

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SOUTHEAST-SD, LLC, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 10-9666  
 )  
 DEPARTMENT OF TRANSPORTATION, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

A hearing was held pursuant to notice, on December 3, 2010, by Barbara J. Staros, assigned Administrative Law Judge of the Division of Administrative Hearings, in Tallahassee, Florida.

APPEARANCES

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  
Haydon Burns Building, Mail Station 58  
605 Suwannee Street  
Tallahassee, Florida 32399-2202

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

By a Notice of Denied Application dated July 30, 2009, Respondent notified Petitioner that its outdoor advertising permit application for a proposed sign structure to be located on

U.S. Highway 90 in Santa Rosa County was denied. On August 16, 2010, Respondent issued an Amended Notice of Denied Application.

Petitioner timely filed a Request for Formal Administrative Hearing, which was forwarded to the Division of Administrative Hearings on or about October 14, 2010. A formal hearing was scheduled for December 3, 2010. The case was heard as scheduled.

At hearing, Petitioner presented the testimony of one witness, Hal Stevenson. Petitioner's Exhibits 1 through 3 were admitted into evidence. Respondent presented the testimony of three witnesses, Robert Jesse, John Howard, and John Garner. Respondent's Exhibits numbered 1, 2, and 4 through 7 were admitted into evidence. Joint Exhibits numbered 1 and 2 were admitted into evidence.

Official recognition was requested by Respondent of Florida Administrative Code Rule 14-10.0022, and section 479.02, Florida Statutes. The request was granted.

A one-volume Transcript was filed on December 21, 2010. At the parties' request, proposed recommended orders were due 20 days after the filing of a transcript. The parties timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order.<sup>1/</sup>

#### FINDINGS OF FACT

1. The Department of Transportation is the state agency responsible for the regulation of outdoor advertising signs that

are located on all federal-aid primary highways. U.S. Highway 90 (U.S. 90) is a federal-aid primary highway.

2. A permit is required prior to erecting an outdoor advertising sign on all federal-aid primary highways. Southeast-SD, LLC (Southeast) filed an application for an outdoor advertising permit, application # 57549/57550 (the application) on June 29, 2009.

3. Southeast's proposed sign structure meets the size and height requirements of section 479.07. The parcel was commercially zoned in accordance with the provisions of section 479.11, Florida Statutes.

4. Southeast's application site is located on U.S. 90 at milepost 3.118, approximately 550 feet east of the centerline of Woodbine Road.

5. The Department denied Southeast's application and issued a Notice of Denied Outdoor Application (initial denial) on July 29, 2009. The reason stated in the initial denial was:

Sign does not meet spacing requirements  
(1500' for interstates, 1000' for FAP).  
[s. 479.07(9)(a), 1., & 2. F.S.]  
In conflict with permitted sign(s), tag#(s):  
CC479. Held by: Bill Salter Advertising,  
Inc.

6. Bill Salter Advertising, Inc. (Salter's) sign with tag CC479 was located on U.S. 90 less than 500 feet from the application site.

7. Permit CC479 was the subject of a Department revocation proceeding.<sup>2/</sup> On March 8, 2010, the Department issued a Clerk's Order of Dismissal on the challenge to the revocation of CC479. Thus, the revocation of the conflicting sign, CC479, was final on March 8, 2010.

8. On August 16, 2010, the Department issued an Amended Notice of Denied Application (Amended Notice). In the Amended Notice, the Department gave a different reason for the denial. The reason given in the Amended Denial concerned a different Salter tag:

Sign does not meet spacing requirements  
(1500' for interstates, 1000' for EAP).  
[s. 470.07(9)(a), 1., & 2. FS]  
In conflict with permitted sign(s): CF793.  
Held by: Bill Salter Advertising, Inc."

9. CF793 was originally permitted in 1978. At that time, an application for a sign permit was reviewed and notated by the Department, and became the actual permit. The application for CF793 contains information that is type-written on the application form, presumably by the applicant, Salter. In the portion of the application form stating "DOT DESCRIPTION OF SIGN LOCATION (DOT USE ONLY)" the following is hand-written: "Sect. 59 W- 39.95 Miles W-SR 85." Most of the application/permit was filled out by the applicant, and part of it was filled out by the Department.

10. In 1996, the Florida Legislature amended section 479.02, directing the Department to inventory and determine the location of all signs on the state, interstate, and federal-aid primary highway systems. The Department conducted the inventory and, upon completion, sent the database information to each sign owner, giving each owner an opportunity to challenge the accuracy of the results. Salter did not file such a challenge regarding CF793.

11. As of July 30, 2009 (the date of the initial denial), tag CF793 was shown at milepost 13.205 on U.S. 90, in a location approximately 13 miles away from the application site in the Department's database created pursuant to section 479.02(8).

12. Tag CF793 was physically located 13 miles away from its originally permitted location. The Department acknowledges that tag CF793 was not valid in its location 13 miles away from its current location, where it was located from at least 1998 to 2010.

13. The database reflected milepost 13.205 as the location for CF793 from 1998 until 2010.

14. In 2004, the Department sent Salter a Notice of Non-Compliance demanding that Salter post tag CF793 at milepost 13.205.

15. In October 2009, the Department received a letter from Salter regarding moving CF793 to the location specified in the 1978 permit. At this point, the Department investigated the

original application and discovered a "huge discrepancy" between the database location and the permit location in the Department's files. The Department has no documentation regarding how tag CF793 came to be located at milepost 13.205 since the 1998 inventory. The Department decided that its database was incorrect and that it needed to be corrected.

16. On February 1, 2010, the Department changed its database to reflect the location for CF793 as milepost 2.993 on U.S. 90. Salter posted the tag for CF793 at its current location sometime after March 22, 2010 and prior to May 3, 2010. Once Salter placed the tag for CF793, the database was changed again to reflect the physical tag location at milepost 2.950 on U.S. 90, the "current location."

17. The Department hired Cardno TBE, an engineering firm, to conduct field work. An inspector performed field measurements on May 3, 2010, using the wheel and laser methods for field measurement. The inspector identified the stake that was in the ground on Southeast's proposed sign site. He measured along the edge of the pavement on U.S. 90 from the location marked by Southeast to the new location of Salter's CF793 tag. The inspector determined that the distance between the proposed site and the nearest permitted sign, CF793, is 890 feet.

18. Based upon these findings, the Department then determined that Southeast's proposed sign did not meet the 1000-foot spacing requirement.

19. By letter dated May 27, 2010, the Department notified Salter that the location of CF793 was "nonconforming" and that pursuant to Florida Administrative Code Rule 14-10.007, a completed sign must be erected within 270 days or the permit would be revoked. No sign has been built, and the permit has not been revoked. Moreover, it appears that a sign will never be built, as the Department is in possession of correspondence from Santa Rosa County to Salter indicating that a sign cannot be constructed at the current location of tag CF793 due to conflict with several local ordinances.

20. Also on May 27, 2010, the Department sent a letter to Southeast stating that CF793 "now presents a spacing conflict" with Southeast's application location. The letter further states that the Department had advised Salter that a completed sign must be erected within 270 days and that if no sign is erected within that time frame, the permit would be revoked.

21. On August 16, 2010, three months later, the Department amended its denial as set forth above in paragraph 8.

22. Just prior to the hearing, the Department again sent the inspector to conduct another field measurement. This time, the inspector relied upon information regarding the location of the sign from the original application/permit that was provided by the applicant (Salter) in 1978. That is, the inspector measured from a location described by the applicant in the original permit application, then measured the distance from the

location to Southeast's proposed site, and determined the distance to be 884 feet. In making these measurements, the inspector assumed that the nearest intersection in 1978 was in the same location as today, that the original measurer started the measurement from the centerline of that intersection, and that the distance from the nearest intersection indicated by Salter on the original application/permit was measured with the same accuracy as a hand-wheel or laser.<sup>3/</sup>

#### CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case, sections 120.569, and 120.57(1), Florida Statutes.

24. The Department is authorized to regulate outdoor advertising signs located along interstate and federal-aid primary highways pursuant to chapter 479, Florida Statutes, and Florida Administrative Code Chapter 14-10.

25. As the party seeking a permit from the Department, Southeast has the burden of proving its entitlement to the permit by a preponderance of the evidence. Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

26. Section 479.02 provides in pertinent part:

479.02 Duties of the Department.--It shall be the duty of the department to:

\* \* \*

(8) 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. . . . (emphasis added)

27. Section 479.07 provides in pertinent part:

479.07 Sign permits.-

\* \* \*

(4) An application for a permit shall be acted upon 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 acknowledgement from the current permittee and submittal of a transfer fee.  
. . .

(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 each 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 an interstate highway.
2. One thousand feet from any other permitted sign on the same side of the highway, if on a federal-aid highway.  
(emphasis added)

28. Florida Administrative Code Rule 14-10.006(4) provides that in the case of a permitted sign that has not been constructed, the milepost location reflected on the application shall be used as the location of the permitted sign. The original application completed in 1978 did not reference a milepost. However, the database created in 1998 referenced milepost 13.205 for this permit.

29. The 1996 amendment to section 479.02 directed the Department to, prior to 1998, inventory and determine the location of all signs of the state, interstate, and federal-aid primary highway systems. Section 479.02(8) states that upon completion of the inventory, the inventory "shall become the database and permit information" for all signs permitted at the time of completion. The statute then directs the Department to update the inventory every two years. From the time the inventory was completed until 2010, the permit information reflected that CF793 was located approximately 13 miles away from the application site. Thus, at the time Southeast filed its application, there was no spacing conflict with CF793. The conflict with CF793 did not exist until 11 months after Petitioner applied for a permit.

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.

31. Finally, on March 8, 2010, the revocation of CC479 was final. Thus, as of March 8, 2010, the Department had no grounds to withhold a permit from Southeast, as the sole reason cited in the initial denial ceased to exist: conflict with CC479. The Department's delay of five months to issue the Amended Denial, based upon a different sign, is contrary to section 479.07(4) and the intent behind section 120.60(1). While the applicant has the burden, the Department cannot keep changing the landscape. That is, at some point in time, an applicant must be afforded a degree of finality as to the circumstances under which the application is filed.

RECOMMENDATION

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

RECOMMENDED:

That the Department of Transportation enter a final order approving Southeast's sign permit application.

DONE AND ENTERED this 21st day of February, 2011, in Tallahassee, Leon County, Florida.



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Barbara J. Staros  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 21st day of February, 2011.

ENDNOTES

1/ All references to the Florida Statutes are to 2010, unless indicated otherwise.

2/ The revocation proceeding was transmitted to the Division of Administrative Hearings: Bill Salter Advertising, Inc. v. Fla. Dep't of Transp., Case No. 09-6601. Prior to the scheduled hearing, Petitioner's Withdrawal of Request for Administrative Hearing was filed. An Order Closing File was entered on February 26, 2010, which relinquished jurisdiction to the Department.

3/ The content of the original application/permit completed by Salter is hearsay and is not sufficient in itself to support a finding of fact as contemplated by section 120.57(1)(c), Florida Statutes. Whether or not this document is a business record of the Department does not cure the hearsay nature of the portions of the application/permit completed by Salter. See Brooks v. State of Fla., 918 So. 2d 181,193 (Fla. 2005) ("The business record exception does not permit the admission into evidence of the hearsay statements within the Department of Revenue record."), and Reichensey v. Davis, 846 So. 2d 1233, 1234 (Fla. 5th DCA 2003) ("witness's statements, even though contained within the business records, do not fall within the exception, because they were not based upon the personal knowledge of an agent of the 'business.'").

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.