

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PROCTER PRODUCTIONS, INC.,            )  
  )  
      Petitioner,                            )  
  )  
vs.    )     Case No. 08-2778  
  )  
DEPARTMENT OF TRANSPORTATION,        )  
  )  
      Respondent.                          )  
\_\_\_\_\_  
  )

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) on November 20, 2008, in Tampa, Florida, and on February 24, 2009, by video teleconference.

APPEARANCES

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  
Tampa, Florida 33601-1102

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

STATEMENT OF THE ISSUE

The issue is whether 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),<sup>1</sup> and the location does not qualify as an un-zoned commercial/industrial area within the meaning of Subsection 479.01(23).

PRELIMINARY STATEMENT

On March 31, 2008, Respondent issued a Notice of Denied Application. Petitioner timely requested an administrative hearing, and Respondent referred the request to DOAH to conduct the hearing.

At the hearing, Petitioner presented the testimony of three witnesses and submitted 12 exhibits for admission into evidence. Respondent submitted 10 exhibits, called one witness live, and attempted to present the telephonic testimony of a second witness. Due to technical problems that prevented the telephonic testimony, the hearing was reconvened on February 24, 2009, pursuant to the agreement of the parties, to present the live testimony of Respondent's second witness.

The identity of the witnesses and exhibits and the rulings regarding each are reported in the two-volume Transcript of the hearing filed with DOAH on February 24 and March 9, 2009. The parties timely filed their respective Proposed Recommended Orders on March 19, 2009.

## FINDINGS OF FACT

1. Respondent is the state agency responsible for regulating outdoor signs at the proposed site. The proposed site is located at 2505 West Bella Vista Street, Lakeland, Florida. Petitioner is a Florida corporation engaged in the business of full-service advertising in the state, including road-side signs or billboards.

2. On March 21, 2008, Petitioner submitted an application for an outdoor advertising permit for two structures with four sign faces identified in the record by application numbers 57095, 57096, 57097, and 57098. On March 31, 2008, Respondent issued a Notice of Denied Application (the Notice). The Notice notified Petitioner of proposed agency action to deny the permit application.

3. The Notice states two grounds for the proposed denial. The first ground alleges the "Location is not permissible under land use designations of site [sic]" within the meaning of Subsection 479.111(2). The second ground alleges the "Location does not qualify as unzoned commercial/industrial area" within the meaning of Subsection 479.01(23).

4. Section 479.111 applies to signs located within the interstate highway system and the federal-aid primary highway system (the regulated highway system). The proposed site is

located within the regulated highway system adjacent to Interstate 4 in Polk County, Florida.

5. Subsection 479.111(2), in relevant part, authorizes signs within the regulated highway system which satisfy one of two disjunctive requirements. A sign must be located in either a "commercial-zoned" area or must be located in a "commercial-unzoned" area and satisfy a statutorily required use test.<sup>2</sup>

6. The term "commercial-unzoned" is defined in Subsection 479.01(23). However, a determination of whether the proposed site satisfies the statutory use test for a "commercial-unzoned" area is not necessary if the proposed site is found to be in a "commercial-zoned" area. The Legislature has not defined the term "commercial-zoned" area, and Respondent has cited no rule that defines the term.

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.

8. The evidentiary record explicates reasons for not deferring to purported agency expertise in this case. Respondent previously approved a sign permit from the same applicant on the same property. 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.

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."<sup>3</sup> However, Respondent interprets the Leisure Recreational designation to be an "unzoned-commercial" area, because "The subject parcel is not explicitly zoned commercial. . . ."<sup>4</sup>

10. Respondent apparently has adopted a titular test for determining whether the proposed 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.

11. A preponderance of the evidence supports a finding that the local zoning label of Leisure Recreational means the proposed site is "commercial-zoned" within the meaning of Subsection 479.111(2). Credible and persuasive expert testimony shows that the Leisure Recreational zoning designation specifically designates the proposed site for commercial uses, within the meaning of Subsection 479.01(23),<sup>5</sup> including retail structures up to 20,000 square feet, bars, taverns, marinas, and

fishing camps. The commercial uses allowed under the Leisure Recreational zoning designation are not discretionary with county planning staff but are permitted as a matter of right.

12. Much of the dispute and evidence in this proceeding focused on two use tests that Respondent performed in accordance with Subsections 479.01(23)(a) and (b). However, the statutory use test applies only to site locations that are "commercial-unzoned." Findings of fact pertaining to the accuracy of the use tests utilized by Respondent are unnecessary because they are inapposite to "commercial-zoned" property such as the proposed site.

#### CONCLUSIONS OF LAW

13. DOAH has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2008). DOAH provided the parties with adequate notice of the final hearing.

14. Petitioner has the burden of proof in this proceeding. Petitioner must show by a preponderance of the evidence that Respondent should grant the application for a sign permit.

Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778 (Fla. 1st DCA 1981).

15. Petitioner satisfied its burden of proof. Petitioner showed by a preponderance of the evidence that the proposed

site is "commercial-zoned" within the meaning of Subsection 479.111(2).

16. Application of the use test to a proposed site that is "commercial-zoned," rather than "commercial-unzoned," would be an invalid exercise of delegated legislative authority within the meaning of Subsection 120.52(8), because it would go beyond the powers delegated by the Legislature and violate the separation of powers act.<sup>6</sup> Respondent has no statutory authority to perform a use test if, as in this case, the proposed site is "commercial-zoned" within the meaning of Subsection 479.111(2).

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order granting the application for a sign permit.

DONE AND ENTERED this 8th day of April, 2009, in Tallahassee, Leon County, Florida.



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DANIEL MANRY  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 8th day of April, 2009.

ENDNOTES

<sup>1/</sup> References to subsections, sections, and chapters are to Florida Statutes (2007), unless stated otherwise.

<sup>2/</sup> Signs in commercial-unzoned areas must also be within 660 feet of the nearest edge of the right-of-way. State permitting is also subject to the requirements set forth in the agreement between the state and the United States Department of Transportation. Neither the 660-foot proximity test nor the state-federal contract requirement is at issue in this proceeding. The statute also authorizes signs in areas zoned as industrial, but the industrial zoning provisions are not at issue in this proceeding.

<sup>3/</sup> See Proposed Recommended Order of Respondent, Department of Transportation, at 3, para. 4.

<sup>4/</sup> See Proposed Recommended Order of Respondent, Department of Transportation, at 7, para. 9.

<sup>5/</sup> Subsection 479.01(23), in relevant part, defines the term "unzoned commercial" area as one that is "not specifically designated for commercial uses." (Emphasis supplied)

<sup>6/</sup> FLA. CONST. art. II, § 3; see also Crossings at Fleming Island Community Development District v. Echeverri, 991 So. 2d 793 (Fla. 2008)(separation of powers act prohibits officer of executive branch from refusing to enforce existing statute).

COPIES FURNISHED:

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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.