



Florida Department of Transportation

CHARLIE CRIST
GOVERNOR

605 Suwannee Street
Tallahassee, FL 32399-0450

STEPHANIE C. KOPELOUSOS
SECRETARY

FILED
2010 SEP -3 A 11: 54

September 2, 2010

DIVISION OF
ADMINISTRATIVE
HEARINGS

Lawrence P. Stevenson, Administrative Law Judge
Division of Administrative Hearings
The Desoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

Re: **LAMAR OF TALLAHASSEE vs. DEPARTMENT OF TRANSPORTATION,
DOAH CASE NO. 08-3175**

Dear Judge Stevenson:

Enclosed for your file is a copy of the Final Order, which was entered September 2, 2010 with the Department of Transportation, along with a copy of Petitioner's Exceptions to the Recommended Order and the Department's Response to Petitioner's Exceptions.

Sincerely,

Deanna R. Hurt
Assistant General Counsel and
Clerk of Agency Proceedings

DRH:tp

Enclosures

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

FILED
2008 SEP -3 A 11: 54
DIVISION OF
ADMINISTRATIVE
HEARINGS

LAMAR OF TALLAHASSEE,

Petitioner,

vs.

DOT CASE NO.: 08-054
DOAH CASE NO.: 08-3175

DEPARTMENT OF TRANSPORTATION,

Respondent.

FINAL ORDER

On May 30, 2008, the Department of Transportation (Department) issued a Notice of Denied Application (Application Number 57155) to Lamar of Tallahassee (Lamar) for a state sign permit for a location described as State Road 61 (U.S. 319), 168 feet west of Thomasville Road, in Leon County, Florida. The stated basis for the denial was that the sign did not meet the spacing requirement of Section 479.07(9)(a)2, Florida Statutes, in that it was less than 1000 feet from another permitted sign (also owned by Lamar) on the same side of State Road 61, a federal-aid primary highway.

On June 17, 2008, Lamar filed a Petition for Formal Administrative Hearing with the Department to contest the permit denial. The Petition was forwarded to the Division of Administrative Hearings (DOAH) on July 2, 2008, to conduct a formal hearing.

The hearing was scheduled for September 10, 2008, but, on Lamar's motion the hearing was continued to September 25, 2008. On September 17, 2008, Lamar filed a second motion to continue, a motion for leave to amend its Petition, and an Amended Petition for Formal Administrative Hearing Involving Challenge to Unadopted Rule. The Amended Petition alleged that the Department's interpretation of the definition of "nonconforming sign" in Section 479.01(14), Florida Statutes, amounted to an unadopted rule.

On September 19, 2008, the Department filed an unopposed Motion for Remand to allow the parties to review the facts of the case and determine the necessity of a hearing. The motion was granted, and an order closing DOAH's file was entered on September 22, 2008. The order provided that either party would be allowed to request that DOAH reopen the case in the event that the Department disapproved the potential settlement of the case.

The Department filed a motion to reopen the case on September 18, 2009, and DOAH's file was reopened by order dated October 9, 2009. The matter proceeded to hearing before Lawrence P. Stevenson, a duly appointed Administrative Law Judge (ALJ), on January 29, 2010. Appearances on behalf of the parties were as follows:

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

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

At the hearing, the parties stipulated to the admission of Joint Exhibits 1 through 7. Lamar presented no live testimony. Lamar's Exhibits 1 through 4 and 6 were admitted into evidence. These exhibits included the deposition testimony of Myron "Chip" Laborde, regional manager for Lamar Advertising Southeast; Loyd Childree, Lamar's vice president and general manager; and Lisa Adams, outdoor advertising inspector for TBE group, a Department contractor. The Department presented the testimony of Lynn Holschuh, the Department's state outdoor advertising administrator, and Department Exhibits 1 through 7 were admitted into evidence.

The transcript was filed on February 15, 2010. Lamar's unopposed February 25, 2010 motion to extend time to submit proposed recommended orders was granted and the parties were given until March 5, 2010, to file their proposed recommended orders. Both parties did so on March 5, 2010. The ALJ issued his Recommended Order on June 7, 2010, and Lamar filed exceptions thereto on June 22, 2010. The Department's response to Lamar's exceptions was filed on July 2, 2010.

STATEMENT OF THE ISSUE

As stated by the ALJ in his Recommended Order:

At issue in this proceeding is whether the Department of Transportation's Notice of Denied Application for an outdoor advertising permit at State Road 61 (U.S. 319), 168 feet west of Thomasville Road, Leon County, issued to Lamar of Tallahassee on May 30, 2008, should be upheld pursuant to Section 479.07, Florida Statutes, or whether the sign should be permitted as a nonconforming sign as defined by Section 479.01(14), Florida Statutes.

EXCEPTIONS

Lamar takes exception to portions of Conclusions of Law 57 and 58 of the Recommended Order. Regarding an agency's treatment of conclusions of law, Section 120.57(1)(l), Florida Statutes (2009), 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.

Lamar's challenges to both Conclusions of Law 57 and 58 are grounded upon the premise that so long as a sign meets the definition of a nonconforming sign set out in Section 479.01(14), Florida Statutes, the sign is entitled to be permitted notwithstanding the fact that the sign cannot meet the criteria of Section 479.105(1)(e), Florida Statutes. As Lamar sees it, once a sign can be considered a nonconforming sign under the Section 479.01(14) definition, Section 479.105 is inapplicable and the sign is entitled to be permitted. Lamar is mistaken.

Section 479.105(1), Florida Statutes, provides in pertinent part:

(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. [Emphasis added]

* * *

(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.

By its unequivocal terms, Section 479.105(1) applies to **any** sign located adjacent to one of the enumerated road systems. The statute establishes the only process and associated criteria whereby a sign, situated adjacent to a controlled roadway and erected or maintained without a permit, may be issued a permit as either a conforming or nonconforming sign. The issue of whether such a sign will be treated as a conforming or nonconforming sign will not arise until it has been determined that the sign satisfies the Section 479.105(1)(e) requirements.

Here, there is no dispute that the subject sign is unpermitted, has been maintained adjacent to a controlled roadway, and cannot meet the Section 479.105(1)(e) criteria. The ALJ properly concluded that Section 479.105(1), Florida Statutes, was applicable and mandated

denial of Lamar's application. Lamar's exceptions to Conclusions of Law 57 and 58 are 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 35 of the Recommended Order 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 36 through 46, 51 through 55, 56 excluding endnote 6, 57 and 58 of the Recommended Order are fully supported in law, and are adopted and incorporated as if fully set forth herein.
3. The Conclusions of Law in paragraphs 43, 45 through 51 and endnote 6 to paragraph 56 of the Recommended Order address issues concerning the Department's application of the definition of a nonconforming sign contained in Section 479.01(14), Florida Statutes. These Conclusions of Law are rejected because they are not relevant to the disposition of this matter. Once the ALJ found that Section 479.105(1)(e), Florida Statutes, was controlling and that Lamar's sign could not satisfy the permitting requirements set out in that statute, there was no need to determine whether the sign could be characterized as a

nonconforming sign under the Section 479.01(14) definition. That determination would have become necessary, and hence relevant, only if it had first been found that Lamar's sign satisfied the Section 479.105(1)(e) permitting criteria.

ORDER

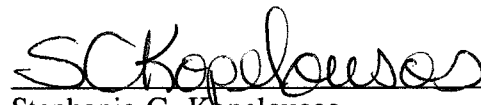
Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that Lamar of Tallahassee's Application Number 57155 for an outdoor advertising sign permit is denied. It is further

ORDERED that Lamar of Tallahassee shall remove the sign which was the subject of Application Number 57155 within 30 (thirty) days of this final order. It is further

ORDERED that should Lamar of Tallahassee fail to remove the sign, the Department of Transportation, or its contractor, will remove the sign without further notice and the cost of removal is hereby assessed against Lamar of Tallahassee pursuant to Section 479.105(3), Florida Statutes.

DONE AND ORDERED this 24 day of September, 2010.



Stephanie C. Kopelousos
Secretary

Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

FILED D.O.T. CLERK
2010 SEP -2 AM 9:00

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:

Kimberly C. Menchion, Esquire
Assistant General Counsel
Department of Transportation
Haydon Burns Building
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399

Lawrence P. Stevenson
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. 22
Tallahassee, Florida 32399

Gerald S. Livingston, Esquire
Brian A. Newman, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095