

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

**LAMAR OUTDOOR ADVERTISING-  
LAKELAND**

**Petitioner,**

**vs.**

**DOAH CASE NO.: 08-1468**

**DOT CASE NO.: 07-114**

**DEPARTMENT OF TRANSPORTATION,**

**Respondent**

---

**FINAL ORDER**

On February 25, 2008, the Florida Department of Transportation (Department) issued an Order Denying Petition for Waiver or Variance to Lamar Outdoor Advertising – Lakeland (Lamar), declining Lamar’s after-the-fact request for permission to raise the height of four non-conforming outdoor advertising signs in contradiction of Fla. Admin. Code Rule 14-10.007(2)(b). On March 13, 2008, the Department received a Petition for Formal Administrative Hearing from Lamar contesting the Department’s order. The matter was referred to the Division of Administrative Hearings (DOAH) on March 24, 2008, for assignment of an Administrative Law Judge and a formal hearing. The matter was consolidated with Lamar’s challenge to existing Rule 14-10.007(2)(b), Florida Administrative Code, filed in DOAH Case No. 08-1408RX.

A formal administrative hearing was held in the consolidated matter on July 23, 2008, before Daniel M. Kilbride, a duly appointed Administrative Law Judge. Appearances on behalf

of the parties were as follows:

For Petitioner: Cynthia S. Tunnicliff, Esquire  
Gerald S. Livingston, Esquire  
Brian A. Newman, Esquire  
Pennington, Moore, Wilkinson, Bell & Dunbar, P.A.  
215 S. Monroe Street, 2<sup>nd</sup> Floor  
Tallahassee, Fl 32301

For Respondent: Susan Schwartz, Esquire  
Department of Transportation  
Haydon Burns Building, Mail Station 58  
605 Suwannee Street  
Tallahassee, Florida 32399-0458

At the hearing, the parties submitted Joint Exhibits 1 through 11 which were admitted into evidence. No live testimony was presented at hearing. The transcript of the final hearing was filed with DOAH on August 6, 2008. The Department filed its Proposed Recommended Order on August 25, 2008, and Lamar filed its Proposed Recommended Order on August 26, 2008. Judge Kilbride issued his Recommended Order on October 7, 2008. Lamar filed its exceptions to the Recommended Order on October 22, 2008, and the Department responded to the exceptions on October 31, 2008.

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

As stated by the Administrative Law Judge in his Recommended Order, the issue presented was “whether Respondent properly denied Lamar Outdoor Advertising’s Petition for Waiver or Variance from Florida Administrative Code Rule 14-10.007(2)(b).”

#### **EXCEPTIONS TO RECOMMENDED ORDER**

Lamar takes exception to Conclusions of Law 26, 29, 31, 32 and 38. No exceptions were taken to the findings of fact in the Recommended Order. Regarding an agency’s treatment of conclusions of law, Section 120.57(1)(l), Florida Statutes, provides:

The agency may adopt the recommended order as the final order of the agency. 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. . .

Lamar initially takes exception to Conclusion of Law 26, which states that the implementing language for Rule 14-10.007 is found in subsection 479.02(1), Florida Statutes. The Department is required by Section 479.02(1), Florida Statutes, to administer and enforce the Highway Beautification Act of 1965, Title 23, United States Code, corresponding federal regulations and a federal-state agreement. Section 23 CFR 750.707(5), prohibits modifications to non-conforming signs. Fla. Admin. Code Rule 14-10.007(2), prohibits modifications to non-conforming signs and subsection (b) states that raising the height above ground level (HAGL) of a non-conforming sign is an impermissible modification. The Department rule is in accordance with the federal regulations and therefore properly implements Section 479.02(1), Florida Statutes. Lamar's exception to Conclusion of Law 26 is rejected.

Lamar also takes exception to Conclusion of Law 29, in which the Administrative Law Judge concluded that the Department's definition of the term "maintenance" is reasonable and that Lamar's "manipulation of the term 'maintenance' to include replacing all structural supports and nearly doubling the size of a structure is without valid basis." Lamar first contends that there is no finding of fact and no competent substantial evidence indicating that the requested waiver would result in doubling the size of the signs. Unchallenged Findings of Fact 3 and 5 indicate

that the Administrative Law Judge was referring to the change in HAGL, which was raised from ten feet or less to eighteen to twenty three feet. The other dimensions of the signs were not at issue in this proceeding. Accordingly, Conclusion of Law 29 is modified to read: "Conversely, Petitioner's manipulation of the term 'maintenance' to include replacing all structural supports and nearly doubling the HAGL of a structure is without valid basis."

Lamar further contends that because Fla. Admin. Code Rule 14-10.007 allows for a reduction in height, an increase in height cannot be viewed as unreasonable. As set out in unchallenged Finding of Fact 14, the Federal Highway Administration agreed to allow a reduction in the height for non-conforming signs if required by local ordinances. But, unchallenged Findings of Fact 15, 16, and 17 show that the Federal Highway Administration refused to concur in an amendment to Rule 14-10.007 which would have allowed a sign owner to raise a non-conforming sign when a noise attenuation barrier screened or blocked the sign. Lamar's exception to Conclusion of Law 29 in this regard is rejected.

Lamar next takes exception to Conclusion of Law 31, in which the Administrative Law Judge concluded that Section 339.05, Florida Statutes, provides authority for Fla. Admin. Code Rule 14-10.007. While this contention relates more to the rule challenge proceeding, the Department concurs with the Administrative Law Judge's conclusion that Section 339.05, Florida Statutes, requiring the Department to secure federal aid and "do all things necessary to cooperate with the United States Government in the construction of roads", provides additional authority for Fla. Admin. Code Rule 14-10.007(2)(b). Under an agreement between the State of Florida and United States Department of Transportation, the Department could forfeit 10 percent of federal-aid highway funds if it does not maintain effective control of outdoor advertising signs, including control over modifications to non-conforming signs. Lamar's exception to

Conclusion of Law 31 is rejected.

Lastly, Lamar excepts to Conclusions of Law 32 and 38, suggesting that the federal government should not decide whether a variance should be granted from state rules. As noted in the Recommended Order, Section 120.542(1), Florida Statutes, on variances and waivers, states in pertinent part:

This section does not authorize agencies to grant variances or waivers to statutes or to rules required by the Federal Government for the agency's implementation or retention of any federally approved or delegated program, except as allowed by the program or when the variance or waiver is also approved by the appropriate agency of the Federal Government.

Based on this provision, federal acquiescence was required prior to granting a variance. Lamar's exception to Conclusions of Law 32 and 38 is rejected.

#### **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 through 18 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 19 through 28, 29 as amended, and 30 through 38 of the Recommended Order are fully supported in law. As such, they are adopted and incorporated as if fully set forth herein.

**ORDER**

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

**ORDERED** that **Petitioner, LAMAR OUTDOOR ADVERTISING-LAKELAND'S** request for a waiver or variance from the provisions of Rule 14-10.007(2)(b), Florida Administrative Code is **DENIED**.

**DONE AND ORDERED** this 18<sup>th</sup> day of December, 2008.



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

FILED D.O.T. CLERK  
2008 DEC 18 AM 8:56

**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:

Susan M. Schwartz, Esquire  
Assistant General Counsel  
Department of Transportation  
Haydon Burns Building  
605 Suwannee Street, M.S. 58  
Tallahassee, Florida 32399-0458

Daniel M. Kilbride  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-1550

Lynn Holschuh  
State Outdoor Advertising Administrator  
Department of Transportation  
Haydon Burns Building  
605 Suwannee Street, M.S. 58  
Tallahassee, Florida 32399-0458

Cynthia S. Tunnicliff, Esquire  
Gerald S. Livingston, Esquire  
Pennington, Moore, Wilkinson,  
Bell & Dunbar, P.A.  
215 South Monroe Street, Second Floor  
Tallahassee, Florida 32301