

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

FILED

07 MAY 24 PM 4:00

DIVISION OF
ADMINISTRATIVE
HEARINGS

LAMAR SOUTH FLORIDA,

Petitioner,

vs.

DOAH CASE NO.: 06-3281

DOT CASE NO.: 06-042

DEPARTMENT OF TRANSPORTATION,

Respondent.

FINAL ORDER

This proceeding was initiated by the filing of a Petition for Formal Administrative Hearing on April 10, 2006, by Respondent, LAMAR SOUTH FLORIDA (hereinafter LAMAR), pursuant to Section 120.57(1), Florida Statutes, in response to a Notice of Intent to Revoke Sign Permit issued by the Petitioner, DEPARTMENT OF TRANSPORTATION (hereinafter DEPARTMENT), on March 21, 2006. The matter was referred to the Division of Administrative Hearings on April 24, 2006, for assignment of an administrative law judge and a formal hearing.

A formal administrative hearing was held in this case in Tallahassee, Florida, on January 12, 2007, before R. Bruce McKibben, a duly appointed administrative law judge. Appearances on behalf of the parties were as follows:

For Petitioner: Gerald Livingston, Esquire
Pennington Moore Wilkinson Bell & Dunbar P.A.
215 South Monroe Street, No. 200
Post Office Box 10095
Tallahassee, Florida 32302-2095

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

At the hearing the **DEPARTMENT** presented the testimony of Lynn Holschuh, and offered Petitioner's Exhibits 1 through 7, which were admitted as offered. **LAMAR** presented no witnesses. **LAMAR** offered Respondent's Exhibits 1 through 14, which were admitted into evidence. Official recognition was taken of all relevant statutes and rules. The transcript was filed on January 26, 2007. On February 9, 2007, **LAMAR** filed its Proposed Recommended Order and the **DEPARTMENT** filed its Proposed Recommended Order on February 12, 2007. Judge McKibbon issued his Recommended Order on February 20, 2007. The **DEPARTMENT** filed its exceptions to the Recommended Order on March 6, 2007. **LAMAR** filed no responses thereto.

STATEMENT OF THE ISSUE

As stated by the administrative law judge in his Recommended Order, the issue presented was:

[W]hether the Department of Transportation's Notice of Intent to Revoke Sign Permit should be upheld pursuant to Section 479.08, Florida Statutes (2006).¹

¹ The administrative law judge mistakenly cited Section 479.04, Florida Statutes, in his Recommended Order.

EXCEPTIONS TO RECOMMENDED ORDER

The **DEPARTMENT'S** exceptions do not address any findings of fact and are directed solely to conclusions of law. Section 120.57(1)(l), Florida Statutes, provides:

The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

The **DEPARTMENT** first takes exception to Conclusion of Law 10 claiming that the administrative law judge failed to note that Section 479.02(1), Florida Statutes, requires the **DEPARTMENT** to administer and enforce an agreement between the State of Florida and the United States Department of Transportation and related federal regulations. The **DEPARTMENT** also contends that reference should be made to the following portions of 23 C.F.R. § 750.707(d) dealing with nonconforming signs:

(d) Maintenance and Continuance. In order to maintain and continue a nonconforming sign, the following conditions apply:

* * *

(5) The sign must remain substantially the same as it was on the effective date of the State law or regulations. Reasonable repair and maintenance of the sign, including a change of advertising message, is not a change which would terminate nonconforming rights. Each State shall develop its own criteria to determine when customary maintenance ceases and a substantial change has occurred which would terminate nonconforming rights.

While the **DEPARTMENT'S** exception does not necessarily go to the reasonableness of

the administrative law judge's conclusion of law, it would complete the conclusion and make proper reference to the laws and regulations implemented by Florida Administrative Code Rule 14-10.007, which the administrative law judge quoted extensively in Conclusion of Law 11. The **DEPARTMENT'S** exception is well-taken and Conclusion of Law 10 is modified accordingly.

The **DEPARTMENT'S** second exception goes to Conclusion of Law 14 insofar as the conclusion suggests that the notice at issue in this matter incorrectly cited to subsection (a) of Florida Administrative Code Rule 14-10.007(1), when subsection (b) contained the actual violation. Specifically, the **DEPARTMENT** argues:

Subsection (a) provides that a loss of non-conforming status will occur if there is a change in the structure of the sign. In the present case, the increase from three poles to four poles, changed the structure of the sign, and therefore subsection (a) was the proper citation. Subsection b [sic] of Rule 14-10.007(1), Florida Administrative Code provides, with certain exceptions not applicable in this case, a "modification that changes the area of the sign facing of the HAGL of the sign" constitutes a substantial change to a non-conforming sign that results in the loss of nonconforming status. The Department should have listed subsection b [sic] as a secondary violation based on the change in the sign's HAGL. Prior to the hearing, Petitioner was aware of the specific violations and therefore was not prejudiced by this omission. *See CLW v. State*, 920 So.2d 109 (Fla. 1st DCA 2006)(minor inaccuracies in a notice may be corrected at any time in the course of proceedings absent a showing of prejudice).

Initially, both the administrative law judge in his Recommended Order and the **DEPARTMENT** in its exceptions have referred to the wrong subsection of Florida Administrative Code Rule 14-10.007. The Notice of Intent to Revoke Sign Permit issued in this case stated: "This nonconforming sign has been structurally changed and is no longer substantially the same as it was on the date it became nonconforming, in violation of s. 14-10.007(2)(a), Florida

Administrative Code.” [Emphasis added] Rather than subsection (2)(a), the administrative law judge and the **DEPARTMENT** referred to subsection (1)(a). This is apparently a typographical error inasmuch as subsection (1) does not have a sub-subsection (a) or (b) and subsection(2) contains the sub-subsections that the administrative law judge and the **DEPARTMENT** were referring to.

To the extent the administrative law judge interpreted Florida Administrative Code Rule 14-10.007(2)(a) as not applying to **LAMAR’S** rebuilding of the sign with an additional pole, it is not only less reasonable than the **DEPARTMENT’S** interpretation of the rule, it is also erroneous on its face. The addition of a support pole to the sign was a change in the sign’s structure and was, therefore, a modification that resulted in the loss of the sign’s nonconforming status. Moreover, subsection (2)(b) only addresses changes to the sign face and the HAGL (Height Above Ground Level) and would not encompass the addition of a support pole. Subsection (2)(a) was the correct subsection to cite for the structural change resulting from the additional pole. Conclusion of Law 14 is modified accordingly.

The **DEPARTMENT** takes exception to Conclusions of Law 15 and 18 contending that the thirty (30) day period to correct a violation of state law provided in Section 479.08, Florida Statutes, is not applicable here because the modifications made to the sign violated federal, not state law. The **DEPARTMENT’S** exception to these conclusions is rejected because the federal law versus state law distinction employed by the **DEPARTMENT** is not viable when the current language of Section 479.08, Florida Statutes, is read in *pari materia* with Section 479.02(1) and (7), Florida Statutes.

However, the administrative law judge’s determination that the thirty (30) day correction

period commenced when **LAMAR** received the specifics of its violations through the discovery process is incorrect. Section 479.08, Florida Statutes, unequivocally provides that the thirty (30) day correction period commences upon the permittee's receipt of the **DEPARTMENT'S** notice of intent to revoke the sign permit. The **DEPARTMENT'S** interpretation is more reasonable because the provision of the thirty (30) day correction period in Section 479.08, Florida Statutes, is not dependant upon the permittee's pursuit of its right to an administrative hearing. Conclusions of Law 15 and 18 are modified accordingly.

In its exception to Conclusion of Law 16, the **DEPARTMENT** takes issue with the administrative law judge's reliance upon Walker v. State, Dep't of Transp., 366 So. 2d 96 (Fla. 1st DCA 1979), for the proposition that the **DEPARTMENT'S** interpretation of the thirty (30) day correction period set out in Section 479.08, Florida Statutes, would render **LAMAR'S** right to notice a nullity. The **DEPARTMENT'S** exception is rejected to the extent it relies upon the federal law versus state law distinction addressed above.

The **DEPARTMENT'S** exception to Conclusion of Law 16 is accepted insofar as it contests the administrative law judge's view that **LAMAR'S** receipt of specific information regarding its violations of Florida Administrative Code Rule 14-10.007 through discovery triggered the running of the thirty (30) day correction period. As stated above, the commencement of the Section 479.08, Florida Statutes, thirty (30) day correction period is not dependant upon the permittee's exercise of his right to an administrative hearing. Conclusion of Law 16 is modified accordingly.

FINDINGS OF FACT

After review of the record in its entirety, it is determined that the administrative law judge's Findings of Fact in paragraphs 1 through 8 are supported by competent, substantial evidence, and are adopted and incorporated as if fully set forth herein.

CONCLUSIONS OF LAW

1. The **DEPARTMENT** has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Chapter 120 and 479, Florida Statutes.
2. The Conclusions of Law in paragraphs 9, 11, 12, 13, and 17 of the Recommended Order are fully supported in law. As such, they are adopted and incorporated as if fully set forth herein.
3. The Conclusions of Law in paragraphs 10, 14, 15, 16, and 18, as modified are adopted and incorporated as if fully set forth herein.
4. The **DEPARTMENT'S** exceptions have brought to light the apparent confusion regarding both the applicability of the thirty (30) day correction period provided for in Section 479.08, Florida Statutes, to improper modification of nonconforming signs in violation of Florida Administrative Code Rule 14-10.007, and the notice required to commence the running of the period. Given this state of affairs, the administrative law judge's recommendation that the **DEPARTMENT'S** Notice of Intent to Revoke Sign Permit be withdrawn will not be disturbed. However, this result is neither an endorsement nor an adoption of the administrative law judge's view of the matter.
5. Section 479.08, Florida Statutes, unequivocally provides that the thirty (30) day correction period commences upon the permittee's receipt of the **DEPARTMENT'S** notice of

intent to revoke the sign permit. This statutory provision applies to violations of Florida Administrative Code Rule 14-10.007 and operates irrespective of whether the permittee exercises his right to request an administrative hearing within the same thirty (30) day period. Consequently, the commencement of the thirty (30) day correction period is not dependant upon the status of discovery in any attendant administrative proceeding.

6. If the permittee desires to correct the violation at issue and has any doubt concerning the nature of the violation, it is incumbent upon the permittee to seek clarification from the DEPARTMENT rather than rely upon the vagaries of the discovery process. The violation must be corrected within the statutory thirty (30) day period which commences upon the permittee's receipt of the DEPARTMENT'S notice of intent to revoke the sign permit.

ORDER

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

ORDERED that the Petitioner's, DEPARTMENT OF TRANSPORTATION, Notice of Intent to Revoke Sign Permit directed to Respondent's, LAMAR SOUTH FLORIDA, outdoor advertising sign permit number 5202, tag number AX 281, is withdrawn.

DONE AND ORDERED this 21st day of May, 2007.

(F02)



STEPHANIE C. KOPELOUSOS
Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

FILED D.O.T. CLERK
2007 MAY 21 AM 9:51

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS, HAYDON BURNS BUILDING, 605 SUWANNEE STREET, M.S. 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER.

Copies furnished to:

Susan Schwartz, Esquire
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Florida Department of Transportation

CHARLIE CRIST
GOVERNOR

605 Suwannee Street
Tallahassee, FL 32399-0450

STEPHANIE C. KOPELOUSOS
SECRETARY

MEMORANDUM:

DATE: April 5, 2007

TO: Lowell Clary, Assistant Secretary for Finance & Administration
Kevin Thibault, Assistant Secretary for Engineering and Operations

FROM: Stephanie C. Kopelousos, Secretary

COPIES: Marion Hart, Ananth Prasad, Personnel & Legal

SUBJECT: DELEGATION OF AUTHORITY FOR
SECRETARY STEPHANIE C. KOPELOUSOS

You are delegated signature and approval authority anytime during my absence from the office. Signature should be made "in your name for the Secretary of Transportation." This delegation will remain in effect until rescinded by me.

In the event all of you are out of the office, signature authority is delegated to Marion Hart and Ananth Prasad.

Please ensure all documents requiring signature and/or approval under this delegation are forwarded to my office for proper coordination/logging prior to signing and also provide a reading file copy of any documents you sign.

SK:oy