STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WOODY DRAKE ADVERTISING, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-5187
	)	
DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This cause came on for final hearing before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on November 18, 2009, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Claude Ridley Walker, Esquire
Guilday, Tucker, Schwartz & Simpson, P.A.
1983 Centre Pointe Boulevard, Suite 200
Tallahassee, Florida 32308-7823

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

STATEMENT OF THE ISSUE

The issue is whether Respondent's Notices of Intent to Revoke Sign Permit should be upheld.

PRELIMINARY STATEMENT

Respondent, on July 30 and August 3, 2009, issued two Notices of Intent to Revoke Sign Permit to Petitioner. The stated grounds for revocation were that Petitioner's sign had been "destroyed" as defined by Respondent. Fla. Admin. Code R. 14-10.007(6)(a). Respondent asserted that more than 60 percent of the sign's upright supports had been damaged to the extent they required replacement. Petitioner timely filed a Petition for Formal Administrative Hearing on August 28, 2009. Respondent referred the matter to the Division of Administrative Hearings for the assignment of an administrative law judge on September 21, 2009. A Notice of Hearing was issued September 29, 2009, setting the matter for hearing in Tallahassee, Florida.

At the hearing, Petitioner presented the testimony of two witnesses, Jack M. Wainwright, Jr., the owner of Woody Drake Advertising, Inc., and Walter Grimes, the owner of Grimes Cranes; and offered one exhibit, which was admitted into evidence. Respondent presented the testimony of Lynn Holschuh, State Outdoor Advertising and Logo Administrator for Respondent and offered Exhibits 1 through 5, all of which were admitted into evidence. The parties also presented one joint exhibit, the Joint Stipulated Pre-hearing Report, which was admitted into evidence. Official recognition was taken of Lamar Outdoor

Advertising-Lakeland v. Fla. Dep't of Transp., 17 So. 3d 799 (Fla. 1st DCA 2009), and Florida Administrative Code Rule 14-10.007.

The Transcript was filed on December 3, 2009. After the hearing, Petitioner and Respondent filed their Proposed Findings of Fact and Conclusions of Law on December 23 and December 24, 2009, respectively. Respondent's request to file its Proposed Recommended Order one day late was granted.

References to statutes are to Florida Statutes (2008) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, Woody Drake Advertising, Inc., owns and operates an outdoor advertising sign (the "Sign"), which is located off Interstate 10 (I-10) in Leon County, Florida, and bears tag numbers AG329 and AG850.

2. Respondent, Florida Department of Transportation, 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 (controlled portion) in accordance with Chapter 479, Florida Statutes.

3. Jack Wainwright, Jr., is the owner and operator of Petitioner, having purchased the company from his parents approximately 13 years ago. Mr. Wainwright's family has been in the business of outdoor advertising since at least 1976.

4. The Sign consists of one structure with two faces and is located within the controlled portion of I-10, .239 miles east of Still Creek. The Sign is a non-conforming, wooden, V-shaped, 12-pole sign.

5. On June 28, 2009, the Sign sustained damage from high winds associated with a storm.

6. The next day, after being notified of the damage, Mr. Wainwright went to the sign's location and physically inspected it.

7. Grimes Cranes is in the business of, among other things, building and maintaining outdoor signs, such as the Sign at issue. Walter Grimes has owned Grimes Cranes since 2000. Mr. Grimes has worked in the business of erecting and maintaining wooden and metal outdoor advertising signs for approximately 23 years. On average, Mr. Grimes erects 18-to-20 outdoor advertising signs a year. By his estimate, Grimes Cranes has moved, erected, or maintained approximately 75 percent of the outdoor advertising signs in Tallahassee, Florida.

8. Mr. Wainwright contacted Mr. Grimes to obtain an estimate to repair the Sign. They met at the Sign's location on either June 30 or July 1, 2009. Based upon his experience and visual inspection of the uprights, Mr. Grimes concluded that

five of the 12 uprights could be reused when repairing the Sign as they were neither broken, splintered, nor otherwise damaged.

9. Mr. Grimes concluded that 35-to-40 percent of the total Sign had been destroyed by the storm. This conclusion was based upon his personal examination of the Sign and his experience in maintaining and erecting outdoor advertising signs.

10. After Mr. Grimes' inspection of the Sign, Mr. Wainwright disassembled the Sign and transported the materials to his father's farm.

11. Once he disassembled the Sign, Mr. Wainwright assessed the damage to it. Based upon his knowledge and experience as owner of Petitioner sign company for the past 13 years, Mr. Wainwright determined that six of the 12 uprights were reusable.

12. Although Mr. Grimes intended to use the five uprights he found to be undamaged in the rebuilding of the Sign, he was not able to do so because Mr. Wainwright had removed the uprights from the area. Mr. Grimes determined it was simpler and more economical to install new uprights on the site rather than haul the reusable ones from their present location on the Wainwright family farm.

13. Ms. Lynn Holschuh has been Respondent's State Outdoor Advertising and Logo Administrator since 1992. While well educated with both a bachelor's and master's degree in English,

she has not worked in the business of erecting outdoor signs; has never personally erected an outdoor advertising sign; and has no personal experience building an outdoor advertising sign.

14. The two Notices issued by Respondent that are the basis for this action were signed by Ms. Holschuh as the State Outdoor Advertising and Logo Administrator. The Notices state Florida Administrative Code Rule 14-10.007(6)(a) as the basis for the proposed action, alleging that "[m]ore than 60% of the upright supports have been damaged such that replacement is required."

15. Ms. Holshcuh never personally inspected the Sign's uprights and has no personal knowledge as to whether eight or more of the uprights were damaged such that normal repair practices of the industry required their replacement. The Notices were issued after she reviewed photographs taken on July 7, 2009, by an inspector for Respondent.

16. Ms. Holschuh determined, after inspecting the photographs, that ten of the Sign's uprights had been damaged since only two were standing when the inspector took the pictures. This was an assumption on her part based upon the photographs, not her personal inspection of the Sign and uprights following the damage from the storm.

17. Respondent's inspector returned to the site of the Sign on August 17, 2009, took additional photographs, and noted

that a new 10-pole sign had been erected on the site. The Sign had been permitted as a 12-pole sign, but had been rebuilt as a 10-pole sign with 10 brand new uprights.

18. Respondent interprets Florida Administrative Code Rule 14-10.007(6)(a) as requiring that the sign owner use the poles that are not damaged in rebuilding the sign. Respondent does not interpret this rule provision to allow the erection of a completely new sign. Ms. Holschuh admitted that Florida Administrative Code Rule 14-10.007(6)(a) does not explicitly require the actual re-use of the non-damaged upright supports when a non-conforming sign is re-erected.

19. Respondent concedes that as long as 60 percent of the uprights had not been damaged to the extent that replacement of the upright supports was required due to the damage, the sign could be disassembled and re-erected. Ms. Holschuh agreed that the Sign could have been disassembled and re-erected if no more than seven of the uprights had sustained damage.

20. Damage to seven of the uprights would constitute 58.33 percent replacement while damage to eight of the uprights would constitute 66.67 percent replacement.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

22. Respondent has the authority to regulate outdoor advertising and to issue permits for signs along interstate and federal primary aid highways pursuant to Chapter 479, Florida Statutes, and Florida Administrative Code Rule Chapter 14-10.

23. Section 479.02, Florida Statutes, specifically authorizes Respondent to administer and enforce the provisions of Chapter 479 and the agreement between Florida and the United States Departments of Transportation relating to the size, lighting, and spacing of signs in accordance with Title I of the Highway Beautification Act of 1965 and Title XXIII, United States Code, and federal regulations in effect as of the effective date of the Act.

24. As the party seeking to revoke the sign permit, Respondent bears the burden to prove its allegation by a preponderance of the evidence. Fla. Dep't of Transp. v. J.W.C., 396 So. 2d 778, 788 (Fla. 1st DCA 1981). "Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, ..." § 120.57(1)(j), Fla. Stat.

25. Subsection 479.02(1), Florida Statutes, gives Respondent the authority to administer and enforce the provisions of Chapter 479. An agency is afforded wide discretion in the interpretation of the statute which it administers. Republic Media v. Dept. of Transp., 714 So. 2d 1203, 1205 (Fla. 5th DCA 1998); Atlantic Outdoor Advertising v. Dep't of Transp., 518 So. 2d 384, 386 (Fla. 1st DCA 1987), rev. den., 525 So. 2d 876 (Fla. 1988); Natelson v. Dep't of Ins., 545 So. 2d 31, 32 (Fla. 1st DCA 1984), pet. for rev. den., 461 So. 2d 115 (Fla. 1985).

26. The parties stipulated that the original sign was non-conforming and consisted of 12 poles. The parties further stipulated that the Sign re-erected by Petitioner consisted of 10 new poles and did not re-use the poles that were damaged by the storm.

27. Florida Administrative Code Rule 14-10.007(6) provides, in relevant part, as follows:

> A nonconforming sign may continue to exist so long as it is not destroyed, abandoned, or discontinued. "Destroyed," abandoned," and "discontinued" have the following meanings:
> (a) "Destroyed" means more than 60% of the upright supports of a sign structure are physically damaged such that normal repair practices of the industry would call for, in the case of wooden sign structures, replacement of the broken supports . . . .

28. The eyewitness accounts by Mr. Wainwright and Mr. Grimes, both experienced in the outdoor advertising sign business, prove that at least five of the upright poles for the Sign were not destroyed or damaged by the storm and were, therefore, suitable for use in erecting the new sign. Respondent's testimony, based upon photographs taken after the sign had been partially disassembled and removed to another location, and taken more than a week after the damage occurred, is not entitled to as much weight. The greater weight of the evidence supports Petitioner's position that less than 60 percent of the sign was damaged, therefore entitling it to re-erect the non-conforming sign pursuant to Florida Administrative Code Rule 14-10.007(6)(a).

29. Since it has been established that less than 60 percent of the Sign was destroyed, thus entitling Petitioner to re-erect the non-conforming sign on the existing site, the discussion must turn to the agency's interpretation of Florida Administrative Code Rule 14-10.007(6)(a).

30. Respondent interprets Florida Administrative Code Rule 14-10.007(6)(a) to require the actual re-use of the upright supports when a non-conforming sign is re-erected. Ms. Holschuh admitted that this Rule does not explicitly require this. Petitioner argues that Respondent has imposed an additional requirement applicable to all non-conforming signs in Florida.

As such, this provision is being applied like a rule, yet it has not been promulgated as a rule pursuant to the requirements of Chapter 120, Florida Statutes. The Petition in this matter did not include a challenge to the statement as an unpromulgated rule. Respondent was not put on notice that such a challenge would be part of this proceeding until the commencement of the hearing, and the agency did not waive proper notice and its due process rights. Hence, Petitioner was not permitted to present an alleged challenge to this unadopted rule at hearing. Accordingly, Petitioner filed a Petition for Determination of Agency Statement as Unadopted Rule and Petition to Determine the Invalidity of an Existing Rule on December 22, 2009 (DOAH Case No. 09-6971RU), and that case will proceed in due course.

31. The only issue that remains for determination here is whether Florida Administrative Code Rule 14-10.007(6)(a) requires Respondent to re-use the undamaged uprights in the re-erection of its non-conforming sign. The Rule clearly and unambiguously defines "destroyed" as when more than 60 percent of the upright supports (the poles) are damaged to the point where they cannot be re-used. The greater weight of the evidence in this case supports the finding that less than 60 percent of the poles were "destroyed." Therefore, Petitioner had the legal right to re-erect the sign at issue in this matter. The fact that Petitioner chose to use new poles rather

than re-use the old, undamaged poles, was based upon financial and logistical reasons as described by the sign erection witness, Mr. Grimes. According to Mr. Grimes, it was easier to haul in 10 new poles from one location than to haul the usable old poles from the farm and the new poles from the lumber yard. This was a business decision between Mr. Grimes and Mr. Wainwright and not relevant to the issue of whether the old poles had to be re-used. Accordingly, once it was established that less than 60 percent of the uprights had been destroyed by the storm, Petitioner acted within its statutory rights to rebuild the Sign using old materials or new.

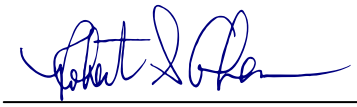
32. Since the Notices of Intent to Revoke the Sign Permit did not inform Petitioner that Respondent took issue with whether a 10-pole sign could be erected in place of a 12-pole sign, and no admissible evidence was produced on this point, Petitioner was within its rights in erecting the 10-pole sign to replace the previous sign.

RECOMMENDATION

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

RECOMMENDED that the Florida Department of Transportation enter a final order dismissing the Notices of Intent to Revoke Sign Permit.

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



ROBERT S. COHEN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of January, 2010.

COPIES FURNISHED:

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

Claude Ridley Walker, Esquire
Guilday, Tucker, Schwartz & Simpson, P.A.
1983 Centre Pointe Boulevard, Suite 200
Tallahassee, Florida 32308-7823

Deanna Hurt, Clerk of Agency Proceedings
Department of Transportation
Haydon Burns Building
605 Suwannee Street, Mail Station 58
Tallahassee, Florida 32399-0450

Stephanie C. Kopelousos, Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street, Mail Station 57
Tallahassee, Florida 32399-0450

Alexis M. Yarbrough, General Counsel
Department of Transportation
Haydon Burns Building
605 Suwannee Street, Mail Station 58
Tallahassee, Florida 32399-0450

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.