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

PROCTER PRODUCTIONS, INC.,

Petitioner,

vs.

DOT CASE NO.: 08-051
DOAH CASE NO.: 08-2778

DEPARTMENT OF TRANSPORTATION,

Respondent.

_____/

FINAL ORDER

This proceeding was initiated by the timely filing of a request for an administrative hearing by Petitioner, Procter Productions, Inc. (Procter), in response to Notices of Denied Application for Application numbers 57095, 57096, 57097, and 57098, issued on March 31, 2008, by the Department of Transportation (Department). On June 12, 2008, the case was referred to the Division of Administrative Hearings (DOAH) for assignment of an Administrative Law Judge and a formal hearing.

A formal administrative hearing was held on November 20, 2008, in Tampa, Florida, and on February 24, 2009, by video teleconference, before Daniel Manry, a duly appointed Administrative Law Judge (ALJ). Appearances on behalf of the parties were as follows:

For Petitioner: Stephen Tabano, Esquire
Trenam, Kemker, Scharf, Barkin,
Frye, O'Neill & Mullis, P.A.
101 East Kennedy Boulevard, Suite 2700
Post Office Box 1102
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For Respondent: Kimberly Clark Menchion, Esquire
Department of Transportation
Haydon Burns Building
605 Suwannee Street, Mail Station 58
Tallahassee, Florida 32399-0458

At the hearing, Procter presented the testimony of Andrew Procter, Sarah Miklavcic and James Malless. The Department presented the testimony of Susan Rosetti. Technical difficulties prohibited the telephonic testimony of a second witness, Lynn Holschuh. The hearing was reconvened on February 24, 2009, at which time Ms. Holschuh's testimony was heard. Procter offered Exhibits 1 through 12, and the Department offered Exhibits 1 through 3 and 5 through 10, all of which were admitted into evidence.

The transcripts from the hearing on November 20, 2008, and February 24, 2009, were filed with DOAH on February 24, 2009, and March 9, 2009, respectively. The Department and Procter filed their respective Proposed Recommended Orders on March 19, 2009. The ALJ issued his Recommended Order on April 8, 2009. Both parties filed exceptions to the Recommended Order.

STATEMENT OF THE ISSUE

As stated by the ALJ in his Recommended Order, the issue presented was

> "[W]hether Respondent should deny Petitioner's application for a sign permit, because the proposed site is not zoned commercial and, therefore, fails the requirement for commercial zoning in Subsection 479.111(2), Florida Statutes (2007), and the location does not qualify as an un-zoned commercial/industrial area within the meaning of Subsection 479.01(23)."

EXCEPTIONS

Procter takes exception to the recommended order findings of fact 1, 2, 3, and 8 and to the number of sign permits referred to in the ALJ's recommendation. The Department takes

exception to the recommended order findings of fact 6 through 12 and conclusions of law 15 and 16.

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 on 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 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'l Eng'rs, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007); Rogers, 920 So. 2d at 30.

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.

Procter first takes exception to finding of fact 1 contending that the ALJ set out the incorrect street address for the proposed sign sites. Procter's exception is well taken. The

record confirms that the correct address for the proposed sign sites is 2710 West Bella Vista Street, Lakeland, Florida. Finding of fact 1 is modified accordingly.

Procter next takes exception to findings of fact 2 and 3 claiming that the ALJ mistakenly employed the singular terms "application," "permit," and "notice" when in fact more than one application, permit, and notice were in issue. Procter's exception is borne out by the record. Findings of fact 2 and 3 are modified to reflect the use of the plural of the terms "application," "permit," and "notice."

Procter takes issue with finding of fact 8 asserting that:

> the Administrative Law Judge indicates that Respondent previously approved a sign permit from the same applicant on the same property. The evidentiary record shows that a sign permit was approved from the same applicant, but on property owned by a Ms. Maddox, whose property had the same type of business as the property which is the subject of this proceeding.
>
> 5. Paragraph 8 of the Recommended Order also states that Petitioner spent $23,000.00 to move the previously approved sign so that both the proposed and existing signs could be permitted on the same property. The evidentiary record shows that the already approved sign on the Maddox property was moved to another point on the Maddox property in order to accommodate the spacing for the signs on the property which is the subject of this proceeding.

There is no record support for the challenged portion of the ALJ's findings. On the other hand, Procter's version of the facts referred to in finding of fact 8 was clearly set out in its proposed recommended order and is confirmed by the record. Finding of fact 8 is modified accordingly.

Procter's final exception is directed to the ALJ's recommendation. Procter claims that:

> the Administrative Law Judge recommends that Respondent enter a Final Order granting the application for a sign permit. The

> evidentiary record shows that four (4) applications were made so that the recommendation should more properly read that the applications for sign permits be granted.

Procter's exception is soundly supported by the record and it is duly noted that the ALJ's recommendation encompasses Application for Outdoor Advertising Permit Numbers 57095, 57096, 57097, and 57098.

The Department's first exception goes to finding of fact 6 and takes issue with the ALJ's statement that: "The Legislature has not defined the term 'commercial-zoned' area, and Respondent has cited no rule that defines the term." The term is defined by statute, as noted in the Department's proposed recommended order. Section 479.01(3), Florida Statutes (2007), provides:

> "Commercial or industrial zone" means a parcel of land designated for commercial or industrial use under both the future land use map of the comprehensive plan and the land use development regulations adopted to chapter 163. If a parcel is located in an area designated for multiple uses on the future land use map of a comprehensive plan and the land development regulations do not clearly designate that parcel for a specific use, the area will be considered an unzoned commercial or industrial area if it meets the criteria of subsection 23.

Finding of fact 6 is modified to reflect that the Legislature has defined the term "commercial or industrial zone" and to include the above-quoted statutory definition.

The Department next takes exception to the entirety of finding of fact 7, which is more appropriately viewed as a conclusion of law, and which provides:

> 7. The issue of whether the proposed site is in a "commercial-zoned" area is an issue of fact and is not within the substantive expertise of Respondent. Even if the definition were within the substantive expertise of Respondent, Respondent explicated no reasons in the evidentiary record for deference to agency expertise.

Had the question of whether the subject site was commercially zoned been at issue in the context of typical land planning considerations, the ALJ would have had a reasonable basis for concluding that the Department's substantive expertise would not come into play. However, the question of whether a particular site is a commercial or industrial zone for Chapter 479 regulatory purposes is a question of law falling squarely within the Department's substantive expertise.

Moreover, as the lack of citation to any controlling authority suggests, deference to the Department's substantive expertise is not conditioned upon an evidentiary showing. There is no dispute that the Department is charged with the administration and enforcement of the provisions of Chapter 479. § 479.02(1), Fla. Stat. (2007). Consequently, the Department, in the exercise of its regulatory function, is entitled to deference to its interpretation of the provisions of Chapter 479. As a matter of law, an agency is afforded wide discretion in the interpretation of a statute which it administers and the agency's construction thereof will not be overturned on appeal unless clearly erroneous. Republic Media v. Dep't of Transp., 714 So. 2d 1203, 1205 (Fla. 5th DCA 1998); Atl. Outdoor Advertising v. D.O.T., 518 So. 2d 384, 386 (Fla. 1st DCA 1987); Natelson v. Dep't of Ins., 454 So. 2d 31, 32 (Fla. 1st DCA 1984). The agency's interpretation does not have to be the only one or even the most desirable - - it is enough if it is a permissible one. Little Munyon Island v. Dep't of Envtl. Regulation, 492 So. 2d 735, 737 (Fla. 1st DCA 1986); Florida Power Corp. v. Dep't of Envtl. Regulation, 431 So. 2d 684, 685 (Fla. 1st DCA 1983).

When properly viewed as a conclusion of law, finding of fact 7 has no legal basis and is, therefore, rejected.

Along with the portions of finding of fact 8 challenged by Procter, the Department takes exception to the ALJ's assertion that deference to agency substantive expertise is conditioned upon an evidentiary showing. For the same reasons set out next above, this portion of finding of fact 8 is rejected.

Finding of fact 9 provides:

> 9. It is undisputed that the proposed site is located on property zoned as Leisure Recreational in the Polk County Comprehensive Plan. It is also undisputed that Leisure Recreational "allows for multiple uses including commercial." However, Respondent interprets the Leisure Recreational designation to be an "unzoned-commercial" area, because "The subject parcel is not explicitly zoned commercial..." [Footnotes omitted]

The Department's exception to finding of fact 9 goes to the last sentence of the finding which the ALJ noted was drawn from the Department's proposed recommended order. The interpretation the ALJ attributed to the Department is inaccurate. In paragraph 9 at page 7 of its proposed recommended order, the Department stated: "The subject parcel is not explicitly zoned commercial or industrial, thus a use test is used to determine if it meets the criteria set out in Section 479.01(23), Florida Statutes." The Department clearly did not interpret the Leisure Recreational designation to be an unzoned-commercial area. Had the Department found the site to be an unzoned-commercial area, the permits would have been approved pursuant to Section 479.111(2), Florida Statutes (2007). The last sentence of finding of fact 9 is rejected.

The Department takes exception to finding of fact 10 which provides:

> 10. Respondent apparently has adopted a titular test for determining whether the site is "commercial-zoned." If the zoning designation does not bear the label "commercial," respondent asserts it is not "commercial-zoned" within the

> meaning of Subsection 479.111(2). The fact-finder rejects that assertion and applies a functional test to determine whether the local zoning label permits commercial use.

This finding is essentially a legal conclusion and was properly challenged by the Department on the ground that the Department's determination of whether a site is commercially zoned is not a "titular test" but is instead based on the definition of commercial zone set out in Section 479.01(3), Florida Statutes (2007), to-wit:

> "Commercial or industrial zone" means a parcel of land designated for commercial or industrial use under both the future land use map of the comprehensive plan and the land use development regulations adopted to chapter 163. If a parcel is located in an area designated for multiple uses on the future land use map of a comprehensive plan and the land development regulations do not clearly designate that parcel for a specific use, the area will be considered an unzoned commercial or industrial area if it meets the criteria of subsection 23.

When applying this definition, the Department will look beyond the mere label and examine the permitted uses to see if they are solely commercial. If the permitted uses are solely commercial, the site will be considered to be commercially zoned. Finding of fact 10 is modified accordingly and the last sentence of the finding is rejected.

In finding of fact 11, the ALJ found that a preponderance of the evidence supported a finding that the subject sites are commercially zoned within the meaning of Section 479.111(2), Florida Statutes (2007). This finding of fact has the requisite record support. However, the ALJ has referred to the Leisure Recreational land use designation as a "zoning" label or "zoning" designation. The record clearly establishes that there is no zoning in unincorporated Polk County. Consequently, finding of fact 11 is modified to delete the ALJ's reference to the

Leisure Recreational designation as "zoning." In all other particulars, the Department's exception to finding of fact 11 is rejected.

The Department challenges the ALJ's determination, in finding of fact 12, that a use test was unnecessary. Here again, the ALJ has merged a legal conclusion into a finding of fact. The ALJ is incorrect in his statement that "the statutory use test applies only to site locations that are "commercial-unzoned." The use test set out in Section 479.01(23), Florida Statutes (2007), is applied in those instances where a sign site has not been found to be commercially zoned and the Department is determining whether or not the site is commercially unzoned. "Finding of fact" 12 is modified accordingly.

The Department's exception to conclusion of law 15 is rejected. Based upon Procter's largely undisputed evidentiary showing, the ALJ's conclusion that the subject sign sites are commercially zoned cannot be modified or set aside.

Finally, the Department's exception to conclusion of law 16 is well taken. Where, as here, the Department's investigation indicates that the sign site in issue is not commercially zoned as that term is defined in Section 479.01(3), Florida Statutes (2007), and employed in Section 479.111(2), Florida Statutes (2007), the Department is undeniably vested with the authority to conduct a use test pursuant to Section 479.01(23), Florida Statutes (2007). The fact that it may ultimately be determined that the site in question is commercially zoned rather than commercially unzoned does not render a previously conducted use test "an invalid exercise of delegated legislative authority" much less an action giving rise to separation of powers issues. Conclusion of law 16 is rejected in its entirety.

FINDINGS OF FACT

After review of the record in its entirety, it is determined that the Administrative Law Judge's findings of fact 1 through 3 as modified, 4, 5, 6 as modified, and 8 through 12 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 (2007).

2. Conclusions of Law 13 through 15 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 the Applications for Outdoor Advertising Application numbers 57095, 57096, 57097, and 57098, submitted by Petitioner, Procter Productions, Inc., are granted.

DONE AND ORDERED this 26 day of May, 2009.

SCKopel

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

FILED D.O.T. CLERK
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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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