

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THOROUGHBRED DEVELOPMENT, INC.,)
AND RODNEY DESSBERG,)
)
Petitioners,)
)
vs.) Case No. 12-2326
)
DEPARTMENT OF TRANSPORTATION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On November 24, 2012, an administrative hearing in this case was held by video teleconference in Sarasota and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Robert K. Lincoln, Esquire
Icard, Merrill, Cullis, Timm,
Furen and Ginsburg, P.A.
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2033 Main Street
Sarasota, Florida 34237-6093

For Respondent: Susan Schwartz, Esquire
Department of Transportation
Haydon Burns Building, Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0450

STATEMENT OF THE ISSUE

The issue in this case is whether the Department of Transportation (Respondent) should approve the application filed

by Thoroughbred Development, Inc., and Rodney Dessberg (Petitioners) to permit an existing sign under the "grandfather" provision set forth in section 479.105(1)(e), Florida Statutes (2012).^{1/}

PRELIMINARY STATEMENT

By Notice of Violation dated January 31, 2012, the Respondent notified the Petitioners that the sign at issue in this proceeding was in violation of section 479.105 and that the sign had to either be permitted or removed. The Petitioners thereafter filed an application to obtain the permit.

By notice dated May 24, 2012, the Respondent denied the application. The Petitioners filed a Petition for Administrative Hearing that the Respondent forwarded to the Division of Administrative Hearings (DOAH). DOAH scheduled and conducted the formal hearing.

Prior to the hearing, the parties filed a Joint Pre-hearing Stipulation, including a statement of admitted facts that have been adopted and incorporated herein as necessary.

At the hearing, the Petitioners presented the testimony of one witness and had Exhibits 1 through 8 admitted into evidence. The Respondent presented the testimony of one witness and had Exhibits 1 through 6 admitted into evidence. Joint Exhibits 1 through 5 were admitted by agreement of the parties.

The Transcript of the hearing was filed on November 30, 2012. Both parties filed proposed recommended orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Respondent is the state agency charged with regulation and permitting of certain outdoor advertising signs placed on specified highways.

2. The Petitioners are the applicants for a sign permit, application number 58806/58807. The Petitioners own the sign and the property upon which the sign is located.

3. The sign and property are located on U.S. 41, a federal aid primary highway designated in 2003 as a "Scenic Highway." The relevant portion of U.S. 41 is also referred to as the Tamiami Trail.

4. The sign at issue in this proceeding (the "1964 sign") was erected in 1964 by owner Blue Heron fruit shippers. The sign has remained unpermitted, structurally unchanged, and continuously maintained at the same location since installation.

5. The 1964 sign was built on a parcel of land (the "sign parcel") located at 7450 Tamiami Trail, Sarasota, Florida. A small commercial building also occupied the parcel. The location is within an unincorporated part of Manatee County.

6. The sign parcel has been zoned for commercial use since the erection of the sign in 1964. The sign is not located on state right-of-way and is not a safety hazard.

7. When the 1964 sign was erected, it was used to promote the Blue Heron fruit shipping business located on an adjacent parcel at 7440 Tamiami Trail, Sarasota, Florida (the "Blue Heron parcel").

8. At all times material to this case, the two parcels have had separate legal descriptions. The parcels have separate driveway connections to Tamiami Trail. For reasons unknown, the addresses of the parcels were changed at some point, but the legal descriptions of the parcels have not been amended.

9. Although the parcels were presumably commonly owned or leased by the Blue Heron fruit business at the time the 1964 sign was erected, the parcels were independently sold and owned individually by separate purchasers.

10. The sign parcel is currently designated as 7851 North Tamiami Trail, Sarasota, Florida. The commercial building remains on the property. The Blue Heron parcel is currently designated as 7849 North Tamiami Trail, Sarasota, Florida.

11. In October 1976, Kerry and Jane Kirschner purchased the Blue Heron parcel and the fruit business thereon. The Kirschners continued to operate the fruit business. The sign parcel was owned by another individual.

12. Although there was no written agreement between the Kirschners and the owner of the sign parcel, Mr. Kirschner testified at the hearing that he made a monthly payment to the owner of the sign parcel so that he could continue using the sign to promote the fruit business. It is reasonable to presume that the monthly payment was based upon an agreement between the two owners. It would be unreasonable to assume that the payment was a gift from Mr. Kirschner to the owner of the sign parcel.

13. In January 1978, the Kirschners purchased the sign parcel from the owner to whom Mr. Kirschner had been paying rent. Mr. Kirschner testified that the Kirschners bought the sign parcel to obtain the commercial building and to continue using the 1964 sign to promote the fruit business.

14. In October 1978, "Florida Outdoor, Inc." filed an application for a two-sided sign (the "1978 sign") located on Tamiami Trail, 444 feet to the north of the 1964 sign.

15. A sign permit application must identify the location of regulated signs located nearby the site of the proposed sign. Because the 1964 sign appeared to advertise an on-premises business and was therefore not subject to regulation, the applicant did not reference the 1964 sign.

16. The Respondent approved the application and issued a permit (tag number AW881/AW882) to the applicant.

17. In November 1979, "Florida Outdoor, Inc." filed an application for a two-sided sign (the "1979 sign") located on Tamiami Trail, 150 feet to the south of the 1964 sign. Again, the applicant did not reference the 1964 sign.

18. The Respondent approved the application and issued a permit (tag number AW698/AW699) to the applicant.

19. Both the 1978 and 1979 signs remain at their permitted locations.

20. The Kirschners never combined the two parcels. They sold the Blue Heron parcel in 1986 and sold the sign parcel in 1993.

21. The Notice of Violation dated January 31, 2012, was the first violation ever issued by the Respondent regarding the 1964 sign.

22. At the hearing, the Respondent acknowledged that, had the 1964 sign not been considered exempted from regulation as an "on premises" sign, it could have been permitted prior to the installation of the 1978 and 1979 signs.

23. Following the installation of the 1978 and 1979 signs, the 1964 sign could not have been permitted (absent the "grandfather" provision) due to sign spacing regulations not at issue in this proceeding.

CONCLUSIONS OF LAW

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

25. The Petitioners have the burden of establishing by a preponderance of the evidence entitlement to the permit sought. Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); § 120.57(1)(j). In this case, the burden has been met.

26. Section 479.105 provides, in relevant part, as follows:

Signs erected or maintained without required permit.--

(1) Any sign which is located adjacent to the right-of-way of any highway on the State Highway System outside an incorporated area or adjacent to the right-of-way on any portion of the interstate or federal-aid primary highway system, which sign was erected, operated, or maintained without the permit required by s. 479.07(1) having been issued by the department, is declared to be a public nuisance and a private nuisance and shall be removed as provided in this section.

(a) Upon a determination by the department that a sign is in violation of s. 479.07(1), the department shall prominently post on the sign face a notice stating that the sign is illegal and must be removed within 30 days after the date on which the notice was posted. However, if the sign bears the name of the licensee or the name and address of the nonlicensed sign owner, the department shall, concurrently with and in addition to posting the notice on the sign, provide a written notice to the owner, stating that the

sign is illegal and must be permanently removed within the 30-day period specified on the posted notice. The written notice shall further state that the sign owner has a right to request a hearing, which request must be filed with the department within 30 days after the date of the written notice. However, the filing of a request for a hearing will not stay the removal of the sign.

* * *

(d) If, after a hearing, it is determined that a sign has been wrongfully or erroneously removed pursuant to this subsection, the department, at the sign owner's discretion, shall either pay just compensation to the owner of the sign or reerect the sign in kind at the expense of the department.

(e) However, if the sign owner demonstrates to the department that:

1. The sign has been unpermitted, structurally unchanged, and continuously maintained at the same location for a period of 7 years or more;
2. At any time during the period in which the sign has been erected, the sign would have met the criteria established in this chapter for issuance of a permit;
3. The department has not initiated a notice of violation or taken other action to remove the sign during the initial 7-year period described in subparagraph 1.; and
4. The department determines that the sign is not located on state right-of-way and is not a safety hazard, the sign may be considered a conforming or nonconforming sign and may be issued a permit by the department upon application in accordance with this chapter and payment of a penalty fee of \$300

and all pertinent fees required by this chapter, including annual permit renewal fees payable since the date of the erection of the sign.

27. The parties have stipulated that: the sign has been unpermitted, structurally unchanged, and continuously maintained at the same location for a period of seven years or more; the Respondent has not initiated a notice of violation or taken other action to remove the sign during the initial seven-year period after erection; and the sign is not a safety hazard or located on state right-of-way.

28. The Respondent has acknowledged that the sign could have been permitted had it not been thought to be exempt from such permitting. The issue in the case is therefore whether at some point after the sign was constructed, the exemption could have been lost.

29. It is undisputed that when the 1964 sign was constructed by the Blue Heron fruit business, Florida law essentially exempted a sign from permitting regulations where the sign was constructed by a business owner or lessee on land belonging to such owner or lessee to promoting a business within 100 feet of the sign.

30. The statutory exemption remained law as of 1976, when the Kirschners purchased the Blue Heron parcel, but the two parcels were no longer under common ownership or lease. The sign

parcel was owned by a separate individual with no apparent relationship to the Blue Heron fruit business and to whom Mr. Kirschner made a monthly payment for use of the sign. The evidence is sufficient to establish that as of 1976, the 1964 sign was no longer entitled to exemption from permitting regulations.

31. The Respondent has acknowledged that the sign could have been permitted had it not been thought to be exempt from regulation. The parties have stipulated as to the remainder of section 479.105(1)(e). Accordingly, the application filed by the Petitioners should be approved.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Transportation enter a final order granting the application for the sign permit referenced herein.

DONE AND ENTERED this 31st day of December, 2012, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of December, 2012.

ENDNOTE

^{1/} All statutory references are to Florida Statutes (2012),
unless otherwise indicated.

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.