

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANDRES MONSALVE,)
)
 Petitioner,)
)
 vs.) Case No. 08-4039
)
 DEPARTMENT OF TRANSPORTATION,)
)
 Respondent,)
)
 and)
)
 OUTLOOK MEDIA OF SOUTH FLORIDA)
 LLC,)
)
 Intervenor.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on November 4, 2008, by video teleconference with connecting sites in Miami and Tallahassee, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Linda L. Carroll, Esquire
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For Respondent: Kimberly Clark Menchion, Esquire
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For Intervenor: Joseph DeMaria, Esquire
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STATEMENT OF THE ISSUE

The issue for determination is whether Petitioner's applications for a State sign permit should be granted.

PRELIMINARY STATEMENT

On or about June 16, 2008, Andres Monsalve filed two applications for a State sign permit with the Department of Transportation (DOT). By Notice of Denied Application (Notice of Denial) issued July 3, 2008, DOT notified Mr. Monsalve that his applications were denied, pursuant to Section 479.07(3)(b), Florida Statutes, for the failure to include a statement from the appropriate local governmental official indicating that the agency or unit of local government would issue him a permit upon approval of the state permit application by DOT. On July 15, 2008, DOT issued an amended Notice of Denial, notifying Mr. Monsalve that his applications were denied for the failure to meet spacing requirements of 1500 feet between outdoor advertising signs pursuant to Section 479.07(9)(a)1. and 2., Florida Statutes; for being in conflict with an existing permitted sign; for the failure of the sign to comply with all local government requirements pursuant to Section 479.07(3)(b), Florida Statutes; and for the failure of the building permit

submitted with the application to comply with local governmental requirements. Mr. Monsalve filed a Petition for Formal Hearing. On August 19, 2008, this matter was referred to the Division of Administrative Hearings.

On September 17, 2008, Outlook Media of South Florida, LLC, (Outlook Media) filed a Corrected Motion to Intervene. The motion was granted and Outlook Media was granted intervenor status in this matter.

At hearing, Mr. Monsalve renewed his motion for continuance that was previously denied. The renewed motion for continuance was denied. Additionally, a motion to dismiss, filed by Outlook Media, was denied.

Further, at hearing, Mr. Monsalve testified in his own behalf and entered 14 exhibits (Petitioner's Exhibits numbered 1 and 5-17)¹ into evidence. DOT presented the testimony of one witness and entered seven exhibits (Respondent's Exhibits numbered 1-4, 7, 8, and 11)² into evidence. Outlook Media neither presented the testimony of any witnesses nor entered any exhibits into evidence.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for ten days following the filing of the transcript. The Transcript, consisting of two volumes, was filed on November 17, 2008. DOT and Outlook Media timely filed their post-hearing

submissions. Mr. Monsalve failed to timely file his post-hearing submission; however, no objection was made to his late-filed post-hearing submission. Mr. Monsalve's post-hearing submission is accepted as filed. The late-filing of the post-hearing submission, without objection, is considered an extension of the agreed upon ten-day filing period. The parties' post-hearing submissions were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. No dispute exists that DOT 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. Mr. Monsalve wishes to place two advertising signs within 660 feet of Interstate 95 and visible to Interstate 95. The advertising signs require a permit.

3. On or about June 16, 2008, Mr. Monsalve filed two applications, completing DOT's forms titled "Application for Outdoor Advertising Permit" (Application), with DOT for outdoor advertising signs. The two applications indicated the same location for the outdoor advertising but with different height, width, and total square feet: one was a height of 4 feet, width of 60 feet, and 240 total square feet, and the other was a

height of 12 feet, width of 12 feet, and 144 total square feet. The two Applications were assigned Application numbers 57196 and 57197, respectively. The location for the proposed outdoor advertising signs is 299 Southwest 17 Road in Miami, Florida, near Interstate 95, North of Southwest 3rd Avenue.

4. Mr. Monsalve owns the property on which the advertising signs are to be located.

5. The Application contained a section titled "Local Government Permission." The section provided that it was to be completed by the appropriate local government official or that a "written statement indicating that the sign complies with all local government requirements" may be submitted or, "for a proposed sign location, a copy of the building permit issued by the local government may be submitted." The section was neither completed by the local government official nor was a written statement submitted indicating that the signs comply with all local government requirements. However, Mr. Monsalve submitted a 1999 building permit from the local government. The local government was the City of Miami.

6. The 1999 building permit was issued by the City of Miami on July 13, 1999, to Hampton Inn for a commercial painted wall sign, located at 299 Southwest 17 Road. The building permit was issued Permit Number SG 99-5011166. The Folio

Number, i.e., Property ID Number, on the 1999 building permit is No. 01-4138-002-0020.

7. Mr. Monsalve owns the property for which the 1999 building permit was issued for the advertising sign. The property is the same property identified on his Application, assigned Application number 57197.

8. DOT requires that, in order for a building permit to constitute "local government permission," the permit must have been issued within six months of the date of an application for an outdoor advertising sign. The 1999 building permit submitted by Mr. Monsalve was beyond the six-month time period of the date of Application number 57197.

9. Furthermore, by letter dated June 25, 2008, the City of Miami notified DOT that the 1999 building permit no longer had legal status due to the City of Miami changing its laws regarding billboards and that Mr. Monsalve did not have local government permission.³

10. The evidence demonstrates that the 1999 building permit did not constitute local government permission.

11. The evidence failed to demonstrate that Mr. Monsalve had obtained local government permission.

12. In March 2004, DOT issued a permit to the Hampton Inn for an outdoor advertising sign on Mr. Monsalve's property. The permit was issued Tag Number CA179, and the sign was built on

August 19, 2004. The permit information provides, among other information, that the location of the outdoor advertising sign was located 0.040 miles North of Southwest 3rd Avenue and that the sign was 144 square feet.

13. Hampton Inn and Mr. Monsalve entered into an agreement/contract for Hampton Inn to lease outdoor advertising space from Mr. Monsalve at 299 Southwest 17 Road, Miami, Florida. A Second Lease Agreement between Mr. Monsalve and the Hampton Inn indicates in provision numbered one that the lease agreement was extended until March 31, 2007. The evidence demonstrates that, subsequent to March 31, 2007, the lease of the space by the Hampton Inn continued on a month-to-month basis and that the last time that Mr. Monsalve received payment for the monthly lease was in March 2008.

14. The location for the outdoor advertising sign permit, Tag Number CA179 is the same location of Mr. Monsalve's proposed outdoor advertising sign in Application number 57197.

15. In June 2008, the outdoor advertising sign permit, Tag Number CA179, was transferred from Hampton Inn to Outlook Media using DOT's form titled "Outdoor Advertising Permit Transfer Request." The permit is considered by DOT to be currently active.

16. The location for Mr. Monsalve's Application number 57197 is currently permitted to Outlook Media due to the

transfer of outdoor advertising sign permit, Tag Number CA179 to Outlook Media.

17. The distance between the proposed sign in Mr. Monsalve's Application number 57196 and the space in the outdoor advertising sign permit, Tag Number CA179, is less than 1500 feet.

18. The evidence demonstrates that the sign in Mr. Monsalve's Application number 57197 conflicts with the outdoor advertising sign permit, Tag Number CA179, in that the two are the same location.

19. Mr. Monsalve believed that he, as the property owner, owned the outdoor advertising sign permit, Tag Number CA179, as well. He did not agree for the permit to be transferred. Mr. Monsalve was not aware that the outdoor advertising sign permit, Tag Number CA179, had been transferred by Hampton Inn to Outlook Media. The evidence was insufficient to demonstrate that he owned or did not own the permit or that his permission was required for the permit to be transferred.

20. Mr. Monsalve did not agree to lease the space for the outdoor advertising sign permit, Tag Number CA179, to Outlook Media.

21. Mr. Monsalve notified DOT that a problem existed between him and the City of Miami regarding obtaining local government permission and requested DOT to put his Application

on "Hold" in order to provide him with time to resolve the problem. He also notified DOT regarding his dispute with the transfer of the outdoor advertising sign permit, Tag Number CA179, to Outlook Media. DOT is unable to place applications on hold but is required to act on applications within 30 days.

22. Also, Mr. Monsalve notified the City of Miami, among other things, of his dispute with the transfer of the outdoor advertising sign permit, Tag Number CA179, to Outlook Media, and that he did not give Outlook Media permission to erect a sign on his property for which the outdoor advertising sign permit, Tag Number CA179, was issued.

23. By Notice of Denial issued on July 3, 2008, DOT notified Mr. Monsalve that his Applications were denied for the following reason:

Other: No statement from the appropriate local governmental official indicating that the agency or unit of local government will issue a permit to the applicant upon approval of the state permit application by the Department (Section 479.07(3)(b), Florida Statutes).

24. On July 15, 2008, DOT issued an amended Notice of Denial, notifying Mr. Monsalve that his Applications were denied for the following reasons:

Sign does not meet spacing requirements
(1500' for interstates . . .)
s.479.07(9)(a)1.&2., FS
In conflict with permitted sign(s), tag #(s)

CA 179 held by Outlook Media of South Florida, LLC . . .

Sign/location does not comply with all local government requirements . . .
s.479.07(3)(b), FS

Other: The building permit submitted with the application is not in compliance with local governmental requirements.

25. No evidence was presented to demonstrate that a determination had been made as to what Mr. Monsalve's legal rights are as the owner of the property regarding his lease agreement/contract with the Hampton Inn and the outdoor advertising sign permit, Tag Number CA179; and regarding the transfer of the outdoor advertising sign permit, Tag Number CA179.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2008).

27. These proceedings are de novo. § 120.57(1)(k), Fla. Stat. (2008).

28. The general rule is that "the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal." Florida Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778, 788

(Fla. 1st DCA 1981). Mr. Monsalve has the ultimate burden of proof by establishing through a preponderance of evidence that he is entitled to the permit for which he has applied from DOT. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Antel v. Department of Professional Regulation, Florida Real Estate Commission, 522 So. 2d 1056, 1058 (Fla. 5th DCA 1988); J. W. C. Company, Inc., supra.; § 120.57(1)(j), Fla. Stat. (2008).

29. Section 479.07, Florida Statutes (2007) and (2008), provides in pertinent part:

(1) [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.

(2) A person may not apply for a permit unless he or she has first obtained the written permission of the owner or other person in lawful possession or control of the site designated as the location of the sign in the application for the permit.

(3)(a) An application for a sign permit must be made on a form prescribed by the

department, and a separate application must be submitted for each permit requested. A permit is required for each sign facing.

(b) As part of the application, the applicant or his or her authorized representative must certify in a notarized signed statement that all information provided in the application is true and correct and that, pursuant to subsection (2), he or she has obtained the written permission of the owner or other person in lawful possession of the site designated as the location of the sign in the permit application. Every permit application must be accompanied by the appropriate permit fee; a signed statement by the owner or other person in lawful control of the site on which the sign is located or will be erected, authorizing the placement of the sign on that site; and, where local governmental regulation of signs exists, a statement from the appropriate local governmental official indicating that the sign complies with all local governmental requirements and that the agency or unit of local government will issue a permit to that applicant upon approval of the state permit application by the department.

* * *

(4) An application for a permit shall be acted on by the department within 30 days after receipt of the application by the department.

* * *

(6) A permit is valid only for the location specified in the permit. Valid permits may be transferred from one sign owner to another upon written acknowledgment from the current permittee and submittal of a transfer fee of \$ [sic] 5 for each permit to be transferred. However, the maximum transfer fee for any multiple transfer

between two outdoor advertisers in a single transaction is \$ 100.

(7) A permittee shall at all times maintain the permission of the owner or other person in lawful control of the sign site to have and maintain a sign at such site.

* * *

(9)(a) 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.

30. The evidence demonstrates that Mr. Monsalve is requesting a permit for an outdoor advertising sign on Interstate 95 highway. § 479.07(1), Fla. Stat. (2007) and (2008).

31. The evidence demonstrates that the proposed location for the outdoor advertising sign for Application number 57196 is less than 1500 feet from an already permitted outdoor advertising sign, i.e., Tag Number CA179, on the same side of the Interstate highway and, therefore, fails to meet the requirement of Section 479.07(9)(a)1., Florida Statutes (2007) and (2008).

32. Further, the evidence demonstrates that Mr. Monsalve's sign location for Application number 57197 conflicts with the permitted outdoor advertising sign, Tag Number CA179.

33. The evidence fails to demonstrate that the 1999 building permit from the City of Miami submitted by Mr. Monsalve with his Applications was issued within six months of his Applications filed with DOT for the outdoor advertising sign permit.

34. The evidence fails to demonstrate that Mr. Monsalve has obtained the local governmental permission, and, therefore, his Applications fail to meet the requirement of Section 479.07(3)(b), Florida Statutes (2007) and (2008).

35. Mr. Monsalve argues that a dispute exists as to whether the outdoor advertising sign permit, Tag Number CA179, was lawfully transferred to Outlook Media by Hampton Inn, and, therefore, whether Tag Number CA179 lawfully belongs to Outlook Media. Even though Section 479.07, Florida Statutes (2007) and (2008), contains provisions setting forth certain requirements to be met between an applicant or a permittee and the owner of the sign site or other person in lawful control of the sign site, a resolution of this dispute in these proceedings is not within the authority of this Administrative Law Judge.

36. Moreover, Mr. Monsalve argues that the outdoor advertising sign permit, Tag Number CA179, became invalid at the termination of the lease agreement for the sign space with the Hampton Inn on March 31, 2007, citing Lamar Advertising Company v. Department of Transportation, 490 So. 2d 1315 (Fla. 1st DCA

1986). In Lamar, supra, the pertinent fact to the instant matter, as agreed to by the parties and adopted by the Department of Transportation, pertaining to the instant matter, was that the owner of the property on which the outdoor advertising sign was located notified the lessee, who was the permittee for the sign, that the lease would be terminated and requested the lessee to remove the sign by June 30, 1984; and the pertinent conclusion of law, as adopted by the Department of Transportation, was that the lease on the property terminated on June 30, 1984. The court held that the permit became invalid under Section 479.13, Florida Statutes, which provided that "No person shall construct, erect, operate, use or maintain any outdoor advertising structure, outdoor advertising sign or advertisement without the written permission of the owner or other person in lawful possession or control of the property on which the structure or sign is located."; that the prerequisite to issuance of a permit for an outdoor advertising sign by the Department of Transportation was the property owner's permission in writing; that the permit became invalid on the date that the lease was terminated, June 30, 1984, and that the "permit ceased to exist as an impediment due to Section 479.13" and "cannot form the basis for denial of a valid permit." Lamar, at 1318.

37. The court in Lamar, supra, recognized, in a footnote, that Section 479.13, Florida Statutes was repealed in 1984 and

replaced in substance with Section 479.07(7), Florida Statutes (Supp. 1984). Section 479.07(7), Florida Statutes (Supp. 1984) is no different from Section 479.07(7), Florida Statutes (2007) and (2008). In the instant matter, no agreement exists between the parties as to the termination of the lease agreement between the Hampton Inn and Mr. Monsalve. Further, the evidence is insufficient to establish whether the lease agreement was terminated, and, if so, the date of termination. Additionally, the evidence fails to demonstrate that a determination has been made as to what Mr. Monsalve's legal rights are as the owner of the property regarding his lease agreement/contract with the Hampton Inn and the outdoor advertising sign permit, Tag Number CA179. Even assuming that the lease agreement between Mr. Monsalve and the Hampton Inn terminated prior to Mr. Monsalve filing his Applications and that the outdoor advertising sign permit, Tag Number CA179, became invalid prior to the filing of his Applications, the Applications still fail to meet the requirement of obtaining local government permission.

38. Further, Mr. Monsalve argues that he was entitled to local governmental permission. The City of Miami refused to give local governmental permission. A dispute exists between Mr. Monsalve and the City of Miami as to whether he should receive local governmental permission. This Administrative Law

Judge is without authority in these proceedings to address the dispute.

39. Additionally, Mr. Monsalve argues that DOT should have delayed making a determination on his Application to afford him an opportunity to resolve the aforementioned disputes. DOT is required to act on an application for a permit within 30 days of receiving the application. § 479.07(4), Fla. Stat. (2007) and (2008). DOT was statutorily obligated to make a determination within 30 days of receiving Mr. Monsalve's Application, and DOT did so. DOT made its determination on Mr. Monsalve's Application within the 30-day time period.

RECOMMENDATION

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

RECOMMENDED that the Department of Transportation enter a final order denying Andres Monsalve's application for an outdoor advertising sign permit.

DONE AND ENTERED this 17th day of December 2008, in
Tallahassee, Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of December, 2008.

ENDNOTES

- 1/ Petitioner's Exhibits numbered 2-4 were rejected.
- 2/ Respondent's Exhibit numbered 5 is the same as Petitioner's Exhibit numbered 10. Respondent's Exhibit numbered 9 is contained in Petitioner's Exhibit numbered 7.
- 3/ No testimony was presented by a witness from the City of Miami.

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.