STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAMAR OF TALLAHASSEE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-3175
	)	
DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on January 29, 2010, in Tallahassee, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Gerald S. Livingston, Esquire
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Pennington, Moore, Wilkinson,
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For Respondent: Kimberly Clark Menchion, Esquire
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STATEMENT OF THE ISSUE

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,[1/] or whether the sign should be permitted as a nonconforming sign as defined by Section 479.01(14), Florida Statutes.

PRELIMINARY STATEMENT

On May 30, 2008, the Department of Transportation (the "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 denial was that the sign did not meet the spacing requirement of Section 479.07(9)(a)2. 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. On July 2, 2008, the Petition was forwarded to the

Division of Administrative Hearings ("DOAH") for the assignment of an administrative law judge to conduct a formal hearing.

The hearing was initially scheduled for September 10, 2008. 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, amounts 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.

On September 18, 2009, the Department filed a motion to reopen the case. By order dated October 9, 2009, DOAH's file was reopened. The hearing was scheduled for January 29, 2010, on which date it was held.

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, vice-president and general manager of Lamar; 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.[2/] The Department's Exhibits 1 through 7 were admitted into evidence.

The one-volume hearing transcript was filed on February 15, 2010. On February 25, 2010, Lamar filed an unopposed motion to extend the time to submit proposed recommended orders. By order dated February 26, 2010, the motion was granted and the parties were given until March 5, 2010, to file their proposed recommended orders. Both parties timely filed their Proposed Recommended Orders on March 5, 2010.

FINDINGS OF FACT

1. The Department is a state agency empowered to regulate outdoor advertising signs along the interstate and federal-aid primary highway systems of Florida pursuant to Chapter 479, Florida Statutes.

2. Lamar is licensed to engage in the business of outdoor advertising within the state of Florida pursuant to Section 479.04, Florida Statutes.

3. Lamar owns a V-shaped sign located on certain real property at 1940 Thomasville Road in Tallahassee. Thomasville Road is also known as State Road 61. Lamar does not own the real property, but has the right to erect and maintain its sign on the property under a lease that Lamar executed with the landowner in 1998.

4. Lamar's sign was erected in 1998, with the approval of the City of Tallahassee.

5. The sign is located on the southwest corner of the intersection of Thomasville and Betton/Bradford Road, behind the Southern Flooring showroom. The east side of the sign face is within 660 feet of and visible to State Road 61. State Road 61 is a federal-aid highway and thus a "controlled road" subject to the jurisdiction of the Department pursuant to Section 479.07(1), Florida Statutes. Therefore, the east side of the sign requires a permit from the Department. The west side is visible only to Bradford Road and does not require a permit from the Department.

6. On February 10, 2008, Lisa Adams, an outdoor advertising inspector conducting an annual inventory on behalf of the Department, identified the subject sign as an unpermitted

sign that is visible from State Road 61. Ms. Adams completed a Department compliance checklist stating that the sign was possibly illegal because it lacked a Department permit and the east side of the sign was visible from State Road 61.

7. On April 22, 2008, the Department issued a notice of violation stating that the sign was illegal and must be removed within 30 days of the date of the notice, pursuant to Section 479.105, Florida Statutes.

8. Lamar did not file a request for hearing in response to the notice of violation, and does not contest the notice of violation in this proceeding.

9. On May 16, 2008, Lamar filed an Application for Outdoor Advertising Permit for the sign. The Department reviewed the application and issued a Notice of Denied Application on May 30, 2008. The application was denied because the sign site does not meet the spacing requirements of Section 479.07(9)(a)2., Florida Statutes, in that it is closer than 1,000 feet from another permitted sign owned by Lamar.

10. The other permitted sign was built in 1979. The 1,000 foot spacing requirement has been in the statute at all times since the 1998 construction of the sign at issue in this proceeding, meaning that it could never have met the spacing requirement of Section 479.07(9)(a)2., Florida Statutes.

11. Myron Laborde was Lamar Advertising Southeast's regional manager in 1998 when the sign was built. His area of authority included Tallahassee. Mr. Laborde testified that in 1998 the view of the sign from State Road 61 was obstructed by several palm trees, some scrub oaks, and a very tall tallow tree. Some of these trees were removed when Southern Flooring took over and remodeled the old Helms Exterminators building at 1940 Thomasville Road about four years ago. Mr. Laborde testified that the sign is now visible from State Road 61 due to the removal of the trees, but only "if you . . .turn your head 90 degrees" while driving north on State Road 61.

12. Loyd Childree has been the vice-president and general manager of Lamar of Tallahassee since 2003. Mr. Childree testified that the renovations to the Helms Exterminators building began some time after March 2005, and that the building's size was nearly doubled to accommodate the Southern Flooring showroom. Mr. Childree testified that a lot of trees were removed during the renovation, including palm trees and a "canopy-type tree" about 25 to 30 feet tall with a full crown similar to that of an oak. Mr. Childree testified that the sign is now visible from State Road 61 due to the removal of the trees.

13. Mr. Childree further stated that Lamar markets the sign to advertisers based on the traffic counts from Bradford Road, not those from State Road 61.

14. Ms. Adams, the inspector who identified the possible illegality of the sign, has worked for the Department's contractor, TBE Group, since August 2004. Her job is to conduct an inventory of permitted signs on controlled roads such as State Road 61 and determine which unpermitted signs are visible from the roadway. Ms. Adams inventoried State Road 61 in 2005, 2006 and 2007 without identifying Lamar's sign as an unpermitted sign visible from the roadway. Ms. Adams testified that her predecessor in the position inventoried State Road 61 every year since Lamar's sign was erected and never identified the sign as one visible from State Road 61.

15. Ms. Adams testified that she might have seen the sign in a previous year but did not identify it as illegal because she believed it had "on-premise" advertising, i.e., it advertised Southern Flooring. With certain restrictions, a sign erected on the premises of a business establishment that bears advertising for that establishment is exempt pursuant to Section 479.16(1), Florida Statutes.

16. Ms. Adams frankly conceded that she was speculating and that her memory was unclear as to whether she had seen and noted this sign in past years. In any event, Lamar's log of

advertisers showed that Southern Flooring never advertised on the sign.

17. Lynn Holschuh is the Department's state outdoor advertising administrator, and had held this position since 1992. Ms. Holschuh testified that State Road 61 has been inventoried by an outdoor advertising inspector every year since Lamar's sign was erected in 1998. None of the inspectors noted the visibility or possible illegality of the sign until Ms. Adams noted the sign on February 12, 2008.

18. Ms. Holschuh lives in Tallahassee and has driven on State Road 61 hundreds of times over the years. In her deposition, she testified that she believed the sign was not visible when it was built, and only became visible from State Road 61 when a third party removed the obstructing trees.

19. The testimony of Mr. Laborde, Mr. Childree, and Ms. Holschuh was credible and uncontroverted as to the history of the sign. It is found that the sign was not visible from State Road 61 when it was erected in 1998, but that it became visible from State Road 61 when trees were removed by the landowner during renovations to the old Helms Exterminators building at some point after March 2005.

20. Lamar's sign, now visible from State Road 61, is subject to the Department's jurisdiction pursuant to Section 479.01, Florida Statutes, because State Road 61, as a federal-

aid primary highway, is a "controlled road" under the statute. A sign visible from a controlled road must carry a Department permit.

21. Lamar contends that the facts of this case establish that its sign meets the definition of a "nonconforming sign" set forth in Section 479.01(14), Florida Statutes:

> "Nonconforming sign" means 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.

22. Lamar's sign was not visible from State Road 61 in 1998 and therefore was "lawfully erected" in terms of the Department's licensing requirements. Lamar contends that the removal of trees by a third party constituted "changed conditions" that rendered the sign out of compliance with state law, and that the sign is therefore a nonconforming sign under Section 479.01(14), Florida Statutes.

23. The Legislature has provided no definition of the term "changed conditions," and the Department has no rule to provide interpretive guidance to the words of the statute. On September 17, 2008, Lamar filed a motion for leave to amend its petition for hearing in this case to challenge the Department's alleged interpretation of the phrase "due to changed conditions"

as an unadopted rule. In particular, Lamar alleged that the Department was applying an unadopted rule limiting "changed conditions" to those initiated by a government agency. On September 19, 2008, the Department filed an unopposed motion to remand the case to the agency. The motion was granted on September 22, 2008.

24. In the Florida Administrative Weekly dated November 26, 2008 (vol. 34, no. 48, p. 6228), the Department published a Notice of Development of Proposed Rule, with the following preliminary text of an amendment to Florida Administrative Code Rule 14-10.006:

> 14-10.006 Additional Permitting Criteria.
>
> Each application for an outdoor advertising sign permit shall meet the requirements of Sections 479.07(9) and 479.11, F.S. In addition, an application must comply with the requirements of the agreement between the state and the United States Department of Transportation referenced in Section 479.02(1), F.S., which have not been duplicated in Sections 479.07(9) and 479.11, F.S., or superseded by stricter provisions in those statutes. The requirements are:
>
> (1) through (8) No change.
>
> (9) The term "changed conditions" referenced in Section 479.01(14), F.S., defining nonconforming signs, means only the actions of a governmental entity, as defined by Section 11.45, F.S., which includes for example: Rezoning of a commercial area, reclassifying a secondary highway as a primary highway, or altering a highway's configuration causing a preexisting sign to

become subject to the Department's jurisdiction. (Emphasis added)

25. Ms. Holschuh testified that this draft rule language was written in direct response to Lamar's allegation that the Department's denial of its application was based on an unadopted rule.

26. On December 16, 2008, the Department held a workshop on the draft rule. At the workshop, the Florida Outdoor Advertising Association ("FOAA") submitted the following suggested draft language for subsection (9) of Florida Administrative Code Rule 14-10.006:

> (9) The term "changed conditions" referenced in Section 479.01(14), F.S., defining nonconforming signs, means, and shall include, any of the following:
>
> (a) An action taken by a governmental entity, as defined by Section 11.45, F.S., such as the rezoning of a parcel of property fro commercial to noncommercial, reclassifying a secondary highway to a primary highway, altering a highway's configuration, or the taking of any other action within the powers of such governmental entity which thereby causes a preexisting sign to become subject to the Department's jurisdiction;
>
> (b) The action of a third party, who is not the owner of a preexisting sign, relating to modifications to the topography, vegetation, buildings or other physical characteristics of the property upon which the sign is located, or the property surrounding the sign, which thereby causes a preexisting sign to become subject to the Department's jurisdiction.

> (c) an act of God which thereby causes a preexisting sign to become subject to the Department's jurisdiction.

27. The Department rejected the FOAA's proposed language, and ultimately abandoned the effort to adopt a rule defining the term "changed conditions." On September 18, 2009, the Department filed a motion with DOAH to reopen this case and proceed to a fact-finding hearing regarding its proposed rejection of Lamar's application.

28. In her deposition, Ms. Holschuh testified that the rulemaking effort was abandoned because the language proposed by the FOAA made it clear that it would be "nearly impossible" to arrive at a definition that would cover "every situation that might arise for when an existing sign might suddenly become visible."

29. Ms. Holschuh testified in deposition that it is now the Department's policy to review these matters on a case-by-case basis. However, she also testified that the Department, as a matter of "policy," continues to limit its consideration of "changed conditions" to actions taken by a governmental entity. The Department bases this limitation on the examples provided by 23 C.F.R. § 750.707(b), defining "nonconforming signs" for purposes of the Federal Highway Administration:

> A nonconforming sign is 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. Changed conditions include, for example, signs lawfully in existence in commercial areas which at a later date become noncommercial, or signs lawfully erected on a secondary highway later classified as a primary highway.

30. Ms. Holschuh stated that the Department's policy was applied to Lamar in the instant case, and would continue to be applied in the future unless some "extraordinary circumstance" in a specific case led the Department to revisit the policy.

31. At the final hearing, Ms. Holschuh backed away somewhat from her flat statement that the Department's "policy" was to limit consideration of changed conditions to those caused by government action. She stated that FOAA's proposed rule language caused the Department to reconsider its position that governmental action should be the exclusive reason for granting a permit for "changed conditions," and testified that the Department will consider other circumstances in its case-by-case review of permit applications.

32. Ms. Holschuh testified that, under the facts presented in this case, the Department would deny the permit because there is DOAH case law on point for the proposition that tree removal does not constitute "changed conditions," and because broadening

the definition of "changed conditions" to include the situation presented by this case would open up the process to abuse.

33. Ms. Holschuh testified, at more than one point in the proceeding, that the Department would have very likely granted the permit had the trees been removed by the Department rather than the private landowner. She gave no indication that Section 479.105(1)(e), Florida Statutes, or any other statute would prevent the Department from granting the permit for Lamar's nonconforming sign, should the Department find that the sign fell into nonconformity due to "changed conditions."

34. The DOAH case law cited by Ms. Holschuh is Lamar of Tallahassee v. Department of Transportation, Case Nos. 08-0660 and 08-0661 (DOAH September 15, 2008), discussed more fully in the Conclusions of Law below.

35. Ms. Holschuh testified that Lamar's sign is not located in a Department right-of-way and is not a hazard to the public in its current location.

CONCLUSIONS OF LAW

36. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

37. The Department is authorized to regulate outdoor advertising signs located along interstate and federal-aid

primary highways pursuant to Chapter 479, Florida Statutes, and Florida Administrative Code Chapter 14-10.

38. As the party seeking a permit from the Department, Lamar has the burden to prove its entitlement to the permit by a preponderance of the evidence. See Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778 (Fla. 1st DCA 1981) (the burden of proof, apart from statute, is on the party asserting the affirmative of an issue).

39. Section 479.07(1), Florida Statutes, provides:

> Except as provided in ss. 479.015(1)(e) and 479.16, a person may not erect, operate, use, or maintain, or cause to be erected, operated, used, or maintained, any sign on the State Highway System outside an incorporated area or on any portion of the interstate or federal-aid primary highway system without first obtaining a permit for the sign from the department and paying the annual fee as provided in this section. For purposes of this section, "on any portion of the State Highway System, interstate, or federal-aid primary system" shall mean a sign located within the controlled area which is visible from any portion of the main-traveled way of such system.

40. The evidence adduced at hearing established that Lamar's sign fell under the Department's jurisdiction when the removal of trees by the landowner caused the sign to become visible from State Road 61, a federal-aid highway.

41. Section 479.07(9)(a), Florida Statutes, provides, in relevant part:

> A permit shall not be granted for any sign for which a permit had not been granted by the effective date of this act unless such sign is located at least:
>
> 1. One thousand five hundred feet from any other permitted sign on the same side of the highway, if on an interstate highway.
>
> 2. One thousand feet from any other permitted sign on the same side of the highway, if on a federal-aid primary highway....

42. The evidence established that Lamar's sign cannot be permitted as a conforming sign because it is located inside of 1000 feet from another permitted sign, contrary to Section 479.07(9)(a)2., Florida Statutes.

43. As set forth at Finding of Fact 21, supra, Section 479.01(14), Florida Statutes, provides:

> "Nonconforming sign" means 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.

44. Section 479.105(1), Florida Statutes, provides, in relevant 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.
>
> * * *
>
> (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.

45. The evidence established that, for at least some portion of the pendency of this case, the Department interpreted the term "changed conditions" in the statutory definition of

"nonconforming sign" as limited to actions taken by governmental agencies.

46. Lamar contends that this interpretation constitutes an unadopted rule, as defined in Section 120.52(20), Florida Statutes. An unadopted rule is an "agency statement of general applicability that implements, interprets, or prescribes law or policy" that has not been adopted pursuant to the requirements of Section 120.54, Florida Statutes. Section 120.57(1)(e), Florida Statutes, provides, in relevant part:

> 1. An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule. The administrative law judge shall determine whether an agency statement constitutes an unadopted rule. This subparagraph does not preclude application of adopted rules and applicable provisions of law to the facts.
>
> 2. Notwithstanding subparagraph 1., if an agency demonstrates that the statute being implemented directs it to adopt rules, that the agency has not had time to adopt those rules because the requirement was so recently enacted, and that the agency has initiated rulemaking and is proceeding expeditiously and in good faith to adopt the required rules, then the agency's action may be based upon those unadopted rules, subject to de novo review by the administrative law judge. The agency action shall not be presumed valid or invalid. <u>The agency must demonstrate that the unadopted rule</u>:
>
> a. Is within the powers, functions, and duties delegated by the Legislature or, if the agency is operating pursuant to

> authority derived from the State Constitution, is within that authority;
>
> b. Does not enlarge, modify, or contravene the specific provisions of law implemented;
>
> c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;
>
> d. Is not arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;
>
> e. Is not being applied to the substantially affected party without due notice; and
>
> f. Does not impose excessive regulatory costs on the regulated person, county, or city . . . (Emphasis added.)

47. The agency statement that "changed conditions" is limited by policy to changes initiated by governmental action meets the definition of a rule, based on Ms. Holschuh's deposition testimony. Though the Department in November 2008 commenced the process to adopt this policy as a rule, that process was abandoned. Thus, the policy would constitute an unadopted rule if it were applied to Lamar in this case.

48. Nothing in Section 479.01(14), Florida Statutes, or in Chapter 479 as whole, indicates a legislative directive or intent to limit the term "changed conditions" to actions taken by a government agency. The plain language of the term "changed conditions" evokes no such limitation. 23 C.F.R. § 750.707(b)

does not purport to provide an exclusive list of all the possible "changed conditions" that could render a sign nonconforming, nor does the federal rule appear to preempt state governments from expanding on the examples it provides.[3/] The unadopted rule modifies the definition of "nonconforming sign" found at Section 479.01(14), Florida Statutes, by adding a requirement not directly imposed by nor fairly inferable from the language of the statute.

49. Giving full credit to Ms. Holschuh's testimony at the final hearing, the Department is now proceeding on a "case-by-case basis" rather than pursuant to its previously-stated policy. However, this change renders the Department's position no more tenable. Though the Department's asserted "governmental action" policy constituted an unadopted rule that modified the specific provision of law it purported to implement, it at least had the virtue of articulating a reviewable standard against which the agency's decision could be judged.

50. Absent the policy, "changed conditions" is an undefined term for purposes of the grant or denial of a permit. The Department provided no standard or reference point against which its decision may be measured. The Department offered no evidence tending to show that "changed conditions" in the statute carries any meaning other than that which a common reader would ascribe to it, or to show that this tribunal should

defer to the Department's specialized knowledge and expertise in interpreting and applying the term. It stands to reason that if the Legislature is not allowed to delegate to an agency the power to exercise unrestricted discretion in applying the law, Department of State, Division of Elections v. Martin, 916 So. 2d 763, 769-771 (Fla. 2005), then an agency may not assume such power.

51. In the instant case, there was no dispute that Lamar's sign was lawfully erected, and that the only reason it currently fails to comply with state law is the cutting of trees by the landowner, a circumstance out of Lamar's control.[4/] The Department has offered no reasonable explanation for why this should not be considered "changed conditions" pursuant to the undefined term set forth in Section 479.01(14), Florida Statutes, and Lamar's sign therefore considered nonconforming.

52. Ms. Holschuh pointed to Lamar of Tallahassee v. Department of Transportation, Case Nos. 08-0660 and 08-0661 (DOAH September 15, 2008), as authority for the proposition that the removal of trees does not constitute "changed conditions." However, in that case the Administrative Law Judge did not make an explicit finding as to whether the removal of trees causing the sign to become visible from a federal-aid highway constituted "changed conditions." The dispositive issue was

whether the sign in question met the permitting criteria of Section 479.105(1)(e), Florida Statutes.[5/]

53. The dispositive issue in the 2008 Lamar of Tallahassee proceeding raises the final question in the instant case. Lamar contends that once its sign is found to meet the definition of a "nonconforming sign," the inquiry is at an end and the permit should be granted.

54. The Department contends that, even if the sign is nonconforming, it must still meet the criteria set forth in Section 479.105(1)(e), Florida Statutes, in order to obtain a permit. The Department's position, in this case and in the 2008 proceeding, has been that Section 479.105(1)(e), Florida Statutes, "is the only portion of Chapter 479 which establishes criteria under which a sign erected or maintained without a permit may be issued a permit as either a conforming or a nonconforming sign. A non-permitted sign's eligibility for the issuance of a permit is governed by those criteria and is not dependent upon . . . whether the sign is ultimately characterized as a conforming or nonconforming sign." Lamar of Tallahassee v. Department of Transportation, Case Nos. 08-0660 and 08-0661 (Department of Transportation Final Order, October 27, 2008), p. 8.

55. The parties do not dispute that Lamar's sign cannot meet the requirement set forth in Section 479.105(1)(e)2.,

Florida Statutes. At no time since its erection in 1998 would the sign have met the criteria of Chapter 479 for the issuance of a permit due to its proximity within 1000 feet of another permitted sign.

56. Lamar argues that Section 479.105(1)(e) is not at issue in this case. Lamar notes that the Department did not cite Section 479.105(1)(e) as a basis for disapproval of the permit, and points out that Ms. Holschuh testified that the permit would most likely have been granted if the trees had been removed by a governmental entity. Lamar contends that Ms. Holschuh's testimony establishes that the Department could grant the nonconforming sign permit to Lamar, notwithstanding Section 479.105(1)(e), Florida Statutes.[6]

57. Lamar's reading of Ms. Holschuh's testimony is fair and reasonable. However, Ms. Holschuh is only the administrator of the outdoor advertising program. She does not have the authority to waive the requirements of Section 479.105(1), Florida Statutes. The statute plainly states that a sign "erected, operated, or maintained without the permit required by s. 479.07(1)" adjacent to the right-of-way on a federal-aid highway is a public nuisance and must be removed, unless it can meet the criteria set forth in paragraph (e). Lamar's sign is subject to this statute, and cannot meet the criteria of paragraph (e).

58. In summary and conclusion, Lamar established that its sign meets the definition of a "nonconforming sign" set forth in Section 479.01(14), Florida Statutes. The Department's unadopted rule limiting the definition of "changed conditions" to actions taken by government agencies was an illicit modification of the statute it purported to implement. The Department articulated no reasonable rationale for denying that Lamar's sign was nonconforming. However, Lamar could not establish that its nonconforming sign satisfied the criteria set forth in Section 479.105(1)(e), Florida Statutes. Therefore, the Department should deny Lamar's permit application.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Department of Transportation denying the application of Lamar of Tallahassee 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 (Application Number 57155).

DONE AND ENTERED this 7th day of June, 2010, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of June, 2010.

ENDNOTES

[1/] Unless otherwise indicated, references to the Florida Statutes are to the 2008 edition.

[2/] In addition to her live testimony, Ms. Holschuh's deposition of January 7, 2010, was admitted into evidence as Joint Exhibit 7.

[3/] At least two states provide for "changed conditions" that go beyond governmental action. Arizona Administrative Code s. R17-3-901 (signing for colleges/universities) provides that "physical deterioration of a sign" is an example of a "changed condition." Georgia Comprehensive Rules and Regulations r. 672-6-.03(2) provides that "changed conditions" include those "beyond the control of the sign owner since the erection of the sign."

[4/] If there were evidence that Lamar had procured its own "changed conditions," by itself removing the trees or having them removed by a third party, then the Department would be fully justified in denying the permit for failure to meet the definition of a "nonconforming sign." Though Ms. Holschuh never elaborated on the potential for "abuse" that caused the Department to reject broadening the definition of "changed

conditions," it is presumed from the context of the hearing that she had in mind such a "self-help" scenario.

[5/] The most apt Findings of Fact from the cited case are as follows:

> 13. The Department's employee responsible for issuing violation notices is Lynn Holschuh. She confirmed that if the south sign face was completely blocked from view from the main traveled way of SR366/West Pensacola Street when it was originally constructed, a sign permit would not be required from the Department. Ms. Holschuh further testified that if a change in circumstances occurred resulting in the subject sign becoming visible from the main traveled way of Pensacola Street, the sign might be permitted by the Department as a non-conforming sign, if it met the criteria for such.
>
> 14. In this case, the south face of the sign was once legal and did not require a permit because several large trees blocked the sign's visibility from a federal aid highway. The removal of the trees that blocked the sign caused the sign to become visible from a federal aid highway. In short, the south sign face no longer conformed to the Florida Statutes and Rules governing such signs and now is required to have a sign permit. However, the sign has not been in continuous existence for seven years and has received a Notice of Violation since its construction in 2005. The evidence was clear that the sign does not meet the requirements to qualify as a nonconforming sign and cannot be permitted as such. Therefore, Petitioner's application for a sign permit should be denied and the sign removed pursuant to the Notice of Violation.

The most relevant Conclusion of Law is as follows:

> 20. In this case, the evidence showed that the sign had been lawfully erected in 2005 because it was not visible from a federal aid highway and did not require a permit. There was no evidence that the designation of a highway changed the legal status of the sign. In fact, the status of the sign changed when the trees blocking its view were removed. However, the evidence was clear that the sign has not been in continuous existence for seven years since its construction. Additionally, the sign has been issued a Notice of Violation since the time of its construction. Given these facts, the sign does not meet the statutory requirements to be designated a nonconforming sign entitled to a permit under [Section 479.105(1)(e), Florida Statutes.] See Scharrer v. Department of Professional Regulation, 536 So. 2d 320 (Fla. 3rd DCA 1988). The evidence was also clear that the sign is located within 1,000 feet of another permitted structure. Therefore, Petitioner is not entitled to a permit for the south face of the subject sign since it is within 1,000 feet of another permitted sign.

[6/] Lamar has identified a genuine source of tension in the governing statutes, a tension that the Department's own rules appear to acknowledge. The facts of this case established that Lamar's sign was "lawfully erected" as that term is used in Section 479.01(14). However, the sign was lawfully erected outside of the jurisdiction of the Department. Once it fell within the Department's jurisdiction, the sign became subject to the Catch-22 of Section 479.105(1)(e)2., Florida Statutes: in order to obtain a permit, the sign in question must have met the Department's permitting criteria at some point during its existence, even though it was never subject to the Department's jurisdiction until a third party cut down the obstructing trees. In other words, a sign may meet the definition of a "nonconforming sign" yet be unpermittable. Section

479.105(1)(e) makes no exception for a sign that was "lawfully erected" yet never met the criteria for a Department permit.

Florida Administrative Code Rule 14-10.004 is titled "Permits." It does not cite Section 479.105, Florida Statutes, as either rulemaking authority or as a law implemented. Section (3) of the rule provides:

> (3) Notwithstanding any other provisions of this rule chapter, an outdoor advertising sign existing at a location which previously was not subject to the permitting requirements of this chapter, but which has become subject to the requirements of this chapter due to changes in the jurisdictional designation of highways, shall be granted a state permit in accordance with the process outlined below:
>
> (a) The Department shall conduct an inventory of outdoor advertising signs on the highway section subject to jurisdictional change and, within 60 calendar days of the effective date of the proposed change, advise all affected sign owners and local governments that the change is being considered, the regulatory effect of the change, and when the change may become effective.
>
> (b) Upon approval of the jurisdictional change, the Department will provide a second notice to sign owners and local governments advising that the change in jurisdiction has become effective and that sign owners have 30 calendar days from receipt of the second notice to submit an application for a sign permit.
>
> (c) When the Department is unable to provide the advance notice referenced in paragraph (a), above, the Department will advise the affected sign owners that they have 90 calendar days from receipt of the notice that the change in jurisdiction has become

> effective to submit an application for a sign permit.
>
> (d) The Department shall issue an Outdoor Advertising Permit, Form 575-070-30, Rev. 07/01, to the sign owner upon receipt of a complete Application for Outdoor Advertising Permit, Form 575-070-04, Rev. 02/09, together with all items required by Section 479.07(3)(b), F.S. For existing signs, the written statement required by Section 479.07(3)(b), F.S., shall be any written document from the appropriate local governmental official indicating compliance with local requirements as of the date of the permit application. A previously issued building permit shall be accepted as the statement from an appropriate local governmental official, except in cases where the local government has provided notice to the sign owner that the sign is illegal or has undertaken action to cause the sign to be removed. When a building permit is submitted as the statement of the local government, the applicant shall certify in writing that the local government has not provided notice that the sign is illegal, and that the local government has taken no action to cause the sign to be removed.

The quoted rule establishes that the Department has not always been consistent in its position that the only way for the owner of an existing sign to obtain a permit is by way of Section 479.105(1)(e). In Florida Administrative Code Rule 14-10.004(3), the Department effectively decrees that where there has been a change in the jurisdictional designation of a highway, the question whether the sign "would have met the criteria established in [Chapter 479, Florida Statutes]" at any time during its existence may be ignored. Though this is no doubt a practical solution to the problem of large numbers of signs falling under the Department's jurisdiction at once when a highway designation changes, it does not appear to be consistent with Section 479.105(1), Florida Statutes, with the Department's position in the instant case, or with the Department's Final Order in the 2008 Lamar of Tallahassee case as quoted in

Conclusion of Law 54, supra.

The validity of Florida Administrative Code Rule 14-10.004(3) is not at issue in this proceeding. The rule was cited to indicate that it was not unreasonable for Lamar to believe that the Department could sidestep Section 479.105(1) when exigent circumstances and basic fairness to an applicant make it reasonable to do so.

However, despite the apparent unfairness to Lamar, the undersigned is constrained by the statutory scheme to recommend denial of Lamar's application. In the instant case, the Department's position is correct and consistent with Sections 479.07(1) and 479.105(1), Florida Statutes.

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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.