

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

FILED  
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DIVISION OF  
ADMINISTRATIVE  
HEARINGS

LAMAR OF TALLAHASSEE,

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.

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DOAH CASE NO.: 08-1136

DOAH CASE NO.: 08-1137

DOT CASE NO.: 07-034

DOT CASE NO.: 08-021

**FINAL ORDER**

This proceeding was initiated by the timely filing of Petitions for Formal Administrative Hearing by Petitioner, Lamar of Tallahassee (Lamar), in response to Notice of Violation-Illegally Erected Sign (Notice No. 31307L2) issued on March 14, 2007, and Notice of Denied Application (Application No. 56925) issued January 16, 2008, by the Respondent, Department of Transportation (Department). On March 5, 2008, the matters were referred to the Division of Administrative Hearings (DOAH) for assignment of an Administrative Law Judge and a formal hearing. An order consolidating the cases was issued March 12, 2008.

A formal administrative hearing was held in these cases in Tallahassee, Florida, on June 12, 2008, before Harry L. Hooper, 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: Susan Schwartz, Esquire  
Assistant General Counsel  
Department of Transportation  
605 Suwannee Street, M.S. 58  
Tallahassee, Florida 32399-0458

### PRELIMINARY STATEMENT

This case involves an outdoor advertising sign owned by Lamar. The sign is located at the northeast corner of the intersection of Betton Road and Thomasville Road in Tallahassee, Florida.

In a Notice of Violation-Illegally Erected Sign, Notice Number 31307L2, dated March 14, 2007, the Department informed Lamar that the sign was in violation of Section 479.01, Florida Statutes, which contains a list of definitions and cannot be the subject matter of a violation of Chapter 479, Florida Statutes. The notice also informed Lamar that an outdoor advertising permit was required for the sign, but a permit had not been issued. This case was assigned Department Case Number 07-034 and Division of Administrative Hearings (DOAH) Case Number 08-1136.

On December 14, 2007, Lamar submitted an application to the Department requesting a permit for the sign. The Department denied the application pursuant to Section 479.07(9)(a), Florida Statutes, which prohibits a permit for a sign located 1,000 feet from any other permitted sign on the same side of a Federal-Aid Primary highway. This case was assigned Department Case Number 08-021 and DOAH Case Number 08-1137.

In both cases Lamar requested an administrative hearing. The cases, along with another

case that was subsequently withdrawn, were forwarded to DOAH on March 5, 2008, for assignment of an administrative law judge and a formal hearing. On March 12, 2008, DOAH Case Numbers 08-1136 and 08-1137 were consolidated for hearing. After three continuances granted at Lamar's request, the cases were heard on June 12, 2008, before Administrative Law Judge Hooper.

During the hearing Lamar moved, *ore tenus*, to dismiss Case Number 08-1136 because the Notice of Violation cited Section 479.01, Florida Statutes, as the basis for the violation. Section 479.01 cannot be violated by failing to have a permit for a sign. The Administrative Law Judge disposed of Lamar's motion ruling:

However, the text of the "Notice of Violation-Illegally Erected Sign" stated that, "This sign is illegal and must be removed within 30 days from the date of this Notice, pursuant to s. 479.105, Florida Statutes."

Subsection 479.105(1), Florida Statutes, provides that:

(1) Any sign which is located adjacent to the right-of-way of any highway on the State Highway System outside of an incorporated area or adjacent to the right-of-way on any portion of the interstate or federal-aid primary highway system, which sign was erected, operated, or maintained without the permit required by s. 479.07(1) having been issued by the department, is declared to be a public nuisance and a private nuisance and shall be removed as provided in this section.

The Department, when attempting to enforce a statute that could cause substantial financial costs on a citizen, ought to state its intentions and its basis for the action with specificity. The failure to do so could result in a dismissal. In this case however, the error, alleged by the Department's counsel to be a scrivener's error, was not so serious as to mislead Lamar as to the intentions of the Department. Indeed, the Petition for Formal Administrative

Hearing, as well as the discovery accomplished in the case, reveals that Petitioner was well informed as to the nature of the controversy and the governing statutes.

Lamar filed a Proposed Recommended Order that argued that a recommended order of dismissal should issue in the case because of the incorrect statutory citation. Respondent filed Department of Transportation's Response to Motion to Dismiss. Lamar filed Petitioner's Answer to Department's Response to Motion to Dismiss. The matters stated in the Proposed Recommended Orders, Department of Transportation's Response to Motion to Dismiss, and Petitioner's Answer to Department's Response to Motion to Dismiss, and the cases cited, were considered in arriving at the conclusion that a recommended order of dismissal should not issue.

(Recommended Order, pp. 3-4)

At the hearing, the Department presented the testimony of two witnesses and offered 12 exhibits into evidence. Lamar presented no testimony and offered no exhibits.

During the hearing, Lamar withdrew its petition in DOAH Case Number 08-1137 which challenged the denial of the permit application. As a result, the Administrative Law Judge recommended that the case be dismissed.

A transcript was filed on June 19, 2008, and the parties filed proposed recommended orders on June 30, 2008. The Administrative Law Judge entered his Recommended Order on July 16, 2008. Lamar filed exceptions to the Recommended Order on July 31, 2008, and the Department filed its response to Lamar exceptions on August 8, 2008.

#### **STATEMENT OF THE ISSUE**

As stated by the Administrative Law Judge in his Recommended Order, the issue presented was "whether a billboard structure is in compliance with Section 479, Florida Statutes."

## EXCEPTIONS TO THE RECOMMENDED ORDER

Lamar's exceptions do not address any findings of fact and are directed solely to the Administrative Law Judge's denial of Lamar's *ore tenus* motion to dismiss advanced at the final hearing in this matter on June 12, 2008. Section 120.57(1)(l), Florida Statutes 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.

The Administrative Law Judge's disposition of Lamar's motion to dismiss is not a matter over which the Department has substantive jurisdiction and cannot, therefore, be modified or rejected by the Department in this Final Order. See G.E.L. Corp. v. Environmental Protection, 875 So. 2d 1257, 1263-1264 (Fla. 5th DCA 2004); Barfield v. Dep't of Health, 805 So. 2d 1008, 1010-1011 (Fla. 1st DCA 2001); Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1141-1142 (Fla. 2d DCA 2001).

Alternatively, even if the Department could properly reject or modify the Administrative Law Judge's denial of Lamar's motion to dismiss, it would not do so. The instant record reflects that Lamar had adequate notice of the nature of the violation, was not prejudiced by the typographical error, and was not, therefore, deprived of due process.

Lamar's exceptions to the Recommended Order are rejected.

## FINDINGS OF FACT

After review of the record in its entirety, it is determined that the Findings of Fact in paragraphs 1 through 14 of the Recommended Order 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 and the parties to this proceeding pursuant to Chapters 120 and 479, Florida Statutes.
2. The Conclusions of Law in paragraphs 15 through 25 of the Recommended Order are wholly supported in law. As such, they 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 DOT Case Number 08-021 (DOAH Case Number 08-1137) is dismissed.


It is further

**ORDERED** that Lamar of Tallahassee's outdoor advertising sign identified in the March 14, 2007, Notice of Violation-Illegally Erected Sign, Notice Number 31307L2, is an illegal sign and must be removed. It is further

**ORDERED** that Lamar of Tallahassee shall remove the outdoor advertising sign it maintains at the intersection of Betton Road and Thomasville Road in Tallahassee, Florida, within 30 days of this Order. 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 20<sup>th</sup> day of August, 2008.



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

*CEC*

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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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