

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAMAR OUTDOOR ADVERTISING-)
LAKELAND,)
)
Petitioner,)
)
vs.) Case Nos. 07-4732
) 07-4734
DEPARTMENT OF TRANSPORTATION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on December 20, 2007, in Tallahassee, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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STATEMENT OF THE ISSUE

At issue in these consolidated proceedings is whether the permits for signs bearing tag numbers BT339, AE862, and AX116 should be revoked, pursuant to Section 479.08, Florida Statutes (2007).

PRELIMINARY STATEMENT

On March 21, 2006, the Department of Transportation (the "Department") issued two Notices of Intent to Revoke Sign Permit ("Notices") to Lamar Advertising - Lakeland ("Lamar"), alleging that nonconforming signs bearing tag numbers BT339, AE862, and AX116 had been structurally changed and were no longer substantially the same as they were on the date they became nonconforming, in violation of Florida Administrative Code Rule 14-10.007(2)(a). The Department issued revised Notices on July 31, 2007. Lamar timely filed petitions for formal administrative hearings to contest the Notices. The petition challenging the Notice regarding tag numbers BT339 and AE862 was assigned DOAH Case No. 07-4732. The petition challenging the Notice regarding tag number AX116 was assigned DOAH Case No. 07-4734. Lamar's unopposed motion to consolidate the cases was granted by order dated December 17, 2007.

At the hearing, Lamar presented the testimony of Dave Henry, its real estate leasing manager. Lamar's Exhibits 1 through 3 were admitted into evidence. The Department presented

the telephonic testimony of its outdoor advertising inspectors Steve Leslie and Mark Johnson, and the in-person testimony of Lynn Holschuh, the Department's state outdoor advertising administrator. The Department's Exhibits 1 through 17 were admitted into evidence.

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 proposed recommended orders. The one-volume hearing Transcript was filed on January 7, 2008. The Department filed its Proposed Recommended Order on January 28, 2008, and Lamar filed its Proposed Recommended Order on January 29, 2008. Neither party objected to the lateness of the other's filing, and therefore both parties proposed recommended orders have been accepted and considered during the preparation of this Recommended Order.

FINDINGS OF FACT

1. Lamar owns and maintains outdoor advertising signs in the State of Florida. Pursuant to the permitting requirements of Section 479.07, Florida Statutes, the Department issues permits and tags to outdoor advertising signs along interstate and federal-aid primary highway systems. Signs that met permitting criteria at the time they were erected, but that do not comply with subsequently enacted laws or that no longer

comply with the law due to changed conditions, may nonetheless be permitted and maintained as "nonconforming signs."¹

2. In compliance with Subsection 479.02(8), Florida Statutes, the Department in 1997 and 1998 conducted a statewide inventory of all signs on the state interstate and federal-aid primary highway systems. This inventory became the database for all signs permitted at the time it was completed. The Department sent the inventory results to all sign owners in order to provide them an opportunity to confirm or challenge the accuracy of the results.

3. The database includes the location of the sign; the dates the sign was permitted and constructed; its date and method of construction; the height, including the Height Above Ground Level ("HAGL"); the height, width, and square footage of the sign facing; the number and type of support structures used; whether the sign is lighted or not; the status of the sign as a conforming, nonconforming, or illegal sign; and other identifying information.

4. Subsection 479.02(8), Florida Statutes, provides that the inventory of signs is to be updated no less than every two years. The Department in fact performs the update every year.

5. In 2004, a series of hurricanes passed through Florida, destroying or damaging thousands of outdoor advertising signs. The Department issued notices of intent to revoke the permits of

nonconforming signs that appeared to have been destroyed by the storms.

6. In February 2005, the Department and Lamar entered into a settlement agreement that allowed Lamar to rebuild some signs and required the removal of others. The signs at issue in this proceeding were among those allowed to remain standing with repair. As to these signs, the settlement agreement provided:

The outdoor advertising signs referenced above remain lawfully erected nonconforming signs and LAMAR may repair said signs, provided that said repair shall be at the pre-storm location and to pre-storm specifications, including configuration, type of materials, height, size, area of face and lighting. Exceptions to pre-storm specifications will be allowed to the extent required to comply with local building codes. Such repairs shall be completed within 270 days of entry of a Final Order approving this Joint Stipulation of Settlement.

The referenced Final Order was entered on March 15, 2005.

7. The Department issued permit numbers 13778 and 137790 and tag numbers BT339 (replaced by tag number CF221 at the time of the hearing) and AE862 to a nonconforming, back-to-back sign located along U.S. 1 in Martin County, .08 miles north of Constitution Boulevard in Hobe Sound. At the time of the 1997 inventory, the Martin County sign was a five-pole wooden structure.

8. The Martin County sign sustained heavy damage during the 2004 hurricanes. After the storms, Lamar sent a work crew to the sign's location to rebuild the sign. The work crew replaced the sign with a four-pole wooden structure.

9. Dave Henry, the real estate leasing manager for Lamar, testified that he gave the crew no particular instruction on how to rebuild the sign. During the rebuilding process, Mr. Henry gave his crews the locations, and told them to rebuild the signs as they had been before the storms. Mr. Henry stated that the crew probably looked at the remains of the damaged sign, saw only four stumps in the ground, and assumed that the original sign had only four supports.

10. On March 21, 2006, the Department issued a Notice to Lamar, stating that the sign bearing tag numbers BT339 and AE862 "has been structurally changed and is no longer substantially the same as it was on the date it became nonconforming, in violation of s. [sic] 14-10.007(2)(a), Florida Administrative Code Rule."

11. On February 20, 2007, a Recommended Order was entered in Lamar South Florida v. Department of Transportation, Case No. 06-3281 (DOAH February 20, 2007). In that case, Judge R. Bruce McKibben recommended that the Department withdraw a Notice issued to Lamar South Florida because the Notice failed to specify exactly which changes to the sign in question caused

the sign to be in violation of the Department's rules. Rather, the Notice merely provided a citation to Florida Administrative Code Rule 14-10.007(2)(a).

12. In a final order dated May 21, 2007, the Department accepted Judge McKibben's recommendation, and acknowledged the "apparent confusion" regarding the running of the 30-day notice period and the nature of the notice required to trigger the running of that period. As a result of the Lamar South Florida case, the Department began to issue Notices that contained more specific information regarding the alleged violations.

13. On July 31, 2007, the Department sent Lamar a replacement Notice for the Martin County sign, adding a more specific description of the violation, which stated that the sign "has been structurally modified in violation of s. [sic] 14-10.007(2)(a), Florida Administrative Code Rule: the number of supports has changed."²

14. The replacement notice also added the following provision:

REVOCATION OF THE PERMIT(S) WILL BECOME FINAL thirty (30) days from your receipt of this notice unless you provide information to the Department showing the Notice was issued in error OR you correct the violation within 30 days of your receipt of this Notice, and provide evidence of the correction to the Department. For nonconforming signs, while you may correct the violation, you may not exceed the

allowable maintenance standards as stated in s. 14-10.007(2), F.A.C.

15. Lamar did not act within 30 days of the Notice to correct the violation and restore the Martin County sign to a five-pole structure. Mr. Henry testified that a fifth pole was added to the structure on November 16, 2007.

16. The Department issued permit number 7359 and tag number AX116 to a nonconforming, single-faced sign in Polk County along U.S. 27, .141 miles east of Heatherwood Boulevard in Lake Wales. On November 22, 1997, the Polk County sign was inventoried and photographed as a seven-pole wooden structure.

17. Lamar did not own the sign at the time the 2004 hurricanes damaged it. Lamar acquired the Polk county sign in 2005, after it had been rebuilt as a six-pole structure.

18. On March 21, 2006, the Department issued a Notice to Lamar, stating that the sign bearing tag number AX116 "has been structurally changed and is no longer substantially the same as it was on the date it became nonconforming, in violation of s. [sic] 14-10.007(2)(a), Florida Administrative Code."

19. On July 31, 2007, the Department sent Lamar a replacement Notice for the Polk County sign, adding a more specific description of the violation which stated that the sign "has been structurally modified in violation of s. [sic] 14-10.007(2), Florida Administrative Code: the number of supports

has changed. . .".³ The replacement notice also contained the language quoted at finding of fact 14, supra.

20. Lamar did not act within 30 days of the Notice to correct the violation and restore the Polk County sign to a seven-pole structure.

CONCLUSIONS OF LAW

21. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2007).

22. The Department is authorized to regulate outdoor advertising signs located along interstate and federal-aid primary highways, pursuant to Chapter 479, Florida Statutes, and Florida Administrative Code Chapter 14-10.

23. The Department has the burden to prove by a preponderance of the evidence the facts necessary to revoke Lamar's permits. See Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778 (Fla. 1st DCA 1981)(the burden of proof, apart from statute, is on the party asserting the affirmative of an issue).

24. Florida Administrative Code Rule 14-10.007, titled "Maintenance of Nonconforming Signs," provides, 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 all those materials incorporated into the sign as load-bearing parts, including vertical supports, horizontal stringers, braces, bracing wires, brackets, and catwalks. Structural materials do not include the sign face, any skirt, any electrical service, or electric lighting, except in cases where such items have been incorporated into the sign as load-bearing parts. 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. . . .

25. 23 C.F.R. s. 750.707(d) provides, in pertinent part:

(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.

26. Section 479.08, Florida Statutes, provides:

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.

27. Though Florida Administrative Code Rule 14-10.007 makes no specific mention of support poles, the Department asserts that "reasonable repair and maintenance" is restricted to "replacement in kind of materials in the sign structure," and that this restriction necessarily applies to support poles. The Department points out Florida Administrative Code Rule 14-10.007(2)(a) prohibits a modification that "changes the structure of, or the type of structure of, the sign," and contends that a change in the number of poles constitutes such a modification. The Department's interpretation of Florida Administrative Code Rule 14-10.007 is reasonable. See Department of Agriculture v. Sun Gardens Citrus, LLP et al., 780 So. 2d 922, 925-926 (Fla. 2d DCA 2001)(trial court must afford great deference to agency's interpretation of a rule it promulgated concerning matters administered by that agency; the

agency's reasonable interpretation of its rule must stand even when there are other reasonable interpretations available).

28. The replacement Notices issued on July 31, 2007, placed Lamar on clear notice that the violations alleged as to both the Martin County sign and the Polk County sign was a change in the number of support poles. The notices provided a 30-day period in which to notify the Department that the Notices were in error or to restore the signs to their original number of supports. Lamar took no action within the prescribed 30-day period to restore the signs to their permitted number of support poles. The Department acted within its discretion in disregarding Lamar's after-the-fact efforts to restore the support poles to their original number of supports.

29. The Department has met its burden of proof and has provided sufficient evidence to support its Notices 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 revoking the permits for the nonconforming signs bearing tag numbers BT339, AE862, and AX116.

DONE AND ENTERED this 21st day of February, 2008, in
Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of February, 2008.

ENDNOTES

1/ Subsection 479.01(14), Florida Statutes, provides:

"Nonconforming sign" means a sign which was lawfully erected but which does not comply with the land use, setback, size, spacing, and lighting provisions of state or local law, rule, regulation, or ordinance passed at a later date or a sign which was lawfully erected but which later fails to comply with state or local law, rule, regulation, or ordinance due to changed conditions.

See also Florida Administrative Code Rule 14-10.007, Maintenance of Nonconforming Signs.

2/ At the hearing and in its proposed recommended order, Lamar has contended that even the revised Notice was insufficient, because it did not specify exactly how the number of supports had changed. The undersigned finds this contention lacking in merit. The quoted language gave Lamar sufficient notice as to which parts of its sign had been changed and required correction.

3/ The Notice also alleged that the HAGL of the sign had been changed. The Department abandoned this allegation at the final hearing.

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.