defines “unzoned commercial or industrial area” as 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 within 1600 feet of each other. At least one of the businesses must be on the same side of the highway and within 800 feet of the sign location and all businesses must be within 660 feet from the nearest edge of the right-of-way. (See Stipulated Law Paragraph 5.)

46. FDOT denied the application(s) herein on the basis of two statutes, Sections 479.111(2), “location not permitted under land use designation of site,” and 479.01(23), "location does not qualify as unzoned commercial/industrial area." The statutes cited in FDOT’s denial provide specifically as follows:

> **479.111 Specified signs allowed within controlled portions of the interstate and federal aid primary highway system.**- Only the following signs shall be allowed within controlled portions of the interstate highway system as set forth in 479.11(1) and (2):
>
> * * *
>
> (2) Signs in commercial-zoned and industrial-zoned areas or commercial-unzoned and industrial-unzoned areas and within 660 feet of the nearest edge of the right-of-way, subject to the requirements set forth in the agreement between the state and the United States Department of Transportation.

> **479.01 Definitions -** As used in this chapter, the term
> (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.
>
> * * *
>
> (b) Certain activities, including, but not limited to, the following, may not be so recognized as commercial or industrial activities:
>
> * * *
>
> 6. Activities conducted in a building principally used as a residence.

47. In its Proposed Recommended Order, Petitioner submits that under Section 479.01(3), FDOT may only determine the future land use map classifications in general, and whether the current land development regulations "clearly designate" that parcel for a specific use; that the statutes impose no requirement for FDOT to make a current land use determination, unless there is a specific designation in the current land development regulations restricting the property to a specific use inconsistent with commercial usage; that using the property appraiser's records constituted an unadopted rule, and that the concept of homestead was mis-applied anyway because a homestead exemption does not

preclude a business or commercial activity from operating outside a municipality; and that an equitable estoppel applies herein because the Instruction for the permit application was misleading. In making these arguments, Petitioner relies heavily on the recent case of Clear Channel Outdoor-Atlantic Coast Division v. Department of Transportation, DOAH Case No. 06-2233 (RO: January 3, 2007; FO: February 14, 2007).

48. In Clear Channel, the Administrative Law Judge (ALJ) found, on the testimony of a zoning official and an expert planner, that each sign site in that case was located on a parcel designated for commercial or industrial use under both the future land use map of the city's comprehensive plan and the city's land use development regulations (zoning) which had been adopted pursuant to Chapter 163. Therein, the future land use map and the zoning both declared the parcels as "utility." The applicable comprehensive plan designated the parcels as "industrial." The local governmental entity's land use element and land development regulations met the definition of "industrial uses" in Florida Administrative Code Rule 9J-5.003, of the Department of Community Affairs, which agency supervises land use planning throughout the state. (See, Chapter 163, Florida Statutes, with regard to comprehensive planning.) The industrial uses authorized under the city's future land use map and its land development regulations were primary permitted

uses, not incidental to other primary uses or permitted only by variance or special exception. They were specially permitted under the plan/map and the zoning. In the face of conformity of the parcel to all concepts of "commercial or industrial" designations, the FDOT sign administrator processing the sign applications in the Clear Channel case testified that in every sign application review, he applied his personal layman's definitions of what type of development or zoning constituted "commercial" and/or "industrial". Under those circumstances, the ALJ concluded that the administrator's interpretation of Section 479.01 (3), Florida Statutes, which applied an everyday "layman's" or "common" understanding to the statutory language "designated for commercial or industrial use" constituted an "unadopted rule" which was inconsistent with the express language of the statute; inconsistent with the definition of "commercial or industrial zones" in 23 C.F.R. Section 750.703 (a); and inconsistent with the Federal acceptance of State zoning reflected in 23 C.F.R. Section 750.708, and the layman's interpretation operated in defiance of the mandate of the Federal regulations. The Recommended Order in Clear Channel was adopted in toto by FDOT, and the sign permits were issued.

49. In Clear Channel, it was shown that by their nature, by their use, and by their compatibility issues, "utilities" were listed in the heavy commercial and industrial type

categories of both the zoning and the land use plan of the local entity. The scenario in Clear Channel is unrelated to the facts herein. Therefore, it is not a precedent for this case.

50. This case was presented at hearing as a challenge to FDOT's decision not to apply a use test to Petitioner's sign permit application. Petitioner claimed for the first time in its Proposed Recommended Order that FDOT's use of the Okaloosa County Property Appraiser's homestead exemption records during its sign permitting review and/or FDOT's use of a layman's definition of "commercial" or "commercial zone" constitutes an unadopted rule. This argument fails on several points. First, it is clear that the time frames and FDOT administrators are not identical in both cases. In the present case, there is no evidence that Mr. Strickland resorts to property appraisers' records in every case or that he has applied his own lay definition of "commercial" in this case or in any other situation. Therefore, there is no "rule," as defined by Section 120.52(15), Florida Statutes, and, of course, Clear Channel's findings of fact cannot carry over in any sense to the present de novo proceeding.[1/] Finally, there was no independent petition alleging an unadopted rule and nothing in the Joint Pre-hearing Stipulation to alert FDOT that Petitioner was claiming that an unadopted rule existed. Therefore, FDOT had no opportunity to prove-up any such position or to otherwise defend against such

an allegation in the hearing. The issue of an unadopted rule was never properly presented to this forum. See, § 120.57(1)(e), Fla. Stat.

51. Petitioner's suggestion that the homestead exemption for the parcel was misunderstood by Mr. Strickland is equally unavailing because neither the homestead exemption statute nor the several cases that interpret whether or not a tax payer may take/be granted such an exemption for real property tax purposes, affects whether or not FDOT can enforce its federal agreement and Chapter 479, with regard to signs on state roads and Federal primary-aid highways.

52. Neither does equitable estoppel lie against FDOT in this case. Admittedly, FDOT's Instruction's attempt to paraphrase or simplify Subsections 479.01 (2), (3), and (23) and Section 479.111, is confusing, at best, but Petitioner is not entitled to a use test or a sign permit solely on that basis. Instructional manuals, by their very nature, cannot supersede State or Federal statutes or excuse the State Agency responsible for enforcing seminal law from following that seminal law. Moreover, the required elements for an equitable estoppel are not present in this case. There has been no demonstration of reliance on the Instruction to Petitioner's detriment. Petitioner's application fee was refunded by FDOT, and Petitioner's lease arrangement with the land owner is contingent

upon FDOT's issuance of a permit. Petitioner is not demonstrably "out of pocket." Therefore, Petitioner has not shown that its reliance on FDOT's Instruction, instead of on the controlling statutes and rules, accrued to Petitioner's detriment or that FDOT's failure to issue the permits under the circumstances would result in a serious injustice to Petitioner.

53. Subsections 479.01 (2), (3), and (23) and Section 479.111, permit FDOT to do what it has done.

54. Section 479.01(3), Florida Statutes, provides:

> (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).

55. Section 479.01(3) begins by defining "commercial or industrial zone" as a parcel designated for commercial or industrial use under <u>both</u> the future land use map and the land use development regulations (current zoning). That is not the case here, because the parcel herein is not designated for commercial or industrial use on <u>either</u> the future land use map

or the current zoning. Thus, the parcel herein is not a "commercial or industrial zone."

56. Next, Section 479.01 (3) specifies that if the parcel is located in an area designated for multiple uses on the future land use map and the land development regulations (zoning) 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 479.01 (23). The parcel herein does not fit that definition of an "unzoned commercial or industrial area," either. Indeed, this parcel is in an area designated for multiple uses on the future land use map: RMU, rural mixed uses. Both Mr. Strickland and Mr. Durbin agree that "rural mixed uses" contain residential and non-residential uses, and that non-residential uses may include commercial uses. However, Mr. Strickland concluded that the current zoning (land use regulations) clearly designated that parcel for the specific use of "agriculture." Since "agriculture" can include residential and non-residential uses, he also verified that the parcel and one of the three nearby businesses were currently in use as residential property. Therefore, it is not necessary to follow Petitioner's interpretive stream to reflect upon the question of "If this parcel were located in an area designated for multiple uses on the future land use map and the land development regulations did not clearly designate that parcel

for a specific use, would the parcel meet the criteria of subsection (23)?"

57. Finally, assuming, arguendo, but not ruling, that a use test were required to be performed using the three nearby commercial businesses submitted by Petitioner, the evidence showed that at least one of those businesses (Plantation Farms Pet Grooming) did not comply with Subsection 479.01 (23) (b) 6., due to its homestead/residential status.

RECOMMENDATION

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

RECOMMENDED that a final order be entered ratifying the October 18, 2005, denial of sign application.

DONE AND ENTERED this 4th day of April, 2007, in Tallahassee, Leon County, Florida.

S

ELLA JANE P. DAVIS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of April, 2007.

ENDNOTE

1/ Petitioner's Proposed Recommended Order asks that the undersigned adopt Finding of Fact 15 from the Recommended Order in Clear Channel Outdoor, Atlantic Coast Division, v. Dept. of Transportation, (RO: January 3, 2007; adopted in toto by FO: February 14, 2007), based upon evidence in that case. The undersigned declines to do so, because all principals of justice demand that each de novo case before the Division be bounded by its own evidence. Moreover, the denial of a sign permit in that case occurred December 2, 2003, in a different timeframe, and by a different FDOT agent, using a different and "personal" test.

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.