STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SG OUTDOOR,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-1551
	)	
DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on September 9, 2009, in Clearwater, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Vincent Stona, pro se
SG Outdoor
36181 East Lake Road, Suite 185
Palm Harbor, Florida 34685

For Respondent: Susan Schwartz, Esquire
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0450

STATEMENT OF THE ISSUE

There are two separate issues in this case: (1) Whether Petitioner breached its contract with Respondent by not making payments for a sign lease, thereby resulting in the sign permit

becoming invalid; and (2) Whether Petitioner constructed a roadside sign illegally, i.e., without a permit.

PRELIMINARY STATEMENT

On July 9, 2004, Respondent, Department of Transportation ("DOT" or the "Department"), issued a Notice of Violation to Petitioner, SG Outdoor, alleging that Petitioner did not have the permission of the owner of the sign site to have its sign in place. On August 10, 2004, DOT issued a letter to Petitioner revoking DOT Sign Permit No. AU557. On October 6, 2005, DOT issued a Notice of Violation, Illegally Erected Sign relating to Sign Permit No. AU557a; and a Notice of Violation, Illegally Erected Sign relating to Sign Permit No. AU557a#2. Petitioner filed a document which was accepted by DOT as a request for formal administrative hearing on October 26, 2005. The request was transferred to the Division of Administrative Hearings ("DOAH) on March 24, 2009, and assigned to the undersigned.

At the final hearing held in this matter, Petitioner called two witnesses: Vincent A. Stona and Gary Barbosa. Petitioner's Exhibits 1 through 28 were admitted into evidence. Respondent called one witness: Lynn Holschuh, an outdoor advertising administrator with DOT. Holschuh was also re-called briefly for rebuttal. Respondent's Exhibits 5 through 14 were admitted into evidence.

At the close of the evidentiary portion of the final hearing, the parties requested, and were allowed, ten days from the filing of the hearing transcript within which to file their respective proposed recommended orders. A one-volume hearing Transcript was filed on October 14, 2009. Both parties timely filed Proposed Recommended Orders containing proposed Findings of Fact and Conclusions of Law. The parties' proposals have been carefully considered during the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner, SG Outdoor, is a company engaged in the business of outdoor advertising in Florida.

2. Respondent is the State of Florida ("State") agency responsible for monitoring compliance with State and Federal laws relating to outdoor advertising. According to those laws, signs within 660 feet of primary or interstate roadways visible from those roadways are subject to advertising regulations. There is currently a 1,500-foot spacing requirement (up from 1,000 feet in 1984) between signs. Further, signs must be located on land zoned for commercial and industrial use.

3. Petitioner owns two signs which are at issue in this proceeding. One of the signs is a single facing sign of wood construction with a seven-foot height above ground level. The sign is assigned Tag No. AU557. The sign is situated just off

Interstate 4, .871 miles east of State Road 33 in Polk County, Florida. This sign will be referred to herein as the "Original Sign." The Original Sign was built in 1971 and was located, at all times relevant hereto, on land owned by Mrs. Ona Grimes until that land was purchased by the State in October 2002.

4. Petitioner also constructed another sign at approximately the same location. This sign, referred to herein as the "New Sign," has a double-faced, single-metal pole and is considerably higher in height than the Original Sign. Both the Original Sign and the New Sign are located on property which DOT contends is zoned as "Pasture, with residence." However, Polk County did away with its zoning ordinance in March 2000 and replaced it with Land Use Districts. The current Land Use District designation for the site is Business Park Center (within the Green Swamp Area of Critical State Concern). There was no competent testimony at final hearing as to whether that designation constitutes commercial or industrial zoning for purposes of roadside signs.

5. The Original Sign was purchased by Petitioner in 1991 and was located on the Grimes property. Petitioner entered into a Ground Lease with Grimes that had a term of 30 years at a payment of $1,500 per year.

6. In 2002, DOT entered into negotiations with Grimes to purchase the property. When DOT purchases property on which a

roadside sign already exists, DOT may take the sign by way of condemnation through eminent domain (sometimes referred to by DOT as a "Take"). In such cases, the State must reasonably compensate the sign owner for the taking of its sign. In the alternative, the State may assume the sign lease and become a lessor to the sign owner. In that case, the sign owner must make its lease payments directly to the State.

7. On May 22, 2002, DOT sent a letter to Petitioner explaining that DOT was in the process of acquiring the right of way on which the Original Sign was located. DOT offered to purchase (or Take) the sign from Petitioner for $17,300. While that offer to Petitioner was pending, DOT went forward with the purchase of the Grimes property. The purchase agreement for the property was signed by Grimes on July 11, 2002. Four days later, a letter from DOT to Petitioner was issued which said:

> Subsequent to receiving agreement and signed ODA [out door advertising] disclaimer from the property owner, an offer has been made to SG Outdoor, Inc. for the purchase of the ODA structure. Negotiations are ongoing.

However, the purchase of Grimes property did not occur immediately.

8. Meanwhile, in August 2002, Grimes entered into an illegal lease with Lamar Advertising, giving Lamar the same rights it had already contracted away to Petitioner. Petitioner was unaware of the lease with Lamar at that time. Such a lease

would have been in violation of the already-existing lease between Grimes and Petitioner. At almost the same time, a DOT memorandum indicated that DOT was still "involved in ongoing negotiations" with Petitioner concerning the sign.

9. The Grimes property purchase (by DOT) finally closed on October 1, 2002, at which time DOT became the owner of the Grimes property. Because of this fact, Petitioner was supposed to make its annual lease payments to the State of Florida ("State") as the new owner. Stated differently, the State became Petitioner's new lessor.

10. On October 14, 2002, Lamar Advertising filed a Sign Permit Application with the Polk County Building Division. The application was for approval of its sign on the Grimes property. The application included a copy of Lamar's lease with Grimes; the lease had a 10-year period and a payment of $4,000 per year.[1]

11. On July 8, 2003 (ten months after DOT purchased the property), Petitioner filed a permit application with Polk County for the New Sign. Petitioner did not, at that time, have permission from DOT to erect a new sign, but believed it could obtain that permission after the fact. Petitioner then went forward with the construction of the New Sign.

12. Meanwhile, Petitioner sent Grimes a check in October 2003, for its lease payment for the period June 1, 2003, through May 30, 2004. By that time, the State already owned the Grimes

property. A member of the Grimes family sent Petitioner's check back to Petitioner in January 2004, explaining that all payments should be made directly to the State. There is no evidence in the record as to whether Petitioner attempted to make a lease payment to the Department at that time or at any other time.

13. In November 2003, DOT issued a certified letter to Petitioner addressing Sign Permit No. AU557 that said:

> On October 2, 2002, the above referenced parcel was purchased by the Florida Department of Transportation. Although the Department will honor an existing lease, it will not engage in any new lease agreements nor grant permission for the referenced sign to remain. Since any potential oral agreement with the previous owner has expired, the Department requests that the [Original] sign be removed.

14. Clearly DOT was mistaken. Petitioner had a written, not oral, lease with the prior owner. In response, Petitioner sent DOT a copy of its Ground Lease with Grimes. At that time, Petitioner also asked for a meeting with DOT's acquisition director to continue negotiating a fair price for the Original Sign.

15. Several months later (on July 9, 2004), DOT issued its Notice of Violation regarding the Original Sign. The notice said "that the outdoor advertising sign referenced above has been acquired by the Department" (rather than saying the

Department had purchased the land). The notice directed Petitioner to immediately remove the sign from the premises.

16. The notice was partially in error; DOT had actually acquired the land, not the sign. Petitioner was in breach of its lease with the State by failing to make lease payments as required by the lease which DOT had assumed. However, it is unclear as to whether, upon notice of receipt of the written lease, DOT had ever advised Petitioner to send its lease payments directly to the Department. The Notice of Administrative Hearing Rights attached to the DOT Notice of Violation indicates a deadline of 30 days from receipt of the Notice for filing such a request, i.e., on or about August 10, 2005.

17. Petitioner responded to the Notice with another letter (dated July 14, 2009) explaining again that it had a valid lease with Grimes for the sign location. Petitioner's letter asked DOT to abate its violation notice and reinstate Petitioner's permit. It also stated that "[i]f the State decides not to acknowledge the Judicial process [the ongoing probate dispute with the Grimes family concerning the lease with Lamar] and still proceeds with the Notice of Violation, then upon receiving your next correspondence, we will exercise our privilege to request an administrative hearing." Petitioner contends that the quoted statement constituted its request for an

administrative hearing. However, the plain reading of the statement indicates that it is a statement of future intent based upon future actions by DOT.

18. DOT then issued a letter dated August 10, 2004, to Petitioner explaining that the permit for the Original Sign had been revoked. The letter directed Petitioner to remove the sign. The letter stated that if Petitioner does not do so, then DOT would have the right to remove the sign. (As of the date of the final hearing in this matter, the sign was still in place.) The August 10 letter, in response to Petitioner's July 14 letter, appears to be the "next correspondence" Petitioner had requested. The exercise of its right to an administrative hearing would, therefore, be due on or about September 11, 2004.

19. On September 8, 2004, Petitioner sent a letter to Holschuh declining DOT's offer to purchase the Original Sign for $17,000. That offer had been made in May 2002.[2] This letter suggests a counter-offer of $82,500 as the purchase price. The letter did not invoke Petitioner's right to an administrative hearing. Holschuh responded that she was not involved in acquisitions, and Petitioner should contact the district office (with whom Petitioner had previously negotiated).

20. Instead of heeding Holschuh's directions, Petitioner then sent her another letter asking her to send the correspondence on to someone in the acquisition division. The

new letter also repeats the counter-offer of $82,500. This letter did not invoke Petitioner's right to a formal hearing, either.

21. About one year later, on October 6, 2005, DOT issued another Notice of Violation, this one addressing Sign Permit No. AU557a (which Holschuh at final hearing said referred to the Original Sign, although there was no "a" nomenclature on the July 9, 2004, Notice of Violation). Also, on October 6, 2005, DOT issued a Notice of Violation addressing Sign Permit No. AU557a#2, which Holschuh said referred to Petitioner's New Sign, even though no permit for the New Sign had ever been issued by DOT. The New Sign by this time had been completed and was being used for outdoor advertising. Petitioner understands the need for a permit to construct a new outdoor sign on the State road right-of-ways, but opined that it believed it could do so after the fact.

22. Petitioner has only obtained approval from Polk County for erecting the sign, an event necessary for construction purposes, but irrelevant to DOT requirements.

23. In the letter to DOT from Petitioner dated October 26, 2005 (and presumably accepted by DOT as Petitioner's request for a formal hearing), reference is made to Sign Permit No. AU557a#2, i.e., the New Sign. However, the letter addresses the Original Sign and its perceived value by Petitioner. It is

patently unclear as to which sign is actually being addressed, but facts surrounding both signs were presented at final hearing and both have been addressed herein.

24. Nonetheless, Petitioner's October 26, 2005, letter was submitted within 30 days of the latest Notice of Violation and was presumably intended to invoke Petitioner's right to a formal administrative hearing. This letter was then forwarded to DOAH by DOT in March 2009, for the purpose of conducting the hearing. (No evidence was presented as to why the DOT's cover letter and Petitioner's request for hearing were not submitted to DOAH until three-and-a-half years after the letter was written.)

CONCLUSIONS OF LAW

25. 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.[3]

26. Proceedings under the jurisdiction of DOAH are de novo in nature. § 120.57(1)(k), Fla. Stat.

27. As the party seeking to revoke Petitioner's permit, the Department bears the burden of proof, by a preponderance of the evidence, that the allegation in the charging document is correct. See LaPointe Outdoor Advertising v Florida Department of Transportation, 382 So. 2d 1347 (Fla. 1980); Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

28. The control and regulation of roadside signs in the State falls within the purview of DOT as set forth in Chapter 479, Florida Statutes. DOT's specific duties in this regard are set forth at Section 479.02, Florida Statutes, and in Florida Administrative Code Rule 14-10.

29. Florida Administrative Rule 14-10.0042 states in pertinent part:

> (1) If the Department intends to deny an application for a license or permit, deny reinstatement of a permit cancelled or not renewed in error, or intends to revoke a license or permit, the Department shall provide, by certified mail, return receipt requested, or by personal delivery with receipt, notice of the facts which warrant such action. The written notice shall contain:
>
> (a) The particular facts or bases for the Department's action;
>
> (b) The statute or rule relied upon;
>
> (c) A statement that the applicant or permittee has the right to an administrative hearing pursuant to Section 120.57,F.S.;
>
> (d) A statement that the Department's action shall become conclusive and final agency action and that the permit or license will be denied or revoked if no request for a hearing is filed within 30 calendar days of receipt of the notice of the Department's intended action.

In the present action, DOT met the requisite requirements concerning notice about revocation of the Original Sign in its July 9, 2004, Notice of Violation. However, when Petitioner

responded with correspondence indicating errors on the part of DOT and requesting further consideration, DOT seems to have abandoned its initial Notice of Violation.

30. Thereafter, on October 6, 2005, the Department reissued a Notice of Violation for the Original Sign and also issued one for the New Sign. Each of the notices was properly served on Petitioner. In response, Petitioner requested and was granted a formal administrative hearing.

31. Section 479.07, Florida Statutes, reads in pertinent part:

> (1) Except as provided in ss. 479.105(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 such 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 the 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.
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> * * *
>
> (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.

Once DOT had purchased the Grimes land, DOT became the de facto and de jure landlord for purposes of the existing sign lease with Petitioner. Petitioner should have, at that time, began making lease payments to the Department. However, the extremely confusing dialogue between DOT and Petitioner makes it impossible to determine whether Petitioner was ever sufficiently notified of this fact. Only upon receipt of the October 6, 2005, Notice of Violation does Petitioner get any idea that its failure to make the payments is considered by the Department to be a breach of the lease. No cure period was granted to Petitioner as required by Section 479.05, Florida Statutes. Thus, DOT cannot meet its burden of proving non-compliance by Petitioner concerning the lease on the Original Sign.

32. Section 479.24, Florida Statutes, states in part:

> Just compensation shall be paid by the department upon the department's removal of a lawful nonconforming sign along any portion of the interstate or federal-aid primary highway systems. This section does not apply to a sign which is illegal at the time of its removal. A sign will lose its nonconforming status and become illegal at such time as it fails to be permitted or maintained in accordance with all applicable laws, rules, ordinances, or regulations other than the provision which makes it nonconforming.

The Department should, therefore, pay just compensation to Petitioner for the Original Sign, minus any lease payments due and owing.

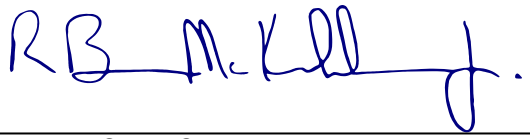
33. The New Sign was admittedly constructed without State approval and its revocation is warranted under the facts stated herein. Petitioner admits its failure to apply for and receive a permit for the New Sign.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by Respondent, Department of Transportation, reversing the revocation of Sign Permit No. AU557 and providing Petitioner, SG Outdoor, just compensation for that sign. Further, the final order should deem the newly constructed sign on the same site to be unauthorized and order its removal.

DONE AND ENTERED this 19th day of November, 2009, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of November, 2009.

ENDNOTES

[1/] This fact is not material to Petitioner's dispute with DOT, except that it is a clear indication of some ongoing misunderstanding concerning the subject property.

[2/] The offer was actually for $17,300.

[3/] Unless otherwise stated herein, all references to the Florida Statutes shall be to the 2009 version.

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.