STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAMAR OF TALLAHASSEE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case Nos. 08-0660
	)	08-0661
DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this proceeding before Diane Cleavinger, Administrative Law Judge, Division of Administrative Hearings on June 24, 2008, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Gerald S. Livingston, Esquire
Pennington, Moore, Wilkinson
Bell & Dunbar, P.A.
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Tallahassee, Florida 32301

For Respondent: Kimberly Clark Menchion, Esquire
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
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STATEMENT OF THE ISSUES

The issues in this case are whether the Department of Transportation properly issued a Notice of Violation for an illegally erected sign to Lamar of Tallahassee and whether the

Petitioner's applications for a sign maintained at the corner of SR366/West Pensacola Street and Ocala Road, in Tallahassee, Leon County, Florida, should be granted as a non-conforming sign or because the Department did not act on either the 2005 or 2007 application for the same sign in a timely manner.

PRELIMINARY STATEMENT

On March 21, 2007, the Florida Department of Transportation (Department or Respondent), posted a Notice of Violation-Illegally Erected Sign, alleging that Lamar of Tallahassee (Lamar or Petitioner), violated certain provisions of Section 479, Florida Statutes, by maintaining an outdoor advertising sign located on the west side of Ocala Road, 222 feet north of SR366/West Pensacola Street, in Tallahassee, Leon County, Florida, without a permit.

On April 12, 2007, the Department received a petition for a hearing from Lamar on the Notice of Violation. The matter was deferred to allow time for Lamar to submit an application for an outdoor advertising permit for the sign.

Lamar submitted an application for the sign. The permit application was denied based on the sign's spacing conflict with another permitted structure. Lamar disagreed with the denial and filed a petition for a formal hearing on the Department's denial.

Both petitions were forwarded to the Division of Administrative Hearings. The petition challenging the Department's Notice of Violation was assigned Case Number 08-0661 and the petition challenging the permit was assigned Case Number 08-0660. On February 18, 2008, the cases were consolidated.

On June 12, 2008, the Department issued an Amended Notice of Violation-Illegally Erected Sign, stating that "the advertising sign noted below is in violation of Section 479.07, Florida Statutes. An outdoor advertising permit is required, but has not been issued for this sign." On June 13, 2008, Lamar filed a Motion to Amend the Petition and an Amended Petition for Administrative Hearing. Additionally, on June 13, 2008, Lamar filed a Second Motion to Amend the Petition for Formal Administrative Hearing. The Department filed a response. The Motions to Amend were granted.

At the hearing, the Department called two witnesses, Lynn Holschuh and Billy Wayne Strickland and offered 14 exhibits into evidence, numbered 1 through 10 and 13 through 16. Lamar presented one witness, Loyd Childree and offered seven exhibits into evidence, numbered 1 through 7. Both parties stipulated that the portion of SR366/West Pensacola Street close to where the subject sign is located has been designated as a Federal Aid Primary highway.

After the hearing, the Petitioner filed a Proposed Recommended Order on August 4, 2008. Likewise, the Respondent filed a Proposed Recommended Order on August 4, 2008.

FINDINGS OF FACT

1. Under Chapter 479, Florida Statutes, the Department is the state agency responsible for regulating outdoor advertising signs located within 660 feet of the state highway system, interstate, or federal-aid primary system.

2. Lamar owns and operates outdoor advertising signs in the State of Florida.

3. On March 15, 2005, Lamar applied for a permit from the Department to erect the subject sign. The permit was denied because it was within 1,000 feet of another permitted sign owned by Lamar that is located on SR366/West Pensacola Street.

4. The review process for Lamar's application for a sign permit involved a two-step process. Initially, Mr. Strickland, the State Outdoor Advertising Administrator, reviewed Lamar's application. He determined that the sign was within 1,000 feet of another permitted structure. On April 12, 2007, he preliminarily denied Petitioner's application, prepared the Notice of Denied Application reflecting a denial issuance date of April 12, 2005, and entered his preliminary decision on the Department's internal database. On the same date, Mr. Strickland forwarded the permit file along with his

preliminary decision and letter to his superior, Juanice Hagan. The preliminary decision was made within 30 days of receipt of Lamar's application.

5. Ms. Hagan did not testify at the hearing. However, at some point, Ms. Hagan approved Mr. Strickland's preliminary decision and entered the official action of the Department on the Department's public database. That database reflects the final decision to deny the application was made on April 20, 2005, outside of the 30 days of receipt of Lamar's application. On the other hand, Ms. Hagan signed the Notice of Denied Application with an issuance date of April 12, 2005. Her signature indicates that her final approval, whenever it may have occurred, related back to April 12, 2005, and was within 30 days of receipt of Lamar's application.

6. Lamar received the Department's letter denying its application, along with the return of its application and application fee. The letter contained a clear point of entry advising Lamar of its hearing rights under Chapter 120, Florida Statutes. However, Lamar did not request a hearing concerning the denied application as required in Florida Administrative Code Rule 14-10.0042(3). Nor did Lamar inform the Department's clerk in writing that it intended to rely on the deemer provision set forth in Section 120.60, Florida Statutes. Absent a Chapter 120 challenge to the Department's action, the

Department's denial became final under Florida Administrative Code Rule 14-10.0042(3).

7. After the denial, Lamar performed a Height Above Ground Level (HAGL) test on the proposed sign's site. The test is used to determine whether the sign face can be seen from a particular viewing location. Lamar determined that the South face could not be seen from SR366/West Pensacola Street due to some large trees located along the West side of Ocala Road and behind the gas station in front of the sign.

8. Pictures of the area surrounding the sign's proposed location, filed with the 2005 permit application, show a number of trees that are considerably taller than the roof of the adjacent gas station and utility poles. These trees appear to be capable of blocking the view of the sign face from SR366/West Pensacola Street and support the results from Lamar's HAGL test. Since the sign could not be seen from a federal aid highway, it did not require a permit. Therefore, around August or October 2005, Lamar built the subject sign on the west side of Ocala Road and 222 feet north of SR 366/West Pensacola Street in Tallahassee, Leon County, Florida.

9. As constructed, the sign sits on a large monopole with two faces, approximately 10 1/2 feet in height and 36 feet wide. The sign's height above ground level is 28 feet extending upwards to 40 feet. The north face of the sign does not require

a permit since it can only be seen from Ocala Road. Likewise, at the time of construction and for some time thereafter, the south face of the sign did not require a permit since it was not visible from a federal aid highway.

10. Following construction of the subject sign, some of the large trees were removed. The removal caused the south face of the sign to be clearly visible from the main traveled way of SR366/West Pensacola Street.

11. On March 21, 2007, the sign was issued a Notice of Violation for an illegally erected sign because it did not have a permit. The Notice of Violation stated:

> YOU ARE HEREBY NOTIFIED that the advertising sign noted below is in violation of section 479.01, Florida Statutes. An outdoor advertising permit is required but has not been issued for this sign.

The Notice cited the wrong statute and, on June 12, 2008, an amended Notice of Violation for an illegally erected sign was issued by the Department. The Amended Notice changed the statutory citation from Section 479.01 to Section 479.07, Florida Statutes. Both the original Notice and Amended Notice stated the correct basis for the violation as: "An outdoor advertising permit is required but has not been issued for this sign."

12. On December 18, 2007, Lamar submitted a second application for an Outdoor Advertising permit for an existing

sign. The application was denied on January 8, 2008, due to spacing conflicts with permitted signs BX250 and BX251. The denial cited incorrect tag numbers for the sign causing the spacing conflict. The incorrect tag numbers were brought to the attention of Mr. Strickland. The Department conducted a field inspection of the sign's area sometime between December 20, 2007 and January 20, 2008. The inspection confirmed that the spacing conflict was caused by signs BZ685 and BZ686. The signs were within 839 feet of the subject sign and owned by Lamar. An Amended Notice of Denied Application was issued by the Department on January 24, 2008. However, the evidence was clear that the Department made the decision to deny the application based on spacing conflicts on January 8, 2008. The fact that paperwork had to be made to conform to and catch up with that decision does not change the date the Department initially acted upon Lamar's application. Therefore, the 2007 application was acted upon within 30 days.

13. The Department's employee responsible for issuing violation notices is Lynn Holschuh. She confirmed that if the south sign face was completely blocked from view from the main traveled way of SR366/West Pensacola Street when it was originally constructed, a sign permit would not be required from the Department. Ms. Holschuh further testified that if a change in circumstances occurred resulting in the subject sign becoming

visible from the main traveled way of Pensacola Street, the sign might be permitted by the Department as a non-conforming sign, if it met the criteria for such.

14. In this case, the south face of the sign was once legal and did not require a permit because several large trees blocked the sign's visibility from a federal aid highway. The removal of the trees that blocked the sign caused the sign to become visible from a federal aid highway. In short, the south sign face no longer conformed to the Florida Statutes and Rules governing such signs and now is required to have a sign permit. However, the sign has not been in continuous existence for seven years and has received a Notice of Violation since its construction in 2005. The evidence was clear that the sign does not meet the requirements to qualify as a nonconforming sign and cannot be permitted as such. Therefore, Petitioner's application for a sign permit should be denied and the sign removed pursuant to the Notice of Violation.

CONCLUSION OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat (2007).

16. In general, Chapter 479, Florida Statutes, requires signs visible from a federal aid primary highway to have a

permit. Section 479.08(9), Florida Statutes (2007), establishes the criteria for sign permits and states, in pertinent part:

> A permit shall be granted for any sign for which a permit had not been granted by the effective date of this act unless such sign is located at least:
>
> (2) One thousand feet from any other permitted sign on the same side of the highway, if on a federal-aid primary highway.

17. Section 479.01(14), Florida Statutes, defines a nonconforming sign as follows:

> "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.

18. Section 479.07(1), Florida Statutes (2007), states:

> Except as provided in §§ 479.105(1)(e) and 479.16, a person may not erect, operate, use, or maintain, or cause to be erected, operated, used, or maintained, any sign on the State Highway System outside an incorporated area or on any portion of the interstate or federal-aid primary highway system without first obtaining a permit for the sign from the department and paying the annual fee as provided in this section. For purposes of this section, "on any portion of the State Highway System, interstate, or federal-aid primary system" shall mean a sign located within the controlled area which is visible from any portion of the main traveled way of such system.

19. Section 479.105, Florida Statutes, declares all unpermitted signs to be a public nuisance and subject to removal. However, Subsection 479.105(e), Florida Statutes, provides an exception for nonconforming signs. Subsection (e) states, as follows:

> However, if the sign owner demonstrates to the department that:
>
> 1. The sign has been unpermitted, structurally unchanged, and continuously maintained at the same location for a period of 7 years or more;
>
> 2. At any time during the period in which the sign has been erected, the sign would have met the criteria established in this chapter for issuance of a permit;
>
> 3. The department has not initiated a notice of violation or taken other action to remove the sign during the initial 7-year period described in subparagraph 1.; and
>
> 4. The department determines that the sign is not located on state right-of-way and is not a safety hazard, the sign may be considered a conforming or nonconforming sign and may be issued a permit by the department upon application in accordance with this chapter and payment of a penalty fee of $300 and all pertinent fees required by this chapter, including annual permit renewal fees payable since the date of the erection of the sign.

20. In this case, the evidence showed that the sign had been lawfully erected in 2005 because it was not visible from a federal aid highway and did not require a permit. There was no evidence that the designation of a highway changed the legal

status of the sign. In fact, the status of the sign changed when the trees blocking its view were removed. However, the evidence was clear that the sign has not been in continuous existence for seven years since its construction. Additionally, the sign has been issued a Notice of Violation since the time of its construction. Given these facts, the sign does not meet the statutory requirements to be designated a nonconforming sign entitled to a permit under Section 479.105(e), Florida Statutes. See Scharrer v. Department of Professional Regulation, 536 So. 2d 320 (Fla. 3rd DCA 1988). The evidence was also clear that the sign is located within 1,000 feet of another permitted structure. Therefore, Petitioner is not entitled to a permit for the south face of the subject sign since it is within 1,000 feet of another permitted sign.

21. Finally, Lamar asserts that Section 120.60, Florida Statutes (2007), known as the deemer clause, entitles it to a permit because neither its 2005 application, nor its 2007 application were acted upon within the statutory period required for such action. Section 120.60(1), Florida Statutes (2007), states, in pertinent part:

> (1) . . . Every application for a license shall be approved or denied within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law. The 90-day time period shall be tolled by the initiation of a proceeding under §§ 120.569 and 120.57.

> Any application for a license that is not approved or denied within the 90-day or shorter time period, within 15 days after conclusion of a public hearing held on the application, or within 45 days after a recommended order is submitted to the agency and the parties, whichever action and timeframe is latest and applicable, is considered approved unless the recommended order recommends that the agency deny the license . . . . Any applicant for licensure seeking to claim licensure by default under this subsection shall notify the agency clerk of the licensing agency, in writing, of the intent to rely upon the default license provision of this subsection. . . .

22. Subsection 479.07(4), Florida Statutes (2007), reads:

> An application for a permit shall be acted on by the department within 30 days after receipt of the application by the department.

23. Florida Administrative Code Rule 14-10.0042(3) states, in pertinent part:

> (3) Requests for Administrative Hearing
>
> (a) All requests for administrative hearings shall be made in writing and shall be filed with the Clerk of the Agency Proceedings, Department of Transportation, 605 Suwannee Street, Mail Station 58, Tallahassee, Florida 32399-0458. Requests for hearing filed in response to notices issued pursuant to Sections 479.07(8)(a), 479.105)(1), or 479.107(1), F.S., must be filed within 30 calendar days of receipt of the notice of the Department's action. Any request for hearing filed in response to a notice issued pursuant to Sections 479.07(8)(a), 479.105(1), or 479.107(1), F.S., must be filed within 30 calendar days of the date of the notice of the Department's action. A request for hearing

> is not timely filed unless it is received by the Clerk of Agency Proceedings within the specified time.
>
> (b) A request for hearing shall conform to the requirements of Rule 28-106.201 or 28-106.301, F.A.C. If the sign owner, applicant, licensee, or permittee fails to file a timely request for a hearing, the Department's action shall become conclusive and final agency action. (emphasis supplied)

24. In this case, the evidence is unclear that the 2005 application was denied within 30 days after its date of receipt by the Department. The better evidence indicates that it was acted upon by the Agency by April 12, 2005, within the 30-day time period for such action. However, even assuming the Department's action was not timely, Petitioner did not file a request for a hearing within 30 days of receiving the 2005 Notice of Denied Application. Furthermore, Lamar never notified the clerk, in writing, of its intention to rely on the Section 120.60(1), Florida Statutes, deemer provision as mandated by Section 120.60, Florida Statutes. Given these two facts, the Department's 2005 denial of Lamar's application became conclusive and the final action of the Department. Lamar cannot now assert that its 2005 application should be deemed to be granted since it has not timely protected its interests.

25. In regards to the 2007 application, the evidence was clear that the Department took final action on the application

within the 30-day time period for such action. Section 120.60(1), Florida Statutes, does not require that the paperwork reflecting the agency's action be finalized or issued within the required time period for such decisions. The statute only requires that the agency make its decision within the required time period. See Department of Transportation v. Calusa Trace Development Corp., 571 So. 2d 543 (Fla. 4th DCA 1990), and Sumner v. Department of Business and Professional Regulation, 555 So. 2d 919 (Fla. 1st DCA 1990). The fact that mistakes were made in the issuance of the original 2007 notice of denial is irrelevant to the question of whether the agency made its decision on the Petitioner's application within the required time period. The written notice is an official record and on this issue only serves as evidence of the action taken by the agency. The mistakes that were made in the original 2007 notice related only to whether Lamar received adequate information regarding the Agency's decision to deny its 2007 permit application. Calusa, supra and Sumner, supra See Scharrer v. Department of Professional Regulation, 536 So. 2d 320 (Fla. 3rd DCA 1988), and since the Department's denial was made within 30 days of the Department's receipt of Lamar's application, the deemer provision of Section 120.60(1), Florida Statutes, does not apply. Given that the south face of the sign does not meet the spacing requirements for a permit and does not qualify for a

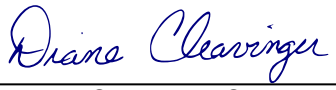
permit as a nonconforming sign, Lamar's application should be denied and the Department is entitled to remove the sign pursuant to its Notice of Violation.

RECOMMENDATION

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

RECOMMENDED that the Department of Transportation enter a final order denying Petitioner a permit for the sign located on the west side of Ocala Road, 222 feet North of SR366/West Pensacola Street and enforcing the Notice of Violation for said sign and requiring removal of the south sign face pursuant thereto.

DONE AND ENTERED this 15th day of September, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.