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

CARTER-PRITCHETT ADVERTISING, INC.,

Petitioner,

vs.

DOT CASE NO.: 09-018
DOAH CASE NO.: 09-1560

DEPARTMENT OF TRANSPORTATION,

Respondent.
_____/

FINAL ORDER

By Notice of Denied Application dated February 16, 2009, the Department of Transportation (Department) advised Carter-Pritchett Advertising, Inc. (Carter-Pritchett) that its applications for outdoor advertising sign permits numbered 57413 and 57414 had been denied. Carter-Pritchett requested a formal administrative hearing in a petition received by the Department on March 12, 2009, and the matter was referred to the Division of Administrative Hearings (DOAH) on March 24, 2009.

On April 27, 2009, the Department issued an Amended Notice of Denied Application which replaced the notice issued on February 16, 2009, and which denied Carter-Pritchett's permit applications on the grounds that the proposed sign site location was not permittable under the land use designation of the site and that the location does not qualify as an unzoned

commercial/industrial area. The matter proceeded to hearing before William F. Quattlebaum, a duly appointed Administrative Law Judge (ALJ), on October 29, 2009. Appearances on behalf of the parties were as follows:

For Petitioner: E. Bruce Strayhorn, Esquire
Strayhorn & Strayhorn
2125 First Street, Suite 201
Fort Myers, Florida 33901

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

At the hearing, Carter-Pritchett presented the testimony of two witnesses and its Exhibits 3 through 7 were admitted into evidence. The Department presented the testimony of three witnesses and had its Exhibits 1 through 9 admitted into evidence. Joint Exhibits 1 through 6 and the parties' October 28, 2009, pre-hearing stipulation (ALJ Exhibit 1) were also admitted into evidence.

The parties timely filed Proposed Recommended Orders on December 16, 2009, and the ALJ issued his Recommended Order on January 22, 2010. Exceptions to the Recommended Order were timely filed by both parties on February 4, 2010.

STATEMENT OF THE ISSUE

As stated by the ALJ in his Recommended Order:

> The issue in the case is whether Carter-Pritchett Advertising, Inc.'s (Petitioner), applications for the outdoor advertising sign permits referenced herein and filed by the Petitioner should be approved.

EXCEPTIONS

Carter-Pritchett first takes exception to that portion of Finding of Fact 12 of the Recommended Order which provides: "The language of the Ordinance clearly indicates that the planned unit development designation is provisional and based on compliance by the developer with a number of conditions." Carter-Pritchett essentially contends that the finding is not supported by the language of the Ordinance (Ordinance No. 3356, Joint Exhibit 3) or any other competent, substantial evidence in the record.

Pursuant to Section 120.57(1)(l), Florida Statutes (2009), an agency has the authority to reject or modify the findings of fact set out in the recommended order. However, the agency cannot do so unless it first determines from a review of the entire record, and states with particularity in its final order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. Rogers v. Department of Health, 920 So. 2d 27, 30 (Fla. 1st DCA 2005). The agency is not permitted to reweigh the evidence or judge the credibility of the witnesses. Id. If there is competent substantial evidence to support the administrative law judge's findings of fact, the agency may not reject them, modify them, or make new findings. Stokes v. State, Bd. of Professional Engineers, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007); Rogers, 920 So. 2d at 30.

Review of Sections 5 and 6 of the Ordinance and the record in its entirety confirms that the development rights afforded by the Ordinance are based upon the satisfaction of a number of requirements and that such rights will expire if the requirements are not met within the time frame provided in the Ordinance. The challenged finding of fact is supported by competent,

substantial evidence and the Department cannot, therefore, reject it, modify it, or make additional findings. Stokes, 952 So. 2d at 1225; Rogers, 920 So. 2d at 30. Carter-Pritchett's first exception is rejected.

Carter-Pritchett and the Department have both taken exception to conclusions of law set out in 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.

The Department's sole exception is directed to the first sentence of Conclusion of Law 22 which states: "The application of the use test was based on 'long standing policy' of the agency." The Department's exception is rejected because it is unnecessary for the disposition of this matter. The ALJ made it clear that he was not relying upon non-rule policy.

Carter-Pritchett's second exception addresses the ALJ's determination, in Conclusion of Law 18, that Carter-Pritchett had not met the burden of establishing entitlement to the sign permits sought in this proceeding by a preponderance of the evidence. Carter-Pritchett argues that it "clearly met its burden of proof based upon the testimony and evidence submitted as well as on the plain, clear reading of the relevant Florida statutes and current adopted administrative rules." The ALJ's findings of fact, all of which have the requisite record support, demonstrate the contrary. Carter-Pritchett's second exception is rejected.

In its third exception Carter-Pritchett challenges Conclusion of Law 20 which states: "In this case, the evidence fails to establish that the zoning applicable to the parcel at issue in this proceeding is either industrial or commercial, because the classification upon which the application is based is provisional and dependent on compliance with conditions set forth in the PUD Ordinance." Carter-Pritchett contends that this finding and conclusion is not supported by competent substantial evidence as Carter-Pritchett argued in its first exception.

The record reflects that Maria Abadal-Cahill, the Department's expert in land use and zoning issues, testified that the zoning of the parcel at issue was mixed use with a planned unit development approval. This testimony and the provisions of Sections 5 and 6 of the Ordinance establish that the development rights afforded by the Ordinance are based upon the satisfaction of a number of requirements and that such rights will expire if the requirements are not met within the time frame provided in the Ordinance. As the ALJ observed in Conclusion of Law 23:

> For all practical purposes, absent evidence that any attempt is being made to comply with the conditions set forth in the Ordinance, the relevant land use category for the parcel at issue in this proceeding is Mixed Use, a designation which would not support approval of the permits at issue in this case.

In addition to its evidentiary concerns, Carter-Pritchett suggests that the conclusion does not comply with relevant legal authority and specifically asserts that it is not based upon a plain reading of Section 478.01(3), Florida Statutes, or the current Florida Administrative Code but is instead based upon the Department's long-standing policy, "which amounts to an 'unadopted rule' pursuant to Subsection 120.52(20), F.S., to classify certain land use designations as 'provisional' or 'conditional' and then disregard such land use designations

from the Subsection 479.01(3), F.S., analysis." The crux of Carter-Pritchett's exception on legal grounds is its belief that the ALJ based his recommendation on an unadopted rule in violation of Section 120.57(1)(e), Florida Statutes, which provides that an agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule. Carter-Pritchett's reliance upon this line of argument is misplaced.

Conclusion of Law 23 makes it clear that the ALJ did not rely upon non-rule policy to conclude that Carter-Pritchett was not entitled to the outdoor advertising permits it was seeking. Instead he considered the Ordinance, and found that none of the requirements that would vest the parcel with an industrial or commercial zoning status had been met or likely would be met within the time provided in the ordinance. As a result, the ALJ concluded that the zoning currently in effect was mixed use which concededly would not entitle Carter-Pritchett to issuance of the permits. Carter-Pritchett's third exception is rejected.

Carter-Pritchett's fourth exception goes to the portion of Conclusion of Law 22 which provides: "Although the Petitioner objected to reliance on policy or the unadopted rule, no formal rule challenge was filed." Carter-Pritchett asserts that to the extent this language implies that a formal rule challenge was necessary to challenge agency action based on an unadopted rule, the implication is contrary to Chapter 120, Florida Statutes. The fact that no rule challenge was filed in this case is an accurate statement and Conclusion of Law 23 demonstrates that the recommended action in this case was not based upon any concept of waiver or procedural default attributed to Carter-Pritchett not having filed a rule challenge. Carter-Pritchett's fourth exception is rejected.

Looking to Conclusion of Law 23, Carter-Pritchett next takes exception to the ALJ's determination that it was unnecessary to address the Department's policy or unpromulgated rule because the land use designation in this case is clearly provisional. Carter-Pritchett challenges this conclusion on the same basis it advanced in its first and third exceptions. Consequently, on the basis of the reasoning advanced in the disposition of Carter-Pritchett's first and third exceptions, its fifth exception is likewise rejected.

In its final exception Carter-Pritchett, on the basis of its reasons stated in its first five exceptions, challenges the ALJ's recommendation that the Department enter a final order denying the sign permit applications at issue in this case. In light of the rejection of Carter-Pritchett's exceptions one through five, Carter-Pritchett's exception directed to the ALJ's ultimate recommendation is 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 16 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 17 through 23 of the Recommended Order are fully supported in law, and are adopted and incorporated as if fully set forth herein.

ORDER

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

ORDERED that Carter-Pritchett Advertising, Inc.'s applications for outdoor advertising sign permits numbered 57413 and 57414 are denied.

DONE AND ORDERED this 5th day of March, 2010.

Stephanie C. Kopelousos
Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

FILED D.O.T. CLERK
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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:

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STEPHANIE C. KOPELOUSOS
SECRETARY

DELEGATION OF AUTHORITY

I, Stephanie C. Kopelousos, Secretary of the Florida Department of Transportation, delegate to Kevin J. Thibault, as the Assistant Secretary for Engineering and Operations, Deborah L. Hunt, as the Assistant Secretary for Intermodal Systems Development, and William F. Thorp, as the Interim Assistant Secretary for Finance and Administration, the authority and responsibility to take action on my behalf at anytime during my absence from the Department headquarters in Tallahassee. I also rescind any prior delegations to the contrary.

SCKopel

Stephanie C. Kopelousos, Secretary
Florida Department of Transportation

May 28, 2008

Date