

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAMAR OF TALLAHASSEE,)
)
 Petitioner,)
)
 vs.) Case Nos. 08-1136
) 08-1137
 DEPARTMENT OF TRANSPORTATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This cause came on for final hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on June 12, 2008, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Gerald S. Livingston, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 South Monroe Street, Second Floor
Post Office Box 10095
Tallahassee, Florida 32302-2095

For Respondent: Susan Schwartz, Esquire
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0450

STATEMENT OF THE ISSUE

The issue is whether a billboard structure is in compliance with Chapter 479, Florida Statutes.

PRELIMINARY STATEMENT

This case involves a large billboard (the sign) located at the northeast corner of the intersection of Betton Road and Thomasville Road in Tallahassee, Florida. It is owned by Lamar of Tallahassee (Lamar).

In a "Notice of Violation-Illegally Erected Sign," dated March 14, 2007, the Florida Department of Transportation (Department) informed Lamar that a sign advertising Women's World, was in violation of Section 479.01, Florida Statutes. The Notice further informed Lamar that an outdoor advertising permit was required for the sign, but a permit had not been issued.

Section 479.01, Florida Statutes, is a list of definitions. It is not a statute that may be violated.

This case was assigned Department case number 07-034 and Division of Administrative Hearings case number 08-1136.

Subsequently, in a letter dated December 14, 2007, Lamar submitted an application to the Department requesting a permit for the billboard. In a document entitled "Denied Application," the Department informed Lamar that their application for a permit was denied pursuant to Subsection 479.07(9)(a), Florida Statutes. This section 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 Division of Administrative Hearings case number 08-1137.

In both cases Lamar requested an administrative hearing. The cases, and another that was subsequently withdrawn, were forwarded to the Division of Administrative Hearings on March 5, 2008. Case numbers 08-1136 and 08-1137 were consolidated for hearing on March 12, 2008. The cases were set for hearing, and subsequent to three continuances granted at Lamar's request, the cases were heard on June 12, 2008.

During the hearing, Lamar moved to dismiss case number 07-1136, because the "Notice of Violation-Illegally Erected Sign" cited Section 479.01, Florida Statutes, as the basis for the violation. As noted herein, one cannot violate Section 479.01, Florida Statutes, by failing to have a permit for a sign. 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 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.

At the hearing, Respondent presented the testimony of two witnesses and offered 12 exhibits into evidence. Lamar did not present any testimony and offered no exhibits.

During the hearing, Lamar withdrew its petition in Case No. 08-1137 that challenged the denial of the permit application. For that reason, it will be recommended that case be dismissed.

A transcript was filed on June 19, 2008. After the hearing, Petitioner and Respondent filed their Proposed Findings of Fact and Conclusions of Law on June 30, 2008. In the Proposed Recommended Order of Respondent, Department of Transportation, there is found the following statement:
"References to Lamar's pre-hearing report, agreed upon by the Department, will be as PHR, followed by the page number." No Pre-hearing report is in the record.

However, Lamar filed a Proposed Pre-Hearing Report and an Amended Proposed Pre-Hearing Report. In the Department's Proposed Recommended Order there are references to "LHR" and page numbers and subparagraph numbers. These references are deemed to refer to Lamar's Proposed Pre-Hearing Report because they coincide with the facts contained therein. In other words, if the factual assertions in the Department's Proposed Recommended Order coincide with facts set forth in Lamar's

Proposed Pre-Hearing Report, then they are deemed facts in this Recommended Order.

References to statutes are to Florida Statutes (2007) unless otherwise noted.

FINDINGS OF FACT

1. The Department is the state agency responsible for regulating outdoor advertising signs located within 660 feet of the nearest edge of the State Highway System, interstate, or Federal-Aid Primary system in accordance with Chapter 479, Florida Statutes.

2. Lamar is in the business of providing outdoor signs for entities wishing to advertise.

3. Lamar owns the sign at the northeast corner of the intersection of Betton Road and Thomasville Road in Tallahassee, Leon County, Florida. The sign was built in 1980 and rebuilt in June 1997. The sign has two sides. One side faces Betton Road, and is visible only to persons on Betton Road. The Department does not assert that a permit is required for that side.

4. The other side of the sign, facing to the west, is within 660 feet of Thomasville Road, which is also referred to as State Route 61, and is visible from Thomasville Road.

5. In 1974, State Route 61 was known as U. S. Highway 319. It was a Federal-Aid Primary route.

6. On June 24, 1974, a road denominated Capital Circle located on the outskirts of Tallahassee, was designated U.S. Highway 319. Thomasville Road although no longer a part of U.S. Highway 319, continued to bear the name State Route 61 and remained a Federal-Aid Primary route.

7. In 1983 the Federal Highway Administration listed both Capital Circle and State Route 61 as Federal-Aid Primary routes.

8. In 1991, the Federal Highway Administration created the National Highway System and ceased using Federal-Aid Primary designations. State Route 61, also known as Thomasville Road, nevertheless remained a Federal-Aid Primary road for outdoor advertising classification purposes at all times pertinent to this case. For federal highway identification purposes, the road is currently in the Surface Transportation Program.

9. Prior to May 23, 1996, Lamar held an outdoor advertising permit pursuant to Section 479.07, Florida Statutes, for this sign. The sign was assigned tag number BG 518-35.

10. On May 23, 1996, the Department issued a "Notice of Violation--Signs for Which Permits Have Been Issued," addressing permit number BG 518-35. This notice indicates that it was sent to Lamar via registered mail, return receipt requested. It informed that the sign was in violation of Chapter 479, Florida Statutes, or Florida Administrative Code Chapter 14-10 because

the sign: "May not be maintained without permission of the person lawfully controlling site (479.11(9), FS)."

11. On July 31, 1996, in a letter signed by District Outdoor Advertising Manager Vicki L. Davis, the Department notified Lamar that, because the Department had received a statement of loss of landowner's permission for the sign bearing tag number BG 518-35, Lamar was required to remove the sign. The Department included a "certificate of cancellation" with the letter.

12. Lamar admits that it voluntarily canceled its permit for the sign in August 1997. Subsequently, the sign remained with its permit tag attached, unmolested by the Department for approximately 11 years.

13. In January 1997, Lamar acquired a separate monopole structure bearing two signs with tag numbers BN 504 and BN 505. These signs are less than 200 feet to the north of the subject sign.

14. During a 2007 inspection, an agent for the Department observed the subject sign. It still bore tag number BG 518-35. On March 14, 2007, the Department issued the "Notice of Violation-Illegally Erected Sign" addressed above. As noted before, the violation was based on the sign's having no permit.

CONCLUSIONS OF LAW

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

16. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue of the proceedings. Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981) and Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). Accordingly, the burden of proof is on the Department.

17. The Department is required to show by clear and convincing evidence that Lamar committed the acts alleged in the "Notice of Violation-Illegally Erected Sign." See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987), where it is stated that "in a case where the proceedings implicate the loss of livelihood, an elevated standard is necessary to protect the rights and interests of the accused." See also, Department of Banking & Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

18. Subsection 479.01(17), Florida Statutes, provides as follows:

479.01. Definitions

As used in this chapter, the term:

* * *

(17) "Sign" means any combination of structure and message in the form of an outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, advertising structure, advertisement, logo, symbol, or other form, whether placed individually or on a V-type, back-to-back, side-to-side, stacked, or double-faced display or automatic changeable facing, designed, intended, or used to advertise or inform, any part of the advertising message or informative contents of which is visible from any place on the main-traveled way. The term does not include an official traffic control sign, official marker, or specific information panel erected, caused to be erected, or approved by the department.

19. Section 479.07, Florida Statutes, provides, in part, as follows:

479.07. Sign permits

(1) Except as provided in ss. 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.

* * *

(9)(a) A permit shall not 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:

1. One thousand five hundred feet from any other permitted sign on the same side of the highway, if on an interstate highway.

2. One thousand feet from any other permitted sign on the same side of the highway, if on a federal-aid primary highway.

The minimum spacing provided in this paragraph does not preclude the permitting of V-type, back-to-back, side-to-side, stacked, or double-faced signs at the permitted sign site.

20. Section 479.105, Florida Statutes, provides in part as follows:

479.105. Signs erected or maintained without required permit; removal

(1) Any sign which is located adjacent to the right-of-way of any highway on the State Highway System outside 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.

* * *

(a) Upon a determination by the department that a sign is in violation of s. 479.07(1), the department shall prominently post on the sign face a notice stating that the sign is illegal and must be removed within 30 days after the date on which the notice was posted. However, if the sign bears the name of the licensee or the name and address of the nonlicensed sign owner, the department shall, concurrently with and in addition to posting the notice on the sign, provide a written notice to the owner, stating that the sign is illegal and must be permanently removed within the 30-day period specified on the posted notice. The written notice shall further state that the sign owner has a right to request a hearing, which request must be filed with the department within 30 days after the date of the written notice. However, the filing of a request for a hearing will not stay the removal of the sign.

* * *

(e) 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.

21. Other exceptions, as noted by Subsection 479.07(1), Florida Statutes, are found at Section 479.16, Florida Statutes. This section addresses signs for which permits are not required. The sign does not fall under any of these exceptions.

22. The sign was erected in 1980 on a portion of the Federal-Aid Primary highway. It was visible from the main-traveled way of the highway. Accordingly, unless falling within one of the exceptions listed at Subsection 479.105(1)(e)1.-4., Florida Statutes, the sign requires a permit.

23. Subsection 479.105(1)(e), Florida Statutes, was first passed as Section 64, Chapter 95-257, Laws of Florida, with an effective date of June 11, 1995. It was amended again in 1996 and has remained unchanged since that date. The sign was erected in 1980 and rebuilt in 1997. Also in 1997, Lamar erected a separate monopole sign having two faces within 200 feet of the sign.

24. Applying these facts to the criteria in Subsection 479.105(1)(e), Florida Statutes, it is found that the sign has been unpermitted, structurally unchanged, and continuously

maintained at the same location for a period of seven years. However, during the seven-year period the sign was not always eligible for a permit because it was within 1000 feet of another sign in violation of Subsection 579.07(9)(a), Florida Statutes. Accordingly, it may not be issued a permit under that subsection.

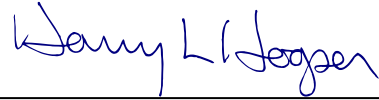
25. Pursuant to this analysis the sign is found to have no permit and is not lawfully entitled to receive a permit.

RECOMMENDATION

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

RECOMMENDED that the Department of Transportation enter a final order finding that the sign is a public or private nuisance and requiring that it be removed as provided in Subsection 479.105(1)(a), Florida Statutes, and dismissing case number 08-1137.

DONE AND ENTERED this 16th day of July, 2008, in
Tallahassee, Leon County, Florida.



HARRY L. HOOPER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of July, 2008.

COPIES FURNISHED:

Gerald S. Livingston, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 South Monroe Street, Second Floor
Post Office Box 10095
Tallahassee, Florida 32302-2095

Susan Schwartz, Esquire
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0450

James C. Myers, Clerk of Agency Proceedings
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0450

Alexis M. Yarbrough, General Counsel
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0450

Stephanie Kopelousos, Secretary
Department of Transportation
Haydon Burns Building, Mail Station 57
605 Suwannee Street
Tallahassee, Florida 32399-0450

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.