

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAMAR OUTDOOR ADVERTISING-)
LAKELAND,)
)
Petitioner,)
)
vs.) Case No. 07-5457
)
DEPARTMENT OF TRANSPORTATION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on February 8, 2008, in Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this case are whether there was a structural change in Petitioner's sign, and whether the Department of

Transportation's Notice of Intent to Revoke Sign Permit for violating Florida Administrative Code Rule 14-10.007(2) should be affirmed.

PRELIMINARY STATEMENT

On January 30, 2006, the Department of Transportation ("DOT" or the "Department") issued a Notice of Intent to Revoke Sign Permit to Lamar Outdoor Advertising - Lakeland ("Lamar"). Lamar responded with a Petition for Formal Administrative Hearing to challenge the decision. On May 1, 2006, DOT issued an Amended Notice of Intent to Revoke Sign Permit, and Lamar filed a petition in response. Finally, on July 31, 2007, DOT issued a final Notice of Intent to Revoke Sign Permit for Noncompliance (the Notice) replacing the prior notices. In response, Lamar filed a 2nd Amended Petition for Formal Administrative Hearing (the Petition), which was duly-transferred to the Division of Administrative Hearings.

At the final hearing, the parties stipulated to Petitioner's Exhibits 1 through 6, which are identified as Joint Exhibits 1 through 6. Petitioner called one witness: Benjamin N. Henry, a real estate manager for Lamar. Respondent called one witness: Lynn Holschuh, an outdoor advertising administrator with DOT. Andre Pavlov, an engineer with DOT, was called as a rebuttal witness.

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 hearing Transcript was filed on February 22, 2008. The parties then requested and were granted additional time to prepare their post-hearing submissions; both parties then 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 eight-tenths of a mile south of Highway 17-92, just south of Haines City in Polk County. The Sign is assigned Tag No. BH378.

2. The Sign was purchased by Lamar from Prime Outdoor in December 2004. At the time it was purchased, the Sign was a single-faced, wooden structure.

3. When the Sign was originally constructed (in the late 1960's), the supports for the Sign were made of one and one-half by one and one-half (1 1/2 x 1 1/2)-inch angle iron. The DOT database indicates the Sign was constructed as a steel, single-

faced structure. Pictures of the Sign as it appeared in 1997 show the steel A-frame construction of the supports.

4. When Lamar decided to purchase the Sign, its real estate leasing manager (David Henry) investigated the status of the Sign. Henry accessed the DOT website to determine the status of the Sign. He also physically inspected the Sign to see whether it was in compliance with state and local regulations. His findings were that DOT records showed the Sign to be made of steel construction, but his visual inspection revealed wooden support posts in place of the steel A-frame construction.

5. Henry knew the Sign had been damaged during the 2004 hurricane season. The Sign had been rebuilt by the time Lamar purchased it in December of that year. The Sign was reportedly rebuilt as part of a global settlement between DOT and the various sign companies whose properties had been similarly damaged during the storms; however, the settlement agreement authorizing reconstruction was not signed until February 2005.¹

6. Inasmuch as Lamar owned another sign nearby, Henry was aware of what the Sign looked like both before and after the hurricanes had damaged it.

7. At the time of the purchase, Lamar was not aware of any actions being taken by DOT due to alleged violations concerning the Sign. Notice of a violation was not issued until 2006.

8. The basis of DOT's proposed revocation was that the Sign had been modified in violation of Florida Administrative Code Rule 14-10.007(2) by: (1) changing structural materials from steel to wood and (2) changing the Height Above Ground Level of the Sign. The second basis for revocation was withdrawn before final hearing, and only the first basis is at issue.

9. There is no dispute that the Sign was originally constructed with a steel A-frame design for its supports but was re-constructed with wooden poles as its support.

10. The A-frame construction was not utilized during reconstruction for two reasons: First, the angle iron used in the original construction is no longer available. The A-frame design was borne of technology from the early 1960's and has proven inferior to new design and materials. Second, the A-frame design would not meet the wind-resistance requirements extant in today's world.

11. The Notice filed by DOT directed Lamar to provide information to DOT within 30 days as to whether (1) Lamar believed the Notice was issued in error or (2) the violation had

been corrected. Lamar did not respond concerning either of the two alternatives.

12. The Notice provided it would become final in 30 days unless Lamar responded as set forth above or contested the revocation by way of an administrative hearing.² Lamar availed itself of the Chapter 120, Florida Statutes, option and filed a Petition for Formal Administrative Hearing.

13. In the de novo final hearing, Lamar presented its rationale as to why the Notice was issued in error, i.e., that Lamar was allowed to change the supports in order to comply with local and state building codes.

14. The post-2004 hurricane season settlement agreement entered into by DOT and Lamar allowed reconstruction of signs damaged by that year's storms. The agreement specifically states, "Exceptions to pre-storm specifications will be allowed to the extent required to comply with local building codes."

15. The angle iron construction of the Sign would not, according to Lamar's witness, meet current wind-storm requirements in the local building code. However, the building code itself was not offered into evidence, and the sole witness presented by Lamar was not offered as an expert to testify concerning the building code.³

16. DOT provided examples of how certain metal supports could have been utilized in place of the old, outdated metal A-

frame used in the original design. That is, wood was not the only alternative available to Lamar.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsections 120.57(1), Florida Statutes.⁴

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

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

20. Florida Administrative Code Rule 14-10.007, in the version dated August 19, 2001, was in effect as of the date of DOT's Notice.⁵ It 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-paragraph (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;^[6]

1. The Department will authorize structural alterations to a nonconforming sign in instances where the Occupational Safety and Health Administration (OSHA) requirements or other safety related requirements necessitate alterations, provided that the reconstruction shall not be authorized primarily for the purpose of replacement of deteriorated materials. The Department will accept a notice or other writing from OSHA or other regulatory body to the permittee requiring the intended alteration as documentation of safety requirements. If the structural alterations are intended to be made to comply with OSHA regulation, the permittee must submit to the Department a statement in writing citing the OSHA regulation with which it is intending to comply and explaining how the intended alteration is required by the cited OSHA regulation. Structural alterations are allowed only if no alternatives are available which address safety requirements. Documentation of the requirements must be submitted to, and approved by, the Department prior to making any structural alterations. The location, structural configuration, number of faces, size of the sign faces, sign structure height, and the

materials used in the sign structure and sign faces must be the same type as those used in the sign prior to approval of the alterations. . . .

* * *

(6) A nonconforming sign may continue to exist so long as it is not destroyed, abandoned, or discontinued. "Destroyed," "abandoned," and "discontinued" have the following meanings:

* * *

a. 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.

Lamar did not submit to DOT a letter from the local zoning or building authority concerning the structure of the Sign. There was no "notice or other writing" on which DOT could rely to grant the proposed changes to the Sign.

21. 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.

DOT's revocation notice was therefore stayed pending the outcome of this final administrative hearing.

22. As the party seeking to revoke Lamar's permit, the Department bears the burden of proof, by a preponderance of the evidence, that the allegation in the charging document is correct. See Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778, 788 (Fla. 1st DCA 1981). There is no dispute concerning the change in structural supports on the Sign, and DOT has met its burden in this case.

23. The burden is then on Lamar to demonstrate that the facts asserted in its Petition, i.e., that conversion of the sign supports from metal to wood was allowable pursuant to the settlement agreement, are true. Id. 396 at 789. Lamar did not meet its burden.

24. It is clear from the evidence that the Sign was rebuilt after it was damaged in the 2004 hurricane season. The

re-construction resulted in a sign that was structurally different from the sign which existed at the time it became nonconforming.

25. The August 2001 version of Florida Administrative Code Rule 14-10.007 did not specifically address structural alterations of signs based on compliance with building codes. So, although the current version of the rule does require written notice as to such alterations, the provision did not exist at the time the Sign was rebuilt. However, inasmuch as Lamar made no competent showing as to what the current building code requires, it is irrelevant that no notice was provided to DOT.

26. The Notice provided Lamar an opportunity to justify the change in the structural materials from metal to wood. At that time, it could have provided DOT with a copy of the local building code, explaining why the structural change was needed. It did not do so, nor did Lamar present any non-hearsay evidence to prove that fact at final hearing. Lamar's purported basis for making the structural change is not supported in the record.

27. The Joint Stipulation of Settlement provided, at paragraph 4.a., "Exceptions to pre-storm specifications will be allowed to the extent required to comply with local building codes." However, absent evidence of what the local building

code provides, Lamar is not entitled to an exception under this portion of the settlement.

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 Permit No. 7478 for Tag No. BH378 and requiring removal of the Sign within 30 days.

DONE AND ENTERED this 26th day of March, 2008, in Tallahassee, Leon County, Florida.



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Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of March, 2008.

ENDNOTES

^{1/} There is no apparent disagreement between the parties that the Sign was repaired pursuant to the global settlement agreement, but no one provided information as to how it came to be rebuilt prior to the settlement agreement being signed.

^{2/} The Notice advises Lamar that "Requesting an administrative hearing will not stay revocation of the permit nor increase the

time allowed to correct the violation." That statement flies in the face of Section 479.08, Florida Statutes (2007), which specifically states that the revocation becomes final 30 days after the entry of the final order. Obviously, no final order can be entered until after the administrative hearing and entry of a recommended order.

^{3/} Although the Administrative Law Judge may have taken official recognition of the building code had it been offered, it was not presented by either party.

^{4/} All references to Florida Statutes herein shall be to the 2007 version.

^{5/} A copy of the December 2007 version of this rule was presented to the undersigned by DOT during the final hearing. However, that rule did not come into existence until after the Notice had been issued in this case. The rule cannot be retroactively applied and is not pertinent to this proceeding.

^{6/} The rule does not specifically refer to modifying a sign from metal to wood, but a reasonable inference can be drawn that the language of the rule would include such a change.

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.