STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAMAR SOUTH FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-3281
	)	
DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on January 12, 2007, in Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Gerald S. Livingston, Esquire
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For Respondent: J. Ann Cowles, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether the Department of Transportation's Notice of Intent to Revoke Sign Permit should be upheld pursuant to Section 479.04, Florida Statutes (2006).[1]

PRELIMINARY STATEMENT

On or about March 21, 2006, the Department of Transportation ("DOT" or the "Department") issued a Notice of Intent to Revoke Sign Permit to Lamar South Florida ("Lamar"). In response, Lamar filed a Petition for Formal Administrative Hearing, which was duly-transferred to the Division of Administrative Hearings. The final hearing was continued one time upon motion of Petitioner and was finally conducted on January 12, 2007. At the commencement of the final hearing, the parties stipulated to admission of Petitioner's Exhibits 1 through 7 and Respondent's Exhibits 1 through 14. Respondent called one witness: Lynn Holschuh, the state outdoor advertising administrator with DOT. No witnesses were called by Petitioner.

At the close of the evidentiary portion of the final hearing, the parties requested and were allowed up to 15 days from the filing of the hearing transcript to file their respective proposed recommended orders. A one-volume Transcript of the hearing was filed on January 26, 2007. Petitioner timely

filed its Proposed Recommended Order on February 9, 2007. Respondent's Proposed Recommended Order was filed on February 13, 2007, but was given consideration because it was only one day late, and the Recommended Order had not been finalized at that point.

FINDINGS OF FACT

1. Lamar is a company which owns and maintains road-side signs, signboards or billboards within the State of Florida. One such billboard (referred to hereinafter as the "Sign") is located on U.S. Highway 41 approximately three-tenths of a mile north of Tuckers Boulevard in Charlotte County. The Sign was given Permit Number 5202 by DOT. This Sign is a nonconforming sign, meaning that it was lawfully erected but does not comply with state or local laws enacted after it was built.

2. DOT conducted a statewide inventory of signs in 1998 and established a database for use in monitoring nonconforming signs in the future. The database includes the type of sign; its date and method of construction; the height, including the Height Above Ground Level (HAGL); its location; whether the sign is lighted or not; and other identifying information about the sign. The inventory of signs is updated at least every two years, but generally is done on an annual basis.

3. On August 13, 2004, during Hurricane Charley, the Sign sustained damage, which required certain repairs. Repairs of

nonconforming signs is allowed, but signs are not supposed to be structurally changed during the repair. Petitioner undertook a repair of the Sign.

4. During the course of the repairs, the Sign underwent two changes. One, the HAGL of the sign went from two feet to approximately five feet. HAGL is the distance from the ground to the bottom of the lowest sign face. Two, the Sign was repaired using four support poles instead of the three poles it had when it became nonconforming.

5. Based upon information contained in its database, DOT concluded that the repairs resulted in unauthorized structural changes. DOT issued a Notice of Intent to Revoke Sign Permit (the "Notice") on March 21, 2006. The Notice alleged the Sign had been structurally altered and was no longer the same as when it had become nonconforming. The Notice cited Florida Administrative Code Rule 14-10.007(2)(a) as the basis for the intent to revoke. That Rule relates to modifications of a sign "such as conversion of a back-to-back sign to V type, or conversion of a wooden sign structure to a metal structure . . .".

6. The Notice included a statement that revocation of the sign permit would become final in 30 days, unless Lamar either: (1) provided information to DOT sufficient to resolve the issue or (2) requested an administrative hearing. Lamar availed

itself of the second option and, timely, filed a Petition for Formal Administrative Hearing.

7. The DOT Notice did not specify exactly which changes to the Sign constituted a violation of Department rules. It merely cited to Florida Administrative Code Rule 14-10.007(2)(a). During the discovery phase of this action, Lamar ascertained that the violations were: (1) the HAGL had been raised from two feet to over five feet; and (2) there were four support posts instead of the original three. This information was discovered by Lamar as a result of interrogatory responses from DOT. The interrogatories had been propounded on September 22, 2006, but were not answered until December 13, 2006, some 82 days later.

8. Upon determining the exact nature of the violation, Lamar undertook to have the repairs corrected so that the Sign was set at the correct HAGL of two feet and one support post was removed. The correcting construction work was accomplished within seven days of discovering the nature of DOT's complaint. As of the date of the final hearing, the Sign had been returned to its condition as of the date it became nonconforming.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings (DOAH) 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. Proceedings under the jurisdiction of DOAH are de novo in nature. § 120.57(1)(k), Fla. Stat.

10. The control and regulation of roadside signs in the state fall within the purview of the Department, as set forth in Chapter 479, Florida Statutes. DOT's specific duties are set forth at Section 479.02, Florida Statutes.

11. One of the rules promulgated pursuant to DOT's authority under Chapter 479, Florida Statutes (and relied upon by DOT as the basis for issuance of the Notice in this case), is Florida Administrative Code Rule 14-10.007, which states in pertinent part:

> (1) A nonconforming sign must remain substantially the same as it was as of the date it became nonconforming.
>
> (2) Reasonable repair and maintenance of nonconforming signs, including change of advertising message, is permitted and is not a change which would terminate the nonconforming status. Reasonable repair and maintenance means the work necessary to keep the sign structure in a state of good repair, including the replacement in kind of materials in the sign structure. Where the replacement of materials is involved, such replacement may not exceed 50% of the structural materials in the sign within any 24 month period. "Structural materials" are defined in sub-subparagraph (6)(a)2.a. below. The following are examples of modifications which do not constitute reasonable repair or maintenance, and which constitute substantial changes to a nonconforming sign that will result in the loss of nonconforming status:

(a) Modification that changes the structure of, or the type of structure of, the sign, such as conversion of a back-to-back sign to a V-type, or conversion of a wooden sign structure to a metal structure;

* * *

(b) Modification that changes the area of the sign facing or the HAGL of the sign, however:

12. Section 479.08, Florida Statutes, reads:

> The department has the authority to deny or revoke any permit requested or granted under this chapter in any case in which it determines that the application for the permit contains knowingly false or misleading information or that the permittee has violated any of the provisions of this chapter, unless such permittee, within 30 days after the receipt of notice by the department, corrects such false or misleading information and complies with the provisions of this chapter. Any person aggrieved by any action of the department in denying or revoking a permit under this chapter may, within 30 days after receipt of the notice, apply to the department for an administrative hearing pursuant to chapter 120. If a timely request for hearing has been filed and the department issues a final order revoking a permit, such revocation shall be effective 30 days after the date of rendition. Except for department action pursuant to s. 479.107(1), the filing of a timely and proper notice of appeal shall operate to stay the revocation until the department's action is upheld.

13. It is clear from the stipulated evidence that the Sign was rebuilt after it was damaged. The reconstruction resulted

in a sign that was somewhat different from the sign which existed at the time it became nonconforming.

14. DOT's notification to Lamar did not specify the alleged violations other than to cite to a departmental rule provision. As it turns out, the provision cited in the Notice (Fla. Admin. Code R. 14-10.007(1)(a)) was not the correct provision because it identified a change that had not actually occurred. Rather, the changes which Petitioner made to its sign were governed by a different rule provision (Fla. Admin. Code R. 14-10.007(1)(b)). Thus, the Notice of Intent to Revoke Sign Permit was not sufficient to put Lamar on notice as to the alleged violations.

15. The 30-day period for correcting violations of state law (See § 479.08, Fla. Stat., as set forth above) would not commence running until Petitioner received notice. It is clear from the facts of this case that Petitioner only received notice during the discovery phase of this case. Therefore, once it received sufficient notice, it had 30 days to correct the violations, and it did so.

16. DOT's interpretation of the statute is that the Notice did not give Lamar a 30-day opportunity to correct its improper repairs. That would, as stated in Lyman Walker,III v. State of Florida, Department of Transportation, 366 So. 2d 96, 99

(Fla. 1st DCA 1979), render Lamar's right to notice a nullity. In the alternative, DOT argues that Lamar should have known what the violation was despite what was stated on the Notice. There is no requirement in law for a person to guess what an agency is thinking when it issues such a notice.

17. The general rule is that the party asserting the affirmative of an issue has the burden of presenting evidence as to that issue. Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778 (Fla. 1st DCA 1981).

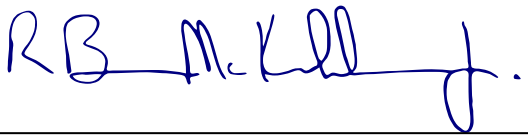
18. It is clear that within 30 days of receiving sufficient notice of the alleged violation of law, the Sign had been repaired in accordance with its condition as of the date it became nonconforming. Respondent has not met its burden of proof to establish nonconformity of the Sign as of the date of the final hearing.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Department of Transportation withdrawing its Notice of Intent to Revoke Sign Permit.

DONE AND ENTERED this 20th day of February, 2007, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of February, 2007.

ENDNOTE

1/ All references to Florida Statutes are to Florida Statutes (2006), unless otherwise indicated.

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.