

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CARTER OUTDOOR ADVERTISING,)	
)	
Petitioner,)	
)	
vs.)	Case No. 11-1681
)	
DEPARTMENT OF TRANSPORTATION,)	
)	
Respondent.)	
_____)	
CBS OUTDOOR, INC.,)	
)	
Petitioner,)	
)	
vs.)	Case No. 11-1682
)	
DEPARTMENT OF TRANSPORTATION,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 18 and 19, 2011, in Miami, Florida, and January 25, 2012, in Tallahassee, Florida, before June C. McKinney, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner Carter: Carol Ann Licko, Esquire
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For Petitioner CBS: Thomas R. Bolf, Esquire
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For Respondent: Kimberly Clark Menchion, Esquire
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STATEMENT OF THE ISSUE

The issues in this case are: whether the Department of Transportation ("Department") properly issued a Notice of Intent to Revoke Sign Permit for Violation to Carter Outdoor Advertising a/k/a Carter Pritchett Advertising ("Carter") for the outdoor advertising sign permitted with tag numbers BV314/315 and whether the Department properly denied CBS Outdoor, Inc.'s ("CBS") application for outdoor advertising sign permit based on a spacing conflict with the outdoor advertising sign permitted with tag numbers BV314/315.

PRELIMINARY STATEMENT

On October 30, 2009, the Department issued CBS a Notice of Denied Outdoor Advertising Permit Application advising that CBS' application was not approved for the following reason:

Sign does not meet spacing requirements (1500' for interstates, 1000' for FAP). In conflict with permitted sign(s), tag#(s): BV314/315.
Held by: Carter-Pritchett.

[s.479.07(9) (a), 1., & 2, FS]

On December 18, 2009, the Department issued a Notice of Intent to Revoke Sign Permit for Violation, advising Carter that the Department intended to revoke its permit, pursuant to section 479.08, Florida Statutes for the following violation:

This nonconforming sign no longer exists at the permitted location and is deemed abandoned by the Department, pursuant to s. 14-10.007(6)(b), Florida Administrative Code.

On November 19, 2009, CBS filed a Petition for Formal Proceedings, requesting a "formal administrative hearing" on the Departments' preliminary denial of its application.

By letter dated January 15, 2010, and received by the Department on or about January 20, 2011, Carter requested an informal administrative hearing, challenging the Notice of Revocation.

An informal hearing was held on March 18, 2011, on CBS's Petition to Intervene and Motion to Transfer to the Division of Administrative Hearings. The Department relinquished jurisdiction to the Division of Administrative Hearings ("DOAH").

On April 5, 2011, the Department referred the matters to DOAH. Petitioner Carter is the subject of DOAH Case No. 11-1681. Petitioner CBS is the subject of DOAH Case No. 11-1682.

On April 14, 2011, the parties filed a Joint Motion to Consolidate DOAH Case Nos. 11-1681 and 11-1682, which the

undersigned granted by Order of Consolidation issued April 22, 2011.

The final consolidated hearing, as noted above, was scheduled for June 14 and 15, 2011. The undersigned granted a continuance and the case was rescheduled for August 23 and 24, 2011. After several continuances, the final consolidated hearing was held on October 18 and 19, 2011, in Miami, Florida, and January 25, 2012, in Tallahassee, Florida.

At the final hearing, Carter presented the testimony of seven witnesses: Rex Hodges, a principal of Carter, who testified as the corporate representative for Carter; Scott Carter, a principal of Carter and a representative of Scott Carter Signs, Inc.; Jean Jose, a representative of the Tabernacle God in Christ, Inc.; Joe Little, CBS's Vice President of Real Estate for the Southeast Region; Ed Scherer, a former real estate representative for CBS; Vanessa Acosta, the current Assistant Director of Building for the City of Miami and the former Assistant Director of Building and Zoning for the City of Miami; and Orlando Toledo, a former representative of the City of Miami, who worked for the City of Miami as the Zoning Administrator, Director of Building, Zoning and Planning, and Director of Building and Zoning. Petitioner's Exhibits 2, 4 and 5, 9, 11 and 12, 15 through 18, 21, 24 through 32, 40, 42, 43, 47 through 51, 55 and 56, 59, 61 through 71, 73

though 85 and 87, 88, and 92, 96, 115, 117 and 118 were received into evidence.

CBS presented the testimony of two witnesses: Daniel Blanton, a surveyor who testified as an expert; and Joe Howard Little, CBS's Vice President of Real Estate for the Southeast Region, who testified as corporate representative for CBS. Petitioner's Exhibits numbered 4, 13 and 14, 18 and 19, 23, 26, 30, 33A, 39 and 40, 42 through 44, 48, 51 and 52, 55, 57 through 62 were received into evidence.

The Department presented the testimony of two witnesses: Robert Jessee, the Department's Manager of Outdoor Advertising and Logo, who testified as corporate representative for the Department; and Mack Barnes, a representative of Cardno TBE and consultant for the Department, who served as an outdoor advertising inspector. The Department's Exhibits numbered 1 through 19 were received into evidence.

The proceedings were recorded and transcribed. The October 18 and 19, 2011, Transcripts were filed at the DOAH on December 19, 2011, and Transcripts Volumes III and IV for the January 25, 2011, hearing were filed on February 13, 2012. All parties availed themselves of the right to submit proposed recommended orders. Both Petitioners and Respondent timely filed Proposed Recommended Orders. The undersigned has considered the

Proposed Recommended Orders, as well as the testimony and exhibits presented at hearing in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The City of Miami is a competitive market for billboards.
2. On December 14, 1998, the Department issued outdoor advertising permits to Carter for the erection of a double-faced sign and assigned permit tag numbers BV314/315 to 3825 NW 2nd Avenue, Miami, Florida, 0.980 miles east of I-95 at milepost 0.906 (the "Tabernacle Sign").
3. Carter leased the property for the Tabernacle Sign from the Tabernacle God in Christ, Inc.
4. The Tabernacle Sign was initially permitted by the Department as a conforming sign.
5. On or about February 6, 2002, the Tabernacle Sign was changed to nonconforming status pursuant to a settlement between Carter and the Department.
6. On August 18, 2003, Carter entered into a settlement agreement with the City of Miami, which limited/restricted the number of signs Carter can maintain in Miami to 20. The settlement agreement also protects the Tabernacle Sign as one on Carter's list of billboards protected by the City until 2028.

7. In late 2007, the Tabernacle God in Christ, Inc. decided to sell the property Carter leased for the Tabernacle Sign, and the church listed the location for sale. The church would not allow Carter to purchase an easement to maintain the Tabernacle Sign at the location.

8. Around August 2008, Carter began looking for a new location for the Tabernacle Sign.

9. Carter first leased a vacant lot as a "new location" for the billboard. On April 9, 2008, the City of Miami issued a building permit to Carter for a billboard at the new location.

10. After Carter obtained the permits for the new location and was ready to construct the billboard, Carter developed concerns regarding Florida Power and Light Company setbacks and decided to identify an alternative location for the billboard sign.

11. During Carter's search for an alternative location, Carter's goal was to have a conforming billboard.

12. Carter identified an alternate location at a site directly to the west of the new location at 221 Northwest 38th Street, Miami, Florida ("new Carter site"), which is not within 100 feet of the Tabernacle church site.

13. Carter performed the soil boring tests to design the foundation for the billboard at the new Carter site.

14. On September 30, 2008, Carter obtained a building permit from the City of Miami for a billboard at 221 Northwest 38th Street. The City of Miami transferred the permit fees previously paid in connection with the new location to the new Carter site.

15. Subsequently, Carter purchased the property at the new Carter site. Carter also performed a substantial amount of preparatory work, including engineering work and the preparation of a survey to place a conforming sign at the new Carter site.

16. On October 10, 2008, Carter closed on its land purchase for the new Carter site.

17. On October 21, 2008, Scott Carter Signs, Inc. ("Carter Signs")^{1/} installed the concrete footer for Carter at the new Carter site in preparation to install the sign.

18. On December 2, 2008, Carter Signs took down the Tabernacle Sign from the permitted location at 3825 NW 2nd Avenue and moved it to Fort Myers, Florida. The company's work order provided the following instructions for the move: "Take down existing sign structure DISASSEMBLED and LOAD ONTO SEMI'S TRANSPORT TO FT. MYERS UNLOAD IN YARD FOR ALTERATIONS."^{2/}

19. As part of the move, the Tabernacle Sign was dismantled. The upper structure, which holds both sign faces, as well as every beam, pole, and stringer was removed from the Tabernacle church site and transported to Fort Myers.

20. When Carter Signs removed the Tabernacle Sign, the permitted tags BV315/314 were also removed from the permitted location.

21. After upgrading the Tabernacle Sign at the storage yard in Fort Myers, Carter Signs re-erected the sign on December 4, 2008, at the new Carter site, a non-permitted location.

22. On January 21, 2009, Carter obtained an electrical permit from the City of Miami for the new Carter site.

23. During the first half of 2009, CBS identified property as a potential location for a sign. At the time, CBS was aware that the identified property was next door to the new Carter site, 25 feet away, and only 200 feet from the Tabernacle of God church location.

24. On or about April 15, 2009, the final inspection for the new Carter site location was completed by the City of Miami.

25. On or about September 29, 2009, CBS obtained local government permission from the Zoning Administrator for the City of Miami for its proposed location.

26. On October 1, 2009, CBS submitted an application to the Department for outdoor advertising permits for a structure with two faces knowing that the site was located next to the new Carter site. The Department assigned the CBS application numbers 57663 and 57664 for the location 3800 Northwest 2nd Avenue off I-95 in Miami, Florida ("proposed site").

27. CBS was aware that Carter had obtained a building permit to erect signs at new Carter site before making application to the Department.

28. The Department hired Cardno TBE, an engineering firm, to perform its fieldwork relating to the CBS application.

29. On or about October 9, 2009, Mack Barnes ("Barnes"), a Cardno TBE outdoor advertising inspector, was assigned to perform an outdoor advertising inspection and site visit related to the CBS application dated October 1, 2009.

30. Barnes performed field measurements during his inspection to evaluate CBS' application for the Department. Barnes discovered that the distance between CBS' proposed site location for its sign and the nearest permitted signs measured less than 1,500 feet from a permitted location that was assigned tag numbers BV314/315.

31. While performing the fieldwork, Barnes discovered a sign structure bearing tag numbers BV314/315 on the catwalk located at milepost 0.873, not at the permitted location at milepost 0.906.

32. Barnes filled out an illegal compliance report for the structure at 0.873 that was not permitted.

33. On October 30, 2009, Barnes also walked the whole perimeter of the Tabernacle of God Christ church site and discovered that the Tabernacle Sign was no longer located at its

permitted location. Additionally, tags BV314/315 were not posted or hanging from any location at the church site.

34. On or about October 22, 2009, CBS submitted a letter to the Department with attached photographs stating:

We believe if you conduct your own investigation, you will come to the inescapable conclusion that Carter's sign permitted by BV314/315 has been disassembled and removed. The former location was non-conforming under state law and they have no authority to re-establish their position there. Their new sign at 221 NW 38th St[reet] is being illegally maintained pursuant to FS 497, 14-10.007(4), and 14-10.007(6)(b). As such, we respectfully request that you not consider this illegal location in the review of the CBS Outdoor application 57663/57664 at 3800 NW 2nd Ave[nue].^[3/]

35. On or about October 28, 2009, Carter obtained local government permission from the Zoning Administrator of the City of Miami for the new Carter site.

36. Carter also secured a building permit from the City of Miami to re-erect the sign.

37. On or about October 30, 2009, Carter submitted an application to the Department for an outdoor advertising permit assigned application numbers 57723 and 57724, for new tags for the new Carter site at milepost 0.873.

38. Rex Hodges ("Hodges"), a principal of Carter, explained at hearing it was a mistake for Carter to wait so long to submit the application for the new Carter site location even though the

company was "working on multiple locations." He also admitted, "[we] knew needed a permit before could move the Tabernacle Sign to 221 Northwest 38th Street. . . . [we] were very busy and [it] fell through the cracks."

39. On October 30, 2009, the Department issued a Notice of Denied Application to CBS providing the following grounds for the proposed action: "Sign does not meet spacing requirements (1500' for Interstates, 1000' for FAP). In conflict with permitted sign(s), tag#(s): BV314/315, Held by: Carter Pritchett."

40. On November 10, 2009, the Department returned Carter's October 30, 2009, application for incompleteness. Carter failed to include the required information regarding designation for future land use and paid an \$88.75 application fee instead of an \$87.00 fee.^{4/}

41. On November 16, 2009, the Department issued Carter a Notice of Violation-Illegally Erected Sign ("Notice") for the unpermitted erected Carter sign at the new Carter site.

42. The Notice specified that Carter may file a completed application for a state outdoor advertising permit to determine whether the sign structure is eligible for issuance of permit. Carter did not submit a request for hearing in response to the Notice.

43. On or about November 19, 2009, CBS filed its petition protesting its Notice of Denied Application and requested a formal hearing.

44. On November 23, 2009, Carter resubmitted the October 30, 2009, completed application for the new Carter site. The Department assigned Carter's application numbers 57749 and 57750 for the new Carter site. The Department deemed the Carter application complete but did not process it due to the pending October 1, 2009, application for CBS' outdoor advertising sign permit within the same vicinity.

45. On or about December 4, 2009, Barnes performed a field review for Carter's application 57749 and 57750 and discovered that tags BV314/315 were still on the billboard catwalk at the new Carter site.

46. The Department's inspection and investigation revealed that Carter's nonconforming Tabernacle Sign was not located at the permitted location.

47. Based upon the investigation, on or about December 18, 2009, the Department issued a Notice of Intent to Revoke Sign Permit for Violation to Carter. The notice provided the following basis for revocation: "This nonconforming sign no longer exists at the permitted location and is deemed abandoned by the Department, pursuant to s. 14-10.007(6)(b), Florida Administrative Code."

48. Carter only recognized that the permit tags BV314/315 were not at the Tabernacle church site after being notified by the Department. Hodges sent Carter's crew to find the tags, which were posted on the catwalk of the sign at the new Carter site. Tags BV314/315 were not permitted for the new Carter site.

49. After the tags were located, Hodges personally took the permit tags BV314/315 and attached them to the fence surrounding the Tabernacle church on a tag board on or about December 19, 2009.

50. On January 15, 2010, Carter protested the Notice of Intent to Revoke.

CONCLUSIONS OF LAW

51. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to section 120.57(1).

52. Chapter 479 provides Respondent the authority to regulate outdoor advertising and to issue permits for "signs in areas adjacent to state highways."

53. This proceeding is de novo. § 120.57(1)(k), Fla. Stat.

54. The party seeking the affirmative of an issue before an administrative tribunal bears the burden to prove its allegation. 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," § 120.57(1)(j), Fla. Stat.

55. Accordingly, the Department bears the burden of proof by clear and convincing evidence as the party seeking to revoke Carter's sign permits tag numbers BV314/315 in DOAH Case Number 11-1681. Likewise, Petitioner CBS, as the applicant bears the burden of proving, by a preponderance of the evidence that it should be granted the permit for which it has applied in DOAH Case Number 11-1682.

56. Section 479.02(1) 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. Dep't 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. denied, 525 So. 2d 876 (Fla. 1988); Natelson v. Dep't of Ins., 454 So. 2d 31, 32 (Fla. 1st DCA 1984), pet. for rev. denied, 461 So. 2d 115 (Fla. 1985).

Carter's Notice of Intent to Revoke Sign Permit for Violation

57. The Department's determination regarding the Notice of Intent to Revoke Sign Permit for Violation issued to Carter is based on Florida Administrative Code Rule 14-10.007(6)(b), which provides in pertinent part:

(6) 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:

* * *

(b) A nonconforming sign is "abandoned" or "discontinued" when a sign structure no longer exists at the permitted location or the sign owner fails to operate and maintain the sign for a period of 12 months or longer. Signs displaying bona fide public interest messages are not "abandoned" or "discontinued" within the meaning of this section. The following conditions shall be considered failure to operate and maintain the sign:

1. Signs displaying only an "available for lease" or similar message,
2. Signs displaying advertising for a product or service which is no longer available,
3. Signs which are blank or do not identify a particular product, service, or facility.

58. The definition of "sign structure" in section 479.01(24) provides in pertinent part:

(24) "Sign structure" means all the interrelated parts and material, such as beams, poles, and stringers, which are constructed for the purpose of supporting or displaying a message or informative contents.

59. The evidence in this case demonstrated that Carter violated the nonconforming sign policy of the Department expressed in the criteria set forth in the rule provisions quoted above. The record evidence indisputably shows the Department issued Carter tags BV314/315 for the permitted location, 3825 Northwest 2nd Avenue, in Miami. The evidence further demonstrates that on

December 2, 2008, Petitioner Carter voluntarily disassembled the nonconforming Tabernacle Sign and moved all the beams, poles, stringers, faces, and interrelated parts to Fort Myers for an upgrade. On December 4, 2008, Carter re-erected the sign at the new Carter site, thereby abandoning the 3825 NW 2nd Avenue location because the nonconforming sign "no longer exists" at the permitted location.

60. The arguments asserted by Carter in its Proposed Recommended Order do not change Carter's abandoned status. Carter contends that it did not abandon the Tabernacle Sign because the Department failed to show Carter "intentionally and voluntarily relinquished further use of the Tabernacle Sign." This case is distinguishable from Hobbs v. Dep't of Transp., 831 So. 2d 745, (Fla. 5th DCA 2002), in that Carter belatedly sought a permit for a new location, after voluntarily removing the permitted nonconforming sign from its original location, which is totally unlike the owner in Hobbs, who immediately took action to obtain a new permit for the sign, once he learned that the previous permit had been canceled.

61. Additionally, rule 14-10.007(6)(b) provides an objective test for determining a party's intent, namely: (a) is the sign structure still at the permitted location or (b) has the sign been operated and maintained at the site in the prior 12 months?^{5/} If

the answer is no, as in this case, then the sign is abandoned and discontinued.

62. Carter's argument that it relocated the nonconforming Tabernacle Sign is also rejected. Section 479.15(3)-(6) and rule 14-10.004(11) limit the circumstances under which relocation applies in that a nonconforming sign can be relocated only if: (a) it is made necessary by a public road works project; (b) the sign is moved within 100 feet of the original location; and (c) the party has the Department's approval. The credible evidence in this matter shows that the new Carter site is more than 100 feet away from the Tabernacle Sign site, Carter failed to get the Department's permission to move, and the record is void of any evidence that the Department acquired public land on which the Tabernacle Sign was situated or any Department project existed that impacted the property on which the sign was lawfully situated. Further, Hodges testified at hearing that Carter knew that it needed a permit before it could move the Tabernacle Sign. Therefore, Carter did not relocate the Tabernacle Sign to a conforming location under the law.

63. The Department has met its burden and demonstrated that Carter abandoned-not relocated-the sign as argued by Carter because the Tabernacle Sign "no longer exists" at the permitted location due to Carter voluntarily removing it on December 2, 2008, in violation of rule 14-10.007(6) (b). Therefore, Carter's

permit should be revoked under the Department's authority in section 479.08.

CBS Notice of Denied Application

64. The Department denied CBS' application for a permit providing the following grounds for the proposed action: "Sign does not meet spacing requirements (1500' for Interstates, 1000' for FAP). In conflict with permitted sign(s), tag#(s): BV314/315. Held by: Carter Pritchett."

65. The spacing requirement that the Department claims CBS' proposed sign does not meet is section 479.07(9)(a)1.'s mandate that to be permitted, a sign must be no less than "one thousand five hundred feet from any other permitted sign on the same side of the highway, if on an interstate highway."

66. Carter seeks to inject numerous other issues into this proceeding concerning CBS' application that the Department did not allege in its Notice of Denied Outdoor Advertising Permit Application. Even though Carter refers to itself as an intervenor in its Proposed Recommended Order and contends it can advance additional grounds for the denial of CBS's application based on its intervenor status, Carter did not petition for leave to intervene in this matter pursuant to rule 28-106.205. Accordingly, Carter is not an intervenor and the undersigned need not consider any of Carter's contentions claimed under intervenor status. Therefore, the undersigned declines to consider any

additional issues Carter raises as grounds for CBS's denial other than the Department's sole noticed issue of spacing.

67. Even if the undersigned considered Carter's lengthy argument in its Proposed Recommended Order regarding the City of Miami's completion and execution of local permission forms in error and whether they are contrary to the City of Miami's policy, any issues related to the City of Miami are not before this tribunal.

68. Further, Carter's assertion of application priority is a red herring. The bottom line is the Department processes sign permit applications in the order of the date and time of receipt of completed applications pursuant to rule 14-10.004(1)(c). Therefore under any analysis, CBS submitted its outdoor advertising permit application on October 1, 2009, and is first in line before either of Carters' 2009 application submissions.

69. Petitioner CBS does not dispute that its proposed sign is less than 1,500 feet from the nearest permitted sign on the same side of the highway [I-95]. Rather, CBS has taken the position and met its burden to show that its application was properly filed and administered by the Department.

70. Since the undersigned has determined that the permit issued for Carter sign bearing tag numbers BV314/315 should be revoked based on abandonment, the Department has no grounds to withhold the permit from CBS as the sole reason for application

denial ceases to exist. Accordingly, the CBS spacing conflict is resolved and there is no further basis to deny CBS' permit applications.

RECOMMENDATION

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

RECOMMENDED the Florida Department of Transportation enter a final order upholding Carter's Notice of Intent to Revoke Sign Permit for Violation and that the Department grant CBS' permit applications.

DONE AND ENTERED this 17th day of April, 2012, in Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of April, 2012.

ENDNOTES

^{1/} Scott Carter Signs is a family business that builds, installs, and disassembles signs. The company has been in outdoor advertising since at least 1956. Scott Carter has been in the sign business since a child, grew up in the business, and inherited the company from his father in 1977.

^{2/} Carter's Exhibit 80.

^{3/} Carter's Exhibit 45.

^{4/} Due to recent changes in the fee scale, the Department would have processed Carter's application if the only issue had been the incorrect application fee. However, the Department could not process the application without the information regarding designation for future land use.

^{5/} Carter also fails to meet the criteria of section (b). The record shows that Carter neither operated nor maintained the site from December 2, 2008, when Carter voluntarily removed the sign and tags, until at least December 19, 2009, when Hodges placed the tags on the Tabernacle church fence, which is over 12 months.

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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.