STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAMAR ADVERTISING OF FT. WALTON BEACH,

Petitioner,

vs. Case No. 07-0801

DEPARTMENT OF TRANSPORTATION,

Respondent.

RECOMMENDED ORDER

A formal hearing was conducted in this case on June 6, 2007, in Fort Walton Beach, Florida, before Diane Cleavinger, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: James E. Moore, Esquire
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For Respondent: David Littlejohn, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner is entitled to an outdoor advertising sign permit to be located in an unzoned

commercial/industrial area and whether the sign site qualified as an unzoned commercial/industrial area.

PRELIMINARY STATEMENT

On November 13, 2006, Petitioner, Lamar Advertising of Fort Walton Beach, filed two applications for outdoor advertising sign site permits with Respondent, the Florida Department of Transportation (Department). The applications sought permits for a one-site location for a two-faced outdoor advertising sign located on US-331, Walton County, Florida. By notice dated November 29, 2006, the Department denied the applications.

On January 30, 2007, Lamar filed an Amended Request for an Administrative Hearing contesting the agency's decisions and requesting a formal hearing. The matter was referred to the Division of Administrative Hearings.

At the hearing, Lamar presented the testimony of three witnesses: Chad Pickens, Lease Manager, Lamar Advertising of Fort Walton Beach; Billy Wayne Strickland, Florida Department of Transportation Outdoor Advertising Senior Agent; and Larry Wayne Adkinson, Vice President of North Florida Development, Inc. Petitioner also offered eight exhibits into evidence. The Respondent presented the testimony of one witness, Billy Wayne Strickland, and offered seven exhibits into evidence.

After the hearing, Petitioner and Respondent filed Proposed Recommended Orders on August 27, 2007. Petitioner also filed a

Motion to Re-open and Request For Judicial Notice on August 25, 2007. The Motion to Re-open the record was granted. On October 11, 2007, a telephone hearing was held so that Petitioner could submit additional evidence. Official recognition was taken of the Department's dismissal of a Notice of Violation issued to North Florida Development, Inc., regarding an unpermitted sign on the property involved in Petitioner's applications.

FINDINGS OF FACT

1. Lamar is in the business of erecting, operating and maintaining outdoor advertising signs in Northwest Florida.

2. The proposed sign's location was in Walton County along US Highway 331, .1 mile south of Bay Grove Road, a collector road. U.S. Highway 331 is a federal aid primary highway and therefore, a state permit is required for signs placed along its path.

3. According to a Walton County zoning plan, the proposed sign's location was in an area zoned Rural Village on both the Future Land Use Map and Land Development Regulations. The June 2006 version of the Walton County Land Development Code provides:

> F. Rural Village (RV): This district is a mixed use district which permits predominately residential development up to a maximum of two units per acre.

> (i) Residential uses shall account for approximately 95 percent of the total land area within any area designated on the FLUM for this District. The remaining area may be utilized for related and compatible commercial uses.
>
> (ii) Commercial uses may occupy up to five percent of the total land area designated on the FLUM for this District.
>
> (iii) Commercial land uses shall be limited to collector and arterial road intersections, intersections of subdivision collectors and arterial or collector road, and areas that are specifically designated Commercial on the FLUM.
>
> (iv) Not more than 15 percent of the total frontage on both sides of a collector or arterial road shall be occupied by commercial uses within this district.

The Walton County Land Development Code also defined general commercial activity as including inventory storage.

4. The proposed sign's location met the requirements for commercial use under the RV designation. Walton County certified to the Department that the designated parcel for the proposed outdoor advertising sign was Rural Village and that the primary use of the area under the current comprehensive plan was agriculture, general agriculture, residential, civic uses, and residential subdivision. Walton County also confirmed that the proposed outdoor advertising sign would be in compliance with all duly adopted local ordinances and would be issued the necessary County permit for such sign.

5. The Walton County Property Appraiser's website listed the usage of the proposed outdoor advertising sign location as a "service station." The service station building was still on the property, but had not been used as such for a number of years.

6. Billy Wayne Strickland, the state outdoor advertising administrator of the Department, processed the outdoor advertising permit applications submitted by Lamar. Mr. Strickland determined after a review of Lamar's applications that the site, being designated as Rural Village with mixed uses allowed, met the need for evaluation under the use test for unzoned commercial or industrial areas contained in Chapter 479, Florida Statutes.

7. The use test is set forth in Florida Statutes 479.02. Under the test, the Department examines a proposed sign's location under the applicable current land use designation and future land use designation to determine if the outdoor advertising site meets the use criteria set forth in the statute for unzoned commercial and industrial areas. The use criteria for such unzoned property require that three commercial or industrial activities be located within 1600 feet of each other, with one of those activities located on the same side of the road and within 800 feet of the proposed sign's location. Distances are measured from building to building. Additionally,

the commercial or industrial activity must be visible from the highway.

8. Mr. Strickland visited the property in order to determine if the proposed sign location met the requirements of the use test. He observed that the proposed sign's site holds an abandoned-looking gas station and a house with a large fenced in area. Leaking fuel tanks made it unlikely the service station would be restored. There were several small, boarded-up, "fishing style cabins" associated with the fenced property. The fenced area had a sign posted for North Florida Development, Inc., a construction company. There was a number for the company listed on the sign. On a tree to the right of the fence was a sign that read "Private Road Keep Out." In general, the area behind the fence appeared to be used for storage of building materials and equipment such as trucks and trailers. Except for the area behind the fence, the North Florida Development property was clearly visible from the highway.

9. Mr. Strickland called the phone number on the sign and was informed that North Florida Development, Inc., that he was calling, was in Miramar Beach, Florida, and that North Florida Development was storing equipment and trucks at the U.S. Highway 331 location for a job they were doing in Destin.

10. There was no one present at the house or the adjacent buildings. The North Florida Development buildings and fenced

area were within 800 feet of the proposed sign’s location and were on the same side of the road as the proposed sign’s location. Because of the lack of activity, Mr. Strickland concluded that the North Florida Development property was not a commercial activity which was visible from the highway. On the opposite side of the Highway, Mr. Strickland observed two businesses within a 1600-foot zone that met the criteria of the use test.

11. Additionally, while at the site, Mr. Strickland issued a Notice of Violation for the on-premises sign of North Florida Development. The Notice required the sign to be removed. Later, after the hearing in this matter, this action was dismissed by the Department.

12. On November 29, 2006, the Department issued a written denial of the outdoor advertising sign site permit applications for the following reasons: (1) the sign site was not permitted under the local land use designation of site per Section 479.111(2), Florida Statutes, and (2) the sign site did not qualify as an unzoned commercial/industrial area per Section 479.01(23), Florida Statutes.

13. On the morning of April 5, 2007, Mr. Strickland, again visited the proposed sign’s site. He observed essentially the same things he observed during his first visit to the location,

except the large North Florida Development sign that had been on the entrance to the fenced area had been removed.

14. Andrew White, a regional inspector with the Department, inspected the North Florida Development site on May 17, 2007, and photographed the area. The sign for North Florida Development had been removed, but the keep-out signs were still in place. Photographs taken from the street revealed a partial view of a storage trailer through the open fence.

15. On the morning of June 6, 2007, just prior to the hearing, Mr. Strickland again visited the proposed sign's location and observed no activity at the location. He could only see a trailer partially visible beyond the privacy fence.

16. Larry Wayne Adkinson, vice president of North Florida Development and a general contractor licensed in Mississippi, lives and works on the property of the proposed sign's location. Mr. Adkinson testified that the property totaled five and a-half or six acres and consisted of his home, his office, the service station and five fishing cabins. He and his business have been at this location for at least 12 years. Work has been delayed on repairing the service station based, in part, upon the fact that the state was seeking to condemn a portion of the property where the service station was located for the expansion of U.S. Highway 331.

17. Mr. Adkinson uses the property as an inventory site, storing construction materials, heavy equipment, landscaping materials, and other bulk material related to his business. The site contained three semi-tractor trailers that were utilized to store construction materials, including doors, windows, and heavy equipment and equipment and materials for a landscape business owned by Mr. Adkinson. The landscape business stored tractor-trailers, small-equipment trailers, plants, brick pavers, scaffolding and rock molds. The site's storage of inventory and business activity was very visible to people who lived in the neighborhood around the North Florida Development property. The visibility was such that, in 2006, the neighbors complained about the view to the County. The County, in turn, asked Mr. Adkinson to place a fence around the area to block the view of people passing through the area. Mr. Adkinson complied with the County's request and built the privacy fence that Mr. Strickland observed. Mr. Adkinson also placed the company's business sign on the fence to identify the property as North Florida Development's business property.

18. Most of the loading and unloading of material and equipment occurs in the early morning and evening hours. At those times, there is considerable activity at the site with trucks and equipment entering and leaving the property.

Mr. Adkinson's testimony was confirmed by the testimony of Chad Pickens, who routinely drives by the site during those hours. Mr. Strickland never visited the property during those busy hours, and therefore, did not observe the business activity associated with the site.

19. Mr. Adkinson uses two of the fishing cabins as machine shops for his company's equipment and tools. The shops contain drill presses, welding and repair equipment. Entry is gained through the rear doors of the cabins. He left the front of the cabins boarded up to prevent theft and storm damage.

20. Mr. Adkinson also receives business mail at the U.S. Highway 331 location and has employees and job applicants report to that location. Clearly, the North Florida Development property is a viable and on-going business that conducts one of its business activities on the property on which the proposed sign is to be located. The activity is visible from the highway, although such activity ebbs and flows through the day. The property, therefore, meets the land use test requirements of Florida Statutes, and the Petitioner's applications should be granted.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

22. The Department of Transportation has 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 Florida Administrative Code Rule 14-10.

23. Lamar's outdoor advertising sign permit applications are governed by the provisions of Chapter 479, Florida Statutes, and Florida Administrative Code Rule 14-10.

24. Chapter 479.01(23), Florida Statutes, provides:

> "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 uses 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 locations;
> 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 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.

25. Section 479.111, Florida Statutes, entitled "Specified signs allowed within controlled portions of the interstate and federal-aid primary highway system" provides:

> Only the following signs shall be allowed within controlled portions of the interstate highway system and the federal-aid primary highway system as set forth in s. 479.11(1) and (2):
>
> (1) Directional or other official signs and notices which conform to 23 C.F.R. ss. 750.151-750.155.
>
> (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 in the agreement between the state and the United States Department of Transportation.

26. In short, if a proposed outdoor advertising sign location is not situated in an area specifically zoned commercial or industrial, Section 479.01(3), Florida Statutes, provides a two-pronged analysis to evaluate the proposed outdoor advertising sign's location. First, the area must be designated for multiple uses on the future land use map of the comprehensive plan, and (2) the land development regulations must not clearly designate the parcel for a specific use. If the property meets these criteria, the area will be considered an "unzoned commercial or industrial area" which must meet the criteria of Section 479.01(23), Florida Statutes.

27. As the party seeking a State sign permit, Lamar bears the burden of proving entitlement to a permit by a preponderance of the evidence. <u>Fla. Dept. of Transportation v. J.W.C. Co., Inc.</u>, 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

28. The Department stipulated that the proposed site for Lamar's outdoor advertising sign is located in a multiple-use area for zoning and future land use. Further, pursuant to the future land use map of the Walton County Land Development Code, the permitted uses include commercial uses. The parcel was not "specifically designated" for a specific use under the current land development regulations. Walton County's zoning classification of Rural Village authorized five percent commercial use. Such classification was not a commercial zoning

designation. The land development regulations allowed the parcel to be developed for either residential or commercial use. The Department, therefore, properly considered the Rural Village designation as mixed use and examined it under Section 479.01(23), Florida Statutes, to determine if the area could be considered an unzoned commercial or unzoned industrial area under the use test.

29. In this case, Lamar's site met the two-prong test for Subsections 479.01(3) and (23), Florida Statutes. The evidence demonstrated that three businesses were within the proper proximity to the proposed site to meet the spacing configuration required in Subsection 479.01(23)(a), Florida Statutes. At least one of those businesses, North Florida Development, is within 800 feet and on the same side of the highway as the proposed location of the sign.

30. It was an error for the Department to determine that inventory storage by North Florida Development was not a commercial activity. The Department's position was based on the fact that the property was neither open to the public, nor providing a service to the public. However, this definition of commercial or industrial activity is not supported by the statute. Indeed, the statute does not mention that a business must be open to the public or providing a service to the public to qualify under this statute. If that were the case, large

company distribution centers, such as those Wal-mart maintains, would not qualify as industrial or commercial activities. Clearly such distribution centers constitute commercial or industrial activities.

31. In Clear Channel Outdoor-Atlantic Coast Division v. Department of Transportation, DOAH Case No. 06-2233, RO: January 3, 2007, the administrative law judge addressed the issue of interpretation of commercial or industrial activity:

> According to Garner, Respondent interprets the term "commercial or industrial use" found in Subsection 479.01(3), Florida Statutes, as those words are "commonly understood," rather than as applied in land development regulations. Garner uses the layman's everyday interpretation of the term "industrial" when applying the term. Respondent has a uniform interpretation of Subsection 479.01(3), Florida Statutes, under which it utilizes an everyday lay definition of commercial or industrial zone, rather than a technical planning and zoning approach. Garner's opinion that the sign sites were not designated as industrial uses was based on this uniform interpretation. That interpretation is not reflected in Florida Administrative Code Rule 14-10.

In this case, the definition of general commercial activity includes inventory storage in the Walton County Land Development Code. The activity was visible enough that neighbors complained and a fence was erected. Additionally, a business sign was placed on the property to identify the property as business property. Commercial activity that supports the company's

business takes place on the property and, therefore, qualifies as a commercial or industrial activity under the statute.

32. In Food'N Fun, Inc. v. Department of Transportation, 493 So. 2d 23 (Fla. 1st DCA 1986), the court addressed the issue of visibility from the highway, thus:

> Food'N Fun applied for the permits involved in Case No. BK-135 in 1979, relying for the required commercial activity on a welding business, which was carried on in a tin shed which it was undisputed could be seen from the right-of-way, Interstate 10 in Jackson County. The permits in BK-136 were applied for in 1980, in reliance on a dairy supply business, located in a building which could also be seen from the highway. Finally, the permits in BK-137 were applied for in 1978, relying on a sausage-making business, conducted in a block building which could be seen from the highway.
>
> In all of these cases, the inspector "field approved" the permits following on-site inspections. They were then approved by the District Administrator and forwarded to Tallahassee for issuance. Food'N Fun thereafter was permitted to renew all of these permits annually until October, 1984, at which time it received "notices of violation" stating that the signs were not in a "commercial or industrial area."
>
> The allegation was expanded upon at hearing on the notices requested by Food'N Fun. DOT stated as to all of these permits that the crux of the alleged violations was that, even though the buildings wherein the various activities were being conducted could be seen from the highway, there was no indication to highway traffic that any commercial activity was in progress, such as a business sign, employees at work, cars in a parking lot, etc. With regard to the

welding and dairy supply business, there was also evidence that those businesses were no longer in operation at the time of the hearing.

Pursuant to Section 479.08(1), Florida Statutes, "the department may . . . revoke any permit issued by it . . . in any case where it shall appear to the department that the application for the permit contains knowingly false or misleading information or that the permit has violated any of the provisions of this chapter. . . ." Testimony by DOT representatives at the violation hearings indicates that the agency was relying on the emphasized ground to revoke Food'N Fun's permits, claiming that based on the invisibility from the highway of commercial activity in progress, the permittee had "violated the chapter," specifically Section 479.01(10) (activity not visible from the main-traveled way), in the placement of its signs.

The hearing officer issued his recommended order finding that, regardless of the initial approval of the applications, the statutory prerequisites for the erection of lawful sign were not present when the applications were submitted in that the activities relied on were not "visible from the main-traveled way," i.e. there was "nothing to indicate to I-10 traffic that a . . . business was up there." He rejected the applicant's argument that DOT was stopped by its approval from revoking the permits because no factual representations had been made that were contrary to a later asserted position. He recommended that the permits be revoked and the signs removed. The recommended order was adopted by the agency as its final order revoking the permits.

An administrative agency, empowered to revoke a permit for reasons specified in a statute, may not revoke such permit for any

> cause not clearly within the ambit of its statutory authority, as statutes authorizing revocation must be strictly construed. Rush v. Department of Professional Regulation, 448 So. 2d 26 (Fla. 1st DCA 1984). In this case, DOT relies on that portion of Section 479.08 which authorizes revocation based on violation of Chapter 479 by the permittee, in this case by placing sign in what DOT later determined to be a non-commercial zone.

The requirement of the privacy fence and the erection of the business sign are sufficient indicia of visible commercial activity in and of themselves to establish a prima facie case of visibility. Additionally, there is considerable commercial or industrial activity in the morning and evening hours at the property. The buildings are visible from the highway. Clearly, Lamar's proposed outdoor advertising sign is located in an unzoned commercial area and meets the use test of the statute. The proposed applications should, therefore, be granted.

RECOMMENDATION

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

RECOMMENDED:

That the Florida Department of Transportation enter a Final Order granting the applications for outdoor advertising sign permits filed by Lamar Advertising of Fort Walton Beach.

DONE AND ENTERED this 13th day of December, 2007, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of December, 2007.

COMPLETE 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.