

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

FILED
11 APR 13 PM 1:28
DIVISION OF
ADMINISTRATIVE
HEARINGS

SOUTHEAST-SD, LLC,

Petitioner,

vs.

DOT CASE NO.: 09-076
DOAH CASE NO.: 10-9666

DEPARTMENT OF TRANSPORTATION,

Respondent.

FINAL ORDER

On July 30, 2009, the Department of Transportation (Department) issued a Notice of Denied Outdoor Advertising Permit Application advising Petitioner, Southeast-SD, LLC, (Southeast) that its application for an outdoor advertising permit numbered 57549/57550 for a proposed sign site located off of U.S. Highway 90 in Santa Rosa County, was not approved. The application was denied because the proposed sign did not meet spacing requirements set out in Section 479.07(9)(a)1. and 2., Florida Statutes. The Department issued an Amended Notice of Denied Application on August 16, 2010. Southeast filed a Petition for Formal Administrative Hearing on August 20, 2010, and the Department referred the matter to the Division of Administrative Hearings (DOAH) on October 14, 2010.

On December 3, 2010, the matter went to hearing before Barbara J. Staros, a duly appointed administrative law judge (ALJ). Appearances on behalf of the parties were as follows:

For Petitioner: Robert C. Downie, II, Esquire
Law Office of Robert Downie
2660 Egret Lane
Tallahassee, Florida 32308

For Respondent: Matthew F. Childs, Esquire
Department of Transportation
605 Suwannee Street, Mail Station 58
Tallahassee, Florida 32399-0458

At the hearing, the parties stipulated to the admission of Joint Exhibits 1 and 2. Southeast presented the testimony of witness, Hal Stevenson, and Southeast's Exhibits 1 through 3 were admitted into evidence. The Department presented the testimony of Robert Jesse, a field operations supervisor; John Howard, an outdoor advertising inspector for TBE group, a Department contractor; and John Garner, Director of the Office of Right of Way. Department Exhibits 1, 2, and 4 through 7 were admitted into evidence.

The hearing transcript was filed on December 21, 2010. The parties' proposed recommended orders were due to be filed on January 10, 2011, and were timely filed by both parties. The ALJ issued her Recommended Order on February 21, 2011, wherein she recommended that Southeast's application be approved. The Department filed exceptions to the Recommended Order on March 4, 2011, and Southeast filed a response to the Department's exceptions on March 14, 2011.

STATEMENT OF THE ISSUE

As stated by the ALJ in her Recommended Order:

Whether an application for an outdoor advertising permit for a sign in Santa Rosa County should be granted or denied.

EXCEPTIONS

The Department takes exception to conclusions of law set out in paragraphs 29 and 31 of the Recommended Order. Regarding an agency's treatment of conclusions of law, Section 120.57(1)(l), Florida Statutes (2010), 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.

No exception has been taken to the ALJ's conclusion of law set out in paragraph 30 of the Recommended Order which states:

30. As some of the evidence the Department relied upon in determining that a spacing conflict existed is hearsay, the Department did not establish that a spacing conflict existed with CF793.

Inasmuch as a spacing conflict with CF793 was the basis for the Department's denial of Southeast's application, this conclusion mandates granting Southeast's permit application. The conclusions of law contained in paragraphs 29 and 31 are dicta and thus unnecessary for the disposition of this matter.

However, in order to avoid any confusion concerning the Department's interpretation and application of the statutes in issue, the Department's exceptions will be addressed. The exceptions are grounded upon what the Department believes to be the ALJ's failure to properly harmonize the provisions of Sections 479.02(8) and 479.07(6), Florida Statutes (2010), and the

ALJ's construing Section 479.07(4) as imposing a time limit for the issuance of an amended notice of denial of a permit application.

Section 479.02(8), Florida Statutes (2010), establishes the Department's duty to:

Prior to July 1, 1998, inventory and determine the location of all signs on the state, interstate and federal aid primary highway systems. Upon completion of the inventory, it shall become the database and permit information for all signs permitted at the time of completion, and the previous records of the department shall be amended accordingly. The inventory shall be updated no less than every 2 years. The department shall adopt rules regarding what information is to be collected and preserved to implement the purposes of this chapter. The department may perform the inventory using department staff, or may contract with a private firm to perform the work, whichever is more cost efficient. The department shall maintain a database of sign inventory information such as sign location, size, height, and structure type, the permitholder's name, and any other information the department finds necessary to administer the program.

Section 479.07(6), Florida Statutes (2010), provides in pertinent part: "A permit is valid only for the location specified in the permit."

As the Department reads these statutes, if there is an inconsistency between the location specified in the permit for a given structure and the actual location of the structure reflected in the database, the location specified in the permit will control for all purposes including the evaluation of whether the permitted location conflicts with the location for a structure proposed in a subsequent permit application. The ALJ in this case took the contrary position concluding that the database location was controlling and that no conflict with the permitted location could exist until the database had been amended to reflect the permit information. The ALJ's conclusion in this regard effectively eliminates the Section 479.07(6) provision that a permit is valid only for the location specified in the permit and, therefore,

advances an unreasonable and erroneous interpretation of the concurrent operation of Sections 479.02(8) and 479.07(6), Florida Statutes (2010).

Section 479.07(4), Florida Statutes (2010), provides that: "An application for a permit shall be acted on by the department within 30 days after receipt of the application by the department." In paragraph 31 of the Recommended Order the ALJ construes this provision as imposing a time limit upon the Department's issuance of an amended notice of denial of a permit application subsequent to the issuance of the original notice of denial. This construction of Section 479.07(4) is also unreasonable and erroneous. Nothing in Section 479.07(4) suggests much less expressly imposes a time limit for issuing an amended notice of denial when, as in this case, the original notice of denial is issued within the thirty day period for action on the application and the matter has not proceeded to final hearing.

Additionally, the ALJ's view of Section 479.07(4) collides with the objective of a *de novo* proceeding which is intended to formulate final agency action, not to review action taken earlier and preliminarily. Florida Department of Transportation v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981). There was no final agency action taken by the Department with respect to Southeast's application at the time Southeast applied for a permit and the Department issued its original notice of denial. Although the Department discovered the spacing conflict with CF793 after issuing its original notice of denial, the matter had not gone to final hearing. The Department's amendment of the notice of denial to place a spacing conflict with CF793 in issue insured that the final agency action ultimately formulated in this matter would be grounded upon a consideration of all relevant factors.

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 22 of the Recommended Order are supported by competent, substantial evidence and are adopted and incorporated as if fully set forth herein.¹

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 23 through 28 and 30 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 Southeast-SD, LLC's Application Number 57549/57550 for an outdoor advertising permit is granted.

DONE AND ORDERED this 4th day of April, 2011.



Secretary
Department of Transportation
Haydon Burns Building
605 Suwannee Street
Tallahassee, Florida 32399

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¹ Neither party filed exceptions to the ALJ's findings of fact.

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:

Matthew F. Childs, Esquire
Assistant General Counsel
Department of Transportation
Haydon Burns Building
605 Suwannee Street, M.S. 58
Tallahassee, Florida 32399-0458

John Garner
Director of the Office of Right of Way
Department of Transportation
Haydon Burns Building
605 Suwannee Street, M.S. 22
Tallahassee, Florida 32399-0450

Barbara J. Staros
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550

Robert C. Downie, II, Esquire
Law Office of Robert Downie
2660 Egret Lane
Tallahassee, Florida 32308