

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAMAR SOUTH FLORIDA,)
)
 Petitioner,)
)
 vs.) Case No. 06-3282
) 06-043
 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 (DOAH).

APPEARANCES

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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. On May 25, 2006, the case was closed at DOAH, and the Petition was again referred to DOAH on August 31, 2006. The case was set for hearing on September 22, 2006; re-scheduled for hearing on November 28, 2006; and then the hearing was finally held on January 12, 2007.

At the final hearing, the parties stipulated to Petitioner's Exhibits 1 through 7, Respondent's Exhibits 1 through 10, and a number of pertinent facts, which will be included in the findings of fact below. Lamar called one witness: Benjamin N. Henry, a real estate manager for Lamar. The Department called two witnesses: Lynn Holschuh, an outdoor advertising administrator with DOT, and Mark Johnson, a sign inspector for DOT Region 5.

At the close of the evidentiary portion of the final hearing, the parties requested, and were allowed, 20 days from the filing of the hearing transcript within which to file their respective proposed recommended orders. A one-volume Transcript of the hearing was filed on January 29, 2007. Both parties filed Proposed Recommended Orders containing proposed findings of fact and conclusions of law. The parties' proposals have been carefully considered during the preparation of this Recommended Order.

FINDINGS OF FACT

1. Lamar is a company which owns and maintains hundreds of road-side signs or billboards within the State of Florida. One such billboard (referred to hereinafter as the "Sign") is located on U.S. Highway 27 approximately .034 miles north of Rock Road in Palm Beach County. The Sign is assigned Permit No. 14103.

2. The Sign was damaged on or about August 13, 2004, during one of that year's major storms, Hurricane Charley. Lamar was hit hard by the 2004 storms and had to repair literally hundreds of signs which existed under DOT permits. The company had to rely upon whatever contractors and laborers were available, drawing crews from several different states to meet their needs.

3. At the time it was damaged, the Sign was a nonconforming sign as that term is defined in Subsection 479.01(14), Florida Statutes. The Sign was of wood construction with a single facing, was 24 feet tall, unlighted, and had a height above ground level (HAGL) of 14 feet. The Sign had been constructed in 1965 and held Tag Nos. CD228 and/or BT364. There were seven wooden support posts holding the sign in place.

4. The construction crews hired by Lamar repaired the sign, but during the repair mistakenly lowered the HAGL from 14 feet to eight feet seven inches. Also, the seven small support posts were replaced with four larger posts. The HAGL was apparently reduced in response to a change in the kinds of crop being grown in the field abutting the sign location. Whereas the field had formerly been used to grow sugar cane (which grows to a height of five or six feet), after the hurricane the field was planted with green beans (which grow close to the ground).

5. The Department's primary inspector for the area where the Sign is located is Mark Johnson. He has inspected the Sign on at least three occasions officially, but has noticed the Sign regularly as it is on his route to the place he goes fishing. He has been seeing the Sign for 15 or 16 years, but it has been within his area of official responsibility for about six years.

6. Johnson first inspected the Sign on or about February 24, 2004. He took an unofficial measurement using his own height. Later, Johnson twice measured the sign using a surveyor's rod. The heights he recorded using the measurement tool were eight feet seven inches on December 22, 2006, and eight feet seven inches on January 10, 2007. He relied upon the DOT database to ascertain that the HAGL had changed from its authorized height.

7. 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.

8. DOT served Lamar with a Notice of Intent to Revoke Sign Permit dated March 21, 2006. The Notice alleged the Sign had been structurally changed 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 violation.

9. The Sign did not increase in height as a result of Lamar's post-hurricane repairs, nor did the sign change from

wood to metal or other such modification as discussed in the rule. Rather, the Sign was reduced in height, and the number of support posts was decreased.

10. The Notice provided it 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.

11. The Notice did not specify exactly what changes to the Sign constituted a violation of Department rules. During the discovery phase of this action, Lamar ascertained that the lowering of the HAGL and the reduction of posts from seven to four were the violations at issue. This information came to Lamar late in December 2006.

12. Since that time, Lamar has hired a contractor to revise the earlier repairs to the sign. The contractor has been directed to raise the HAGL back to 14 feet and to add three more support posts. As of the date of the final hearing, that work had not been concluded, but a contract had been entered into to complete the repairs.

CONCLUSIONS OF LAW

13. 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.

14. Proceedings under the jurisdiction of DOAH are de novo in nature. § 120.57(1)(k), Fla. Stat.

15. The control and regulation of roadside signs in the state falls 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.

16. 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:

(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,

* * *

(c) Modification that enhances the visibility of the sign's message, or the period of time that the message is visible;

(d) Modification that adds automatic changeable faces; or

(e) Modification that adds artificial lighting, or changes the existing lighting such that the illumination to the sign facing is substantially increased.

* * *

(6) A nonconforming sign may continue to exist so long as it is not destroyed, abandoned, or discontinued. . . .

17. 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.

18. 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.

19. DOT's notification to Lamar, concerning the violation, was not specific in nature, but Lamar timely availed itself of the right to contest the Notice in order to determine whether it agreed with DOT that a violation had occurred. The cited rule provides only a general description of some items that might be considered improper modifications of the Sign. It does not list all such modifications nor does it provide a detailed description of changes which might constitute a modification.

20. There is some question whether the change in the number of poles from seven smaller poles to four larger poles is a change. But Subsection (6)(a)2.c. of Florida Administrative Code Rule 14-10.007 states in relevant part: "The repairs to the signs 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." DOT's interpretation of this section to preclude replacement of seven smaller poles with four larger poles is reasonable. Further, although the HAGL was lowered rather than raised, DOT is within its rights to cite Lamar for that unauthorized change in the Sign.

21. DOT has met its burden of proof and has provided sufficient evidence to support its Notice of Intent to Revoke Sign Permit.

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 upholding the Notice of Intent to Revoke Sign Permit.

DONE AND ENTERED this 26th day of February, 2007, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th 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.