STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAMAR OUTDOOR ADVERTISING-LAKELAND,	)	
Petitioner,	)	
vs.	)	Case No. 08-1468
DEPARTMENT OF TRANSPORTATION,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held on July 23, 2008, before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings, pursuant to the administrative appeal of an Order Denying Petition for Variance or Waiver under Subsection 120.542(2), Florida Statutes (2007) in Tallahassee, Florida.[1]

APPEARANCES

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For Respondent: Susan Schwartz, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent properly denied Lamar Outdoor Advertising's Petition for Waiver or Variance from Florida Administrative Code Rule 14-10.007(2)(b).

PRELIMINARY STATEMENT

On November 28, 2007, Petitioner, Lamar Outdoor Advertising - Lakeland, submitted a Petition for Variance from Florida Administrative Code Rule 14-10.007(2)(b), to the Department of Transportation (FDOT) (Respondent), seeking a variance to allow the raising of the height above ground level for four non-conforming signs in Polk County, Florida. On February 25, 2008, Respondent entered an Order Denying Petition for Waiver or Variance. On March 13, 2008, Petitioner submitted a Petition for Formal Administrative Hearing on the Variance Denial to Respondent, which was then referred to the Division of Administrative Hearings (DOAH) on March 24, 2008.

On March 20, 2008, Petitioner filed a Petition to Determine the Invalidity of an Existing Rule with DOAH challenging Florida Administrative Code Rule 14-10.007(2)(b). On April 1, 2008, the challenges to an existing rule in DOAH Case No. 08-1408RX and the Challenge to the Variance Denial in DOAH Case No. 08-1468 were consolidated for hearing. The parties waived the 30-day hearing requirement in Subsection 120.56(1)(b), Florida Statutes, and a hearing was scheduled for June 17, 2008. The

matter was continued upon request of Petitioner, in order to complete additional discovery. The hearing was convened on July 23, 2008.

Prior to hearing, the parties filed a Joint Stipulated Pre-Hearing Report. Petitioner requested official recognition of various provisions of the statutes and laws from Utah and Nevada, 23 Code of Federal Regulation (CFR) 750.707, and the preceding Florida Administrative Code Rule 14-10.007 from 1990. Without objection recognition was granted. At hearing, the parties submitted Joint Exhibits 1 through 11, including the deposition of John Garner, which were admitted into evidence. No live testimony was presented at hearing.

The Transcript was filed on August 6, 2008. By agreement of the parties, proposed orders were timely filed by August 26, 2008. The parties' proposals have been carefully considered in the preparation of this order.

FINDINGS OF FACT

1. Respondent 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 in accordance with Chapter 479, Florida Statutes.

2. Petitioner owns and operates outdoor advertising signs in the State of Florida. In December 2004, Petitioner purchased four outdoor advertising signs adjacent to Interstate 4 in Polk

County, Florida. The signs are located on lots zoned for residential use. In accordance with Section 479.111, Florida Statutes, signs adjacent to interstate highways and federal-aid primary roads are only authorized in commercial, industrial zoned or un-zoned areas. These signs are, therefore, not in conformance with Section 479.111, Florida Statutes, and are non-conforming signs.

3. When initially permitted, the height from the ground to the bottom of the sign (referred to as "Height Above Ground Level" or "HAGL") for each of Petitioner's four signs was ten feet or less. The overall height of the signs from the ground to the top of the sign ranged from 34 to 37 feet.

4. Respondent erected a sound attenuation barrier (soundwall) along Interstate 4 in Polk County, Florida. As a result, the signs were blocked from view by passing motorists.

5. In August 2006, without seeking the permission of Respondent, Petitioner raised the HAGL of the four signs to a height of 18 to 23 feet above ground level to allow the signs to remain visible over the soundwall.

6. In September 2007, Respondent issued Notices of Intent to Revoke Petitioner's permits for violations of Florida Administrative Code Rule 14-10.007(2).

7. Previously, in 1972, an agreement was entered into between the State of Florida and the United States Department of

Transportation to implement and carry out the Highway Beautification Act (HBA) by controlling outdoor advertising signs located along interstates and federal-aid primary highways.

8. One of the purposes stated in the 1972 Agreement, was to allow Florida "to remain eligible to receive the full amount of all Federal-aid highway funds." In accordance with the Agreement, a determination that Florida failed to maintain effective control of outdoor advertising could result in a 10 percent reduction in federal highway funds.

9. Florida Administrative Code Rule 14-10.007 was primarily drawn from the federal regulation language in 23 CFR 750.707, in effect since 1973, which provides as to non-conforming signs:

> (5) The sign must remain substantially the same as it was on the effective date of the State law or regulations. Reasonable repair and maintenance of the sign, including a change of advertising message, is not a change which would terminate non-conforming rights. Each State shall develop its own criteria to determine when customary maintenance ceases and a substantial change has occurred which would terminate non-conforming rights.

10. In November 2007, after receiving the Notices of Intent to Revoke Permits, Petitioner filed a Petition for Variance from Respondent to authorize the raising of these four signs blocked by a noise attenuation barrier.

11. Thereafter, Respondent notified the Division Administrator for the Federal Highway Administration (FHWA) that a request for a variance had been received from Petitioner. By letter dated January 7, 2008, FHWA was asked (1) if it had developed any minimum criteria as to when a substantial change had occurred to a non-conforming sign as prohibited by federal regulations and (2) if no minimum criteria were established, whether a variance from an existing rule could be granted to allow a non-conforming sign to be increased in height as minimally necessary to be seen over a noise attenuation barrier.

12. By letter dated February 5, 2008, FHWA responded that (1) "a minimum Federal criteria has not been established," and (2) "an increase in height is considered an expansion or improvement, which is not allowed for non-conforming signs." The letter concluded:

> To summarize, the HBA and its implementing regulations do not permit the adjustment of a non-conforming sign where action by the State transportation agency obstructs the visibility of the sign from the highway. As such, the FHWA would expect FDOT to deny the request for a variance from the provisions of Florida Administrative Code Rule 14-10.007(2).

13. FHWA's February 2008, correspondence was not its first attempt to address modifications to non-conforming signs. By letter dated June 15, 2000, FHWA informed the Florida Department

of Transportation that non-conforming signs were not permitted to be raised to be seen over a noise wall, stating:

> Federal regulations require that non-conforming signs must remain substantially the same as they are on the effective date of the State law or regulations enacted to control them. FDOT is required to develop its own criteria to determine when customary maintenance ceases and a substantial change has occurred which would terminate non-conforming rights. In this instance, we believe raising the sign above the wall would constitute a substantial change and appreciate that FDOT has come to the same conclusion.

14. In September 2000, Respondent asked FHWA if non-conforming signs could be reduced in size or height when required by local ordinance. FHWA agreed to allow a reduction in height for non-conforming signs, if required by local ordinaces. Later in 2000, FHWA also authorized the addition of catwalks or other fall-protection devices to non-conforming signs provided such addition does not increase the structural integrity of the sign or prolong the life of the sign. Respondent's rules were amended accordingly to allow non-conforming signs to be reduced in size when required by a local ordinance and catwalks and other fall-protection devices to be added provided they did not increase the signs' structural integrity. Fla. Admin. Code R. 14-10.007(a)(2), and (2)(b)(1).

15. In December 2003, Respondent sought FHWA concurrence on amending Rule 14-10.007 to allow sign owners to submit a

request to raise a non-conforming sign when a noise attenuation barrier screens or blocks the sign. The text of the proposed rule provided that any requests approved by Respondent would be forwarded to FHWA for final acceptance.

16. In March 2005, FHWA responded through a memorandum providing: "Guidance on Adjustment of Non-Conforming Outdoor Advertising Signs." As background, the memorandum noted:

> With the broader use of noise walls around the country, the conflict between HBA prohibition against substantial improvement of non-conforming signs and sign owners' demands to maintain sign visibility is arising with increasing frequency.

In analysis and guidance, the memorandum stated:

> Current FHWA regulations permit a non-conforming sign to remain "at its particular location for the duration of its normal life subject to customary maintenance." 23 CFR 750.707(c). The intent of the HBA is to permit a non-conforming sign to continue in place until it is destroyed, abandoned, or discontinued, or is removed by the State (which can use 75 percent Federal funding for the removal of the sign). A non-conforming sign must "remain substantially the same as it was on the effective date of the State law or regulations" adopted to implement the HBA. 23 CFR 750.707(d)(5). A height increase is an expansion and improvement of a sign. In addition, increasing sign height to clear a noise wall typically will require new structural measures, such as a monopole design, that would be inconsistent with the concept of limiting non-conforming signs to the duration of their normal lives.

17. The memorandum concluded with the admonition: "If a State fails to comply with the non-conforming sign provisions of the HBA, it will become necessary to evaluate whether the State is maintaining effective control."

18. On February 25, 2008, Respondent entered an Order Denying Petitioner's Petition for Variance or Waiver, noting: "FHWA has consistently advised Respondent that any increase in height of a non-conforming sign would be a substantial change under the federal regulation." As the underlying purpose of the laws implementing Rule 14-10.007, was to implement and enforce the federal-state Agreement, the HBA of 1965, and federal regulations, Respondent concluded that "Petitioner has not offered any contrary basis for Respondent to conclude that the purpose of the laws underlying the rule can be achieved with a variance." The Order Denying the Petition for Variance or Waiver went on to state that Petitioner has not established a substantial hardship as the affected signs were all over 30 years old and represented only four of the 900 signs owned by Lamar Outdoor Advertising - Lakeland. Lastly, Respondent cited to several cases for the proposition that a sign owner does not have a right to be seen by passing motorists and concluded:

> Any value Petitioner derived from having signs visible from Interstate 4 was also based on an artificially created condition established in an exercise of the state's police power for the benefit of the

> traveling public. Principles of fairness do not compel Respondent to waive its rules and risk the loss of federal funds so that Petitioner can continue receiving the same state-sponsored benefit of passing motorists that the signs enjoyed before the soundwall was erected. Petitioner is subject to and affected by the rule in the same manner as every other sign owner who might wish to construct improvements to a non-conforming sign to enhance or maintain its economic vitality.

CONCLUSIONS OF LAW

19. The DOAH has jurisdiction over the subject matter and the parties hereto, pursuant to Sections 120.569 and Subsections 120.48(8) and 120.57(1), Florida Statutes.

20. Section 120.542, Florida Statutes, provides in pertinent part: Variances and Waivers -

> (1) Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation. A public employee is not a person subject to regulation under this section for the purpose of petitioning for a variance or waiver to a rule that affects that public employee in his or her capacity as a public employee. Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section. An agency may limit the duration of any grant of a variance or waiver or otherwise impose conditions on the grant only to the extent necessary for the purpose of the underlying statute to be achieved. 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. This section is supplemental to, and does not abrogate, the variance and waiver provisions in any other statute.

(2) Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

* * *

(5) A person who is subject to regulation by an agency rule may file a petition with that agency, . . . requesting a variance or waiver from the agency's rule.

* * *

(8) An agency shall grant or deny a petition for variance or waiver within 90 days after receipt of the original petition, . . . The agency's decision to grant or deny the petition shall be supported by competent substantial evidence and is subject to ss. 120.569 and 120.57. Any

> proceeding pursuant to ss. 120.569 and 120.57 in regard to a variance or waiver shall be limited to the agency action on the request for the variance or waiver, except that a proceeding in regard to a variance or waiver may be consolidated with any other proceeding authorized by this chapter.

21. Petitions for Variance or Waiver must comply with the requirements of Florida Administrative Code Rule 28-104.002.

22. A non-conforming sign is defined in Subsection 479.01(14), Florida Statutes, as:

> [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.

23. 23 CFR Subsection 750.707(b) similarly defines a non-conforming sign as:

> [A] sign which was lawfully erected but does not comply with the provisions of State law or State regulations passed at a later date or later fails to comply with State law or State regulations due to changed conditions.

24. 23 CFR Part 750.707(d)(5), provides that a non-conforming sign may undergo reasonable repair and maintenance, but must "remain substantially the same as it was on the effective date of the State law or regulations." Petitioner argues that because 23 CFR Part 750.707(d)(5) allows each state

to "develop its own criteria to determine when customary maintenance ceases and a substantial change had occurred which would terminate non-conforming rights," the Respondent is free to draft a rule that an increase in height as minimally necessary to be viewed over a soundwall is "customary maintenance."

25. Florida Administrative Code Rule 14-10.007 provides in pertinent part:

> (1) A nonconforming sign must remain substantially the same as it was as of the date it became nonconforming.
> (2) Reasonable repair and maintenance of nonconforming signs, including change of advertising message, is permitted and is not a change which would terminate the nonconforming status. Reasonable repair and maintenance means the work necessary to keep the sign structure in a state of good repair, including the replacement in kind of materials in the sign structure. . . . The following are examples of modifications which do not constitute reasonable repair or maintenance, and which constitute substantial changes to a nonconforming sign that will result in the loss of nonconforming status:
>
> * * *
>
> (b) Modification that changes the area of the sign facing or the HAGL of the sign, however:
> 1. Reduction in the area of the sign facing or the HAGL of the sign, which reduction is required by an ordinance adopted by a local government entity with jurisdiction over the sign, is not a change which would terminate the nonconforming status of the sign, provided like materials are used and no

> enhancements are made to the visibility of the sign.

26. The implementing language for Rule 14-10.007 is found in Subsection 479.02(1), Florida Statutes, which provides:

> It shall be the duty of the department to: Administer and enforce the provisions of this chapter and the agreement between the state and the United States Department of Transportation relating to the size, lighting, and spacing of signs in accordance with Title 1 of the Highway Beautification Act of 1965 and Title 23, Unites States Code, and federal regulations in effect as of the effective date of this act.

27. Section 479.02 was initially enacted in 1941 providing the duty of the department to administer and enforce the chapter. The requirement to enforce the Highway Beautification Act was added in December 1971. See Laws of Florida, Chapter 71-971, Section 2. The final clause for enforcement of "federal regulations in effect as of the effective date of this act" was added in 1984. See Laws of Florida, Chapter 84-227, Section 3.

28. Respondent has defined "reasonable repair and maintenance" as "the work necessary to keep the sign structure in a state of good repair, including the replacement in kind of materials in the sign structure." Fla. Admin. Code R. 14-10.007(2). Respondent's definition of reasonable repair and maintenance is not illogical and therefore falls within its grant of rulemaking authority. Board of Podiatric Medicine v. Florida Medical Association, 779 So. 2d 658 (Fla. 1st DCA 2001)

(agency definitions of term subject to various interpretations entitled to deference unless definition is without any valid basis).

29. Respondent's definition of maintenance is reasonable. Cf. Indiana Insurance Co. v. Winston, 377 So. 2d 718, 720 (Fla. 4th DCA 1979) (defining "maintenance" as "the labor of keeping something in a state of repair or efficiency"). Conversely, Petitioner's manipulation of the term "maintenance" to include replacing all structural supports and nearly doubling the size of a structure is without valid basis.

30. Allowing each state to develop rules on when customary maintenance ceases and a substantial change has occurred, does not vest the individual states with unbridled discretion. 23 CFR § 750.705(j) requires that the State submit all regulations and enforcement procedures regarding outdoor advertising control to the FHWA for approval. If FHWA determines that a state is not in compliance with the HBA, it can withhold 10 percent federal highway funding. Cf. South Dakota v. Volpe, 353 F. Supp. 335 (S.D. S. Dak. 1973) (upholding FHWA's removal of 10 percent highway funding because South Dakota's liberal zoning legislation was not consistent with the HBA).

31. Section 339.05, Florida Statutes, entitled Assent to Federal Aid Given, also provides authority for Florida Administrative Code Rule 14-10.007, stating, in pertinent part:

> The department is authorized to make application for the advancement of federal funds and make all contracts and do all things necessary to cooperate with the United States Government in the construction of roads under the provisions of such Acts of Congress and all amendments thereto.

32. In 2003, Respondent asked FHWA for permission to amend its rule to allow non-conforming signs to be raised over soundwalls. FHWA stated in unequivocal terms that increases in height for non-conforming signs were not allowable under federal regulations.

33. In Chancellor Media Whiteco Outdoor Corporation v. State, Department of Transportation, 796 So. 2d 547 (Fla. 1st DCA 2001), rev. denied, 821 So. 2d 293 (Fla. 2002), the court affirmed an order directing the removal of non-conforming signs reconstructed after being destroyed by wildfire. The court in Chancellor addressed the sign owners' suggestion that other states have allowed their sign regulations to vary from the federal regulations, despite the threatened removal of federal funds, by stating:

> Florida has exerted considerable effort over the last 30 years in complying with the Highway Beautification Act in order to protect its full share of federal highway funds. The federal-state agreement has been

> executed, legislation required for compliance has been enacted, and comprehensive state administrative rules have been enacted. The legislature surely did not intend to cast aside these years of effort and imperil the state's share of future federal highway funds simply to allow erection of some non-conforming highway billboards. We instead conclude, as respecting highway signs, that the legislative intent was to authorize erection of new like-kind signs to replace grandfathered signs only if erection of the signs would not be contrary to the Highway Beautification Act and the federal regulations. Because the appellant's non-conforming signs do not satisfy this condition, they are not authorized.

Chancellor, 796 So. 2d at 549-550.

34. In 2002, the Florida legislature enacted legislation balancing the federal legislation with the rights of sign owners by providing:

> This chapter does not prevent a governmental entity from entering into an agreement allowing the height above ground level of a lawfully erected sign to be increased at its permitted location if a noise-attenuation barrier, visibility screen, or other highway improvement is erected in such a way as to screen or block visibility of the sign. However, if a nonconforming sign is located on the federal-aid primary highway system, as such existed on June 1, 1991, or on any highway that was not part of such system as of that date but that is or becomes after June 1, 1991, a part of the National Highway System, the agreement must be approved by the Federal Highway Administration. Any increase in height permitted under this section may only be the increase in height which is required to achieve the same degree of visibility from the right-of-way which

> the sign had prior to construction of the noise-attenuation barrier, visibility screen, or other highway improvement.

§ 479.25, Fla. Stat. (2002-2006).

35. After the FHWA's 2005 memorandum disapproving any increases in height to non-conforming signs, Section 497.25, Florida Statutes was amended in 2006 to provide that only signs conforming to state and federal requirements for land use, size and height could be increased in height if a noise-attenuation barrier is erected so as to block the sign's visibility. By specifying that conforming signs may be raised, under the doctrine of expression unius est excluiso alterius, the Florida legislature has declined to provide authorization for the raising of non-conforming signs.

36. Petitioner had the option of allowing the signs to remain at their original height. Instead, Petitioner chose to violate Respondent's rules and raised the HAGL without permission. Therefore, Petitioner lost the signs' right to remain as non-conforming uses.

37. Petitioner has not demonstrated that the Order Denying Petition for Variance or Waiver was an abuse of agency discretion. Petitioner did not demonstrate that the underlying purpose of the implementing statute could be met through variance, nor that the loss of these four signs would be either a substantial hardship or would violate principles of fairness.

38. Moreover, in accordance with Subsection 120.542(1), Florida Statutes, FHWA concurrence was required to authorize Respondent to waive the provisions of Florida Administrative Code Rule 14-10.007. As FHWA explicitly refused to approve the variance, Respondent properly denied Petitioner's request.

RECOMMENDATION

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

RECOMMENDED that the Department of Transportation enter a final order denying Petitioner's Request for a Waiver or Variance.

DONE AND ENTERED this 7th day of October, 2008, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of October, 2008.

ENDNOTE

[1/] All references to Florida Statutes are to Florida Statutes (2007), unless otherwise indicated.

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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.