STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida

LAMAR OF TALLAHASSEE,

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.
_____/

DOAH CASE NOS.: 08-0660
08-0661
DOT CASE NOS.: 07-041
08-009

FINAL ORDER

On March 14, 2007, the Florida Department of Transportation issued a Notice of Violation-Illegally Erected Sign, notice number 511296, to Lamar of Tallahassee (Lamar), for a sign located 200 feet east of State Road 366/West Pensacola Street, in Tallahassee, Leon County, Florida. On April 12, 2007, the Department received a Petition for Formal Administrative Hearing from Lamar directed to 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 on December 18, 2007, the application was denied by Notice of Denied Application number 56926 issued January 8, 2008, and Lamar filed a Petition for Formal Administrative Hearing to challenge the denial.

Both petitions were forwarded to the Division of Administrative Hearings on February 26, 2008. The petition challenging the Notice of Violation was assigned case number 08-0661 and the petition challenging the permit denial was assigned case number 08-0660. On February 18,

2008, the cases were consolidated.

The Department issued an Amended Notice of Violation-Illegally Erected Sign on June 12, 2008, to correct a statutory citation contained on the original notice. On June 13, 2008, Lamar filed a Motion to Amend the Petition and Amended Petition for Administrative Hearing and a Second Motion to Amend the Petition for Formal Administrative Hearing. The Department filed a response and the motions to amend were granted.

A formal administrative hearing was conducted in Tallahassee, Florida on June 24, 2008, before Diane Cleavinger, a duly appointed Administrative Law Judge. Appearances on behalf of the parties were as follows:

For Petitioner: Gerald S. Livingston, Esquire
Pennington, Moore, Wilkinson, Bell & Dunbar, P.A.
215 South Monroe Street, Suite 200
Tallahassee, Florida 32301

For Respondent: Kimberly Clark Menchion, Esquire
Assistant General Counsel
Department of Transportation
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399-0458

At the hearing, the Department presented the testimony of Lynn Holschuh and Billy Wayne Strickland and Lamar presented the testimony of Loyd Childree. The Department offered exhibits 1 through 10 and 13 through 16, and Lamar offered exhibits 1 through 7, all of which were admitted into evidence. 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.

The transcript from the June 24, 2008, hearing was filed July 14, 2008. The Department and Lamar filed their respective Proposed Recommended Orders on August 4, 2008. The

Administrative Law Judge issued her Recommended Order on September 15, 2008, and the parties filed their exceptions on September 30, 2008. Both parties filed responses to the exceptions.

STATEMENT OF THE ISSUE

As stated by the Administrative Law Judge in her Recommended Order, the issue presented was:

> [W]hether 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.

EXCEPTIONS

Lamar takes exceptions to the Recommended Order Findings of Fact 5 and 14 and the Department takes exception to Findings of Fact 4, 7, and 8.

Pursuant to Section 120.57(1)(l), Florida Statutes (2007), an agency has the authority to reject or modify the findings of fact set out in the recommended order. However, it cannot do so unless the agency first determines from a review of the entire record, and states with particularity in its final order, that the findings of fact were not based upon competent, substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. Rogers v. Dep't of Health, 920 So. 2d 27, 30 (Fla. 1st DCA 2005). The agency is not permitted to reweigh the evidence or judge the credibility of the witnesses. Id. If there is competent, substantial evidence in the record to support the administrative law judge's findings of fact, the agency may not reject them, modify them, or make new findings. Stokes v.

State, Bd. of Prof' Eng'rs, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007); Rogers, 920 So. 2d at 30.

Lamar's first exception is directed to Finding of Fact 5 which provides:

> 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.

Essentially, Lamar contends that there is no provision for a "relation back" to the date of what Lamar characterizes as a preliminary determination.

Lamar's exception is rejected as irrelevant because the Department's denial of Lamar's 2005 application is final and conclusive agency action not subject to challenge in this proceeding. As the Administrative Law Judge ruled in the portion of Conclusion of Law 24 which Lamar has not taken exception to:

> 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.

Next, Lamar takes exception to Finding of Fact 14 which states:

> 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 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.

Lamar does not challenge the facts set out in this finding but does take issue with the ALJ's legal conclusion that: "The evidence was clear that the sign does not meet the requirements to qualify as a nonconforming sign and cannot be permitted as such." Lamar argues that the conclusion should be modified to provide that the sign should be permitted because it meets the statutory definition of a nonconforming sign.

Insofar as the Administrative Law Judge's conclusion indicates that a non-permitted sign's eligibility for receiving a permit is dependent upon its satisfaction of the statutory definition of a nonconforming sign, it is erroneous. A non-permitted sign can be issued a permit as either a conforming or a nonconforming sign only if it satisfies the criteria set out in Section 479.105(e), Florida Statutes. Consequently, Lamar's contention that the sign should be permitted because the evidence showed it was nonconforming is rejected and, consistent with Conclusion of Law 20, the above quoted sentence is modified to read: "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."

The Department's exceptions to Findings of Fact 4, 7, and 8 do not go to the factual content of the findings but instead address a typographical error and the misuse of a statutorily defined term. Turning first to Finding of Fact 4, the Department contends that the Administrative Law Judge's reference to an April 12, 2007, preliminary denial date is erroneous. The Department's exception is well taken. The challenged reference occurs in a portion of the Recommended Order dealing with Lamar's March 15, 2005, permit application. Viewed in this context the 2007 date is obviously a typographical error. Moreover, the record evidence establishes that the preliminary denial occurred on April 12, 2005, and there is no evidence indicating that the preliminary denial occurred in 2007. Finding of Fact 4 is modified to show an April 12, 2005, preliminary denial date.

With respect to Findings of Fact 7 and 8 the Department asserts that the reference to a HAGL test to determine the visibility of a sign from a given location is inaccurate. Lamar's witness described the test they used to determine the visibility of the sign face from Pensacola Street as a HAGL test. However, Florida Administrative Code Rule 14.10.0011(1)(f) defines the acronym as follows:

> (f) "Height Above Ground Level (HAGL)" means the distance between the ground and the bottom of the sign face, excluding any border and trim, as measured from the point on the sign facing closest to the main-traveled way.

Given this definition, a measurement of the distance between the bottom of the sign face and the ground is not going to be determinative of a sign's visibility from a particular location. Although Lamar's witness used the wrong term of art to describe the test they ran to determine the sign's visibility, the erroneous use of the term does not change the fact that the test Lamar

conducted, irrespective of the name given it by the witness, resulted in Lamar determining that the sign would not be visible from a regulated roadway. The Department's exceptions to Findings of Fact 7 and 8 are rejected.

Lamar takes exception to the Recommended Order's Conclusions of Law 16, 19, 20, and 24 and the Department takes exception to Conclusion of Law 16.

Regarding an agency's treatment of conclusions of law, Section 120.57(1)(l), Florida Statutes (2007) provides:

> The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

Both Lamar's and the Department's exceptions to Conclusion of Law 16 note that the Administrative Law Judge incorrectly cited to Section 479.08(9), Florida Statutes (2007), as the source for permitting criteria. These exceptions are well-taken. The statutory citation is corrected to read: "Section 479.07(9), Florida Statutes (2007)."

The Department also notes that the first line of the block quote in Conclusion of Law 16 is inaccurate because it omitted the word "not." The first line of the quoted statutory provision is corrected to read: "A permit shall not be granted for any sign for..."

Lamar's next exception is directed to Conclusions of Law 19 and 20 jointly. Conclusion of Law 19 sets out the contents of portions of Section 479.105, Florida Statutes and Conclusion

of Law 20 states:

> 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. 3d 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.

Looking to the definition of "nonconforming sign" contained in Section 479.01(14), Florida Statutes, Lamar suggests that the Recommended Order erroneously infers that the only circumstance under which a nonconforming sign may be permitted is that set forth in Subsection 479.105(e), Florida Statutes.

There is no dispute that the sign face at issue had never been permitted by the Department. Section 479.105(e), Florida Statutes, is the only portion of Chapter 479 which establishes criteria under which a sign erected or maintained without a permit may be issued a permit as either a conforming or a nonconforming sign. A non-permitted sign's eligibility for the issuance of a permit is governed by those criteria and is not dependent upon the whether the sign is ultimately characterized as a conforming or nonconforming sign. Lamar's exception to Conclusions of Law 19 and 20 is rejected.

Relying upon the same argument advanced in its exception to Finding of Fact 5, Lamar's final exception goes to the portion of Conclusion of Law 24 where the Administrative Law Judge addressed the denial of Lamar's 2005 permit application and determined that: "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." As was the case with Lamar's exception to Finding of Fact 5, this exception is rejected as irrelevant because the Department's denial of Lamar's 2005 application is final and conclusive agency action not subject to challenge in this proceeding.

FINDINGS OF FACT

After review of the record in its entirety, it is determined that the Administrative Law Judge's Findings of Fact in paragraphs 1-3, 4 as modified, 5-13, and 14 as modified are supported by competent, substantial evidence and are adopted and incorporated as if fully set forth herein.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Chapters 120 and 479, Florida Statutes.

2. The Conclusions of Law in paragraphs 15, 16 as modified, and 17-25 of the Recommended Order are fully supported in law, and are adopted and incorporated as if fully set forth herein.

ORDER

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

ORDERED that Lamar's permit application number 56926 is denied; It is further

ORDERED that the outdoor advertising sign referenced in Notice of Violation-Illegally Erected Sign notice number 511296 is in violation of Section 479.07(1), Florida Statutes, and must be removed pursuant to Section 479.105, Florida Statutes; It is further

ORDERED that should Lamar of Tallahassee fail to remove the sign within the next 30 days, the Department of Transportation, or its contractor, will remove the sign without further notice and the cost of removal is hereby assessed against Lamar of Tallahassee, pursuant to Section 479.105(3), Florida Statutes.

DONE AND ORDERED this 27th day of October, 2008.

SC Kopel

Stephanie C. Kopelousos
Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

FILED D.O.T. CLERK
2008 OCT 27 AM 9:14

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY ANY PARTY PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.100(d), FLORIDA RULES OF APPELLATE PROCEDURE, BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE DEPARTMENT'S CLERK OF AGENCY PROCEEDINGS, HAYDON BURNS BUILDING, 605 SUWANNEE STREET, M.S. 58, TALLAHASSEE, FLORIDA 32399-0458, WITHIN THIRTY (30) DAYS OF RENDITION OF THIS ORDER.

Copies furnished to:

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