STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs. Case Nos. 14-4926
14-4927

I-10 PECAN HOUSE, INC.,

Respondent.
_____/

DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs. Case No. 14-4928

OLAN Q. NOBLES,

Respondent.
_____/

RECOMMENDED ORDER

Administrative Law Judge Edward T. Bauer held a final hearing in this case in Tallahassee, Florida, on January 9 and February 13, 2015.

APPEARANCES

For Petitioner: Richard E. Shine, Esquire
Austin M. Hensel, Esquire
Department of Transportation
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Tallahassee, Florida 32399

For Respondent: Sherry D. Walker, Esquire
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STATEMENT OF THE ISSUES

As to DOAH Case Nos. 14-4926 and 14-4927, the issues are whether the billboards identified in the notices of violation are located on the premises of Respondent's business and, thus, exempt from licensure; and, if not, whether the billboards are eligible for licensure pursuant to section 479.07, Florida Statutes, or, alternatively, the "grandfather" provision set forth in section 479.105, Florida Statutes.

With respect to DOAH Case No. 14-4928, the issue is whether Respondent engaged in, or benefitted from, the unpermitted removal, cutting, or trimming of vegetation.

PRELIMINARY STATEMENT

On or about December 17, 2012, Petitioner Department of Transportation ("Department") issued a "Notice of Violation – Illegally Erected Sign" (number 1352), which advised the proprietor of I-10 Pecan House, Olan Q. Nobles, that his billboard (bearing advertising copy "Exit Now") located at milepost 17.554 of I-10 was subject to removal. A second notice of violation (number 1487), likewise issued on December 17, 2012, informed Mr. Nobles that the Department intended to remove his billboard (bearing advertising copy "Welcome to Big O's / We Appreciate Your Business") located at milepost 17.339 of I-10. Mr. Nobles timely requested a formal administrative hearing with respect to each notice of violation.

On April 14, 2013, prior to the referral of the foregoing matters to the Division of Administrative Hearings ("DOAH"), the Department charged Mr. Nobles with a violation of section 479.106(7), Florida Statutes, which prohibits the unlicensed removal, cutting, or trimming of vegetation. Subsequently, on May 16, 2013, Mr. Nobles submitted a timely request for a formal hearing.

The parties thereafter engaged in extended settlement negotiations, during which Mr. Nobles applied for outdoor advertising permits in connection with the billboards identified in the December 17, 2012, notices of violation. The Department ultimately denied the permit applications, prompting a renewed request from Mr. Nobles to refer each case to DOAH.

The Department forwarded the matters to DOAH on October 20, 2014, which were assigned DOAH Case Nos. 14-4926, 14-4927, and 14-4928——relating, respectively, to notice of violation 1487, notice of violation 1352, and the vegetation removal action. Thereafter, by order dated October 31, 2014, the three cases were consolidated for further proceedings.

As noted above, the final hearing was held on January 9 and February 13, 2015, during which the Department called three witnesses (Morris Pigott, Bill Armstrong, and Michael Green) and introduced three exhibits, numbered 1 through 3. Mr. Nobles testified on his own behalf, presented the testimony of three

other witnesses (Don Joiner, Michael McDougal, and Walton Poppell), and introduced ten exhibits, numbered 8, 9, 10, 11, 16, 17, 18, 19, 20, and 21.[1/] The parties also introduced seven joint exhibits, numbered 1 through 7.

Transcripts of the January 9 and February 13 proceedings were filed, respectively, on March 13 and February 23, 2015.[2/] The parties thereafter submitted proposed recommended orders, which the undersigned has considered in the preparation of this Recommended Order.

Unless otherwise indicated, all references to the Florida Statutes are to the current codification.

FINDINGS OF FACT

I. DOAH Case Nos. 14-4926 & 14-4927

A. The Parties

1. The Respondent in these proceedings is I-10 Pecan House, Inc. ("Pecan House"), an entity currently owned and managed by Olan Q. Nobles. As discussed in greater detail below, Pecan House is a small country store that has conducted business in Jefferson County, Florida, for nearly 40 years.

2. The Department is the state agency responsible, inter alia, for the regulation of outdoor advertising signs located within 600 feet of, and visible from, interstate highways.

B. The Events

3. In or around 1976, Erma Jean Walker (Mr. Nobles' sister) and her husband, Lyman Walker, III, purchased three tracts of land that are relevant to this proceeding. The first such parcel, upon which the Walkers quickly constructed an open-air market, comprises one acre and is located on State Road 257, immediately north of the intersection of that roadway and I-10.

4. The second relevant parcel, .18 acres in size and located a short distance to the southeast of the first tract, is situated adjacent to the westbound lanes of I-10. Upon their acquisition of this parcel, the Walkers constructed a billboard that advertised the open-air market and the related business activities conducted on the third parcel.

5. The third parcel, which is roughly 2.3 acres in size and likewise adjoins the westbound lanes of I-10, is located less than 1000 feet to the east of the second tract. It is upon this tract that, in mid-to-late 1976, the Walkers built a concrete structure to be used for the purpose of manufacturing candy and jelly——products the Walkers offered for sale at the nearby open-air market. By the end of 1976, the Walkers also constructed (upon the third parcel) a billboard advertising the open-air market and jelly/candy manufacture.

6. Although the billboards referenced above were visible from I-10 and located within 600 feet of the roadway——and, thus,

within the Department's "controlled area"——the Walkers did not apply for outdoor advertising permits. This is because, as the Department concedes, the billboards were exempt from licensure from 1976 until the mid-1990s (or perhaps later, as Mr. Nobles asserts) under the "on premises" exemption set forth in section 479.16, Florida Statutes. Under the definition of "premises" in effect during that period, the land upon which a sign was located did not need to be contiguous to the advertised business in order for the exemption to apply.

7. For reasons that will soon be apparent, it is necessary to inject a third billboard into this discussion: in 1993, the Walkers constructed on the third tract of land a "double-stack" billboard, which is situated less than 200 feet and 1000 feet, respectively, from the signs erected in 1976 upon the third and second tracts. Although the double-stack billboard would have ostensibly satisfied the on-premises exemption, the Walkers nevertheless applied for——and were granted——an outdoor advertising permit. For all that appears, the Department has never initiated any proceedings to revoke the permit, which remains valid to this day.

8. In 1995, Mrs. Walker transferred control of Pecan House to Mr. Nobles, who until that time had assisted the Walkers on an as-needed basis. Soon thereafter, Mr. Nobles upgraded the open-air market (on the first parcel) to a secure building and,

of particular relevance here, ceased all manufacturing activities at the concrete building (on the third parcel).

9. At or around that time, the Legislature amended the definition of "premises" to include a contiguity requirement.[3/] This is significant, for the second and third parcels——the locations of the two billboards at issue herein——are not contiguous to the first parcel but, rather, are separated by a tract in which neither the Walkers nor Mr. Nobles holds a leasehold or ownership interest. Further, there is no recorded easement connecting Mr. Nobles' three parcels.

10. Thus, although the two billboards constructed in 1976 lost their on-premises status in the mid-1990s, this fact apparently went unnoticed by the Department for roughly 13 years. Then, in March of 2008, the Department issued notices of violation in connection with both billboards. Among other things, the notices alleged that "outdoor advertising permit[s] [were] required, but ha[d] not been issued" for the billboards, which Mr. Nobles was instructed to remove within 30 days.

11. A short time thereafter, an inspector or other agent of the Department conducted, in Mr. Nobles' presence, an examination of the 1976 billboards and Pecan House's business operations. At the conclusion of her inspection, the Department employee erroneously opined that, in fact, there was "no problem"[4/] with the billboards in question, which Mr. Nobles

reasonably took to mean that the signs continued to satisfy the on-premises exemption and, thus, were exempt from licensure. The reasonableness of this understanding was bolstered by the fact that, subsequent to the inspection, Mr. Nobles heard nothing more from the Department concerning the March 2008 notices of violation.[5/]

12. More than four years later, on December 17, 2012, the Department issued new notices of violation in connection with the 1976 billboards: notice 1352, relating to the billboard constructed upon the third parcel, which presently reads "Exit Now" and bears a Shell gasoline logo (hereinafter "Exit Now"); and notice 1487, relating to the billboard erected upon the second parcel, which presently reads "Welcome to Big O's / We Appreciate Your Business" (hereinafter "Big O's").

13. The parties thereafter engaged in settlement negotiations, in the course of which Mr. Nobles' counsel struggled mightily to convince the Department that the billboards continued to satisfy the on-premises exemption. When the Department rejected this argument, Mr. Nobles applied for an outdoor advertising permit for each billboard. The applications were ultimately denied, prompting the Department to refer the matters to DOAH for further proceedings.

14. Based upon the evidence adduced at final hearing, it is evident that the billboards in question no longer meet the

on-premises exemption and, thus, are subject to removal unless the signs meet either the current statutory requirements for a permit or, alternatively, the "grandfather" provision set forth in section 479.105, which authorizes licensure if the billboards satisfy earlier statutory criteria and certain other conditions.

C. Eligibility for Licensure – "Exit Now"

15. Beginning first with the "Exit Now" billboard, the record makes pellucid that the current statutory requirements for licensure cannot be satisfied. Among other things, the sign is located a mere 190 feet from the permitted, double-stack billboard erected in 1993, a distance far less than the minimum spacing requirement of 1500 feet. See § 479.07(9)(a)1., Fla. Stat.

16. As for the potential applicability of the grandfather provision to the "Exit Now" billboard, it is critical to observe that the Department's delay of nearly five years (March of 2008 through December of 2012) in pursuing removal has placed Mr. Nobles at a significant disadvantage.

17. In particular, had the Department moved forward in 2008——instead of inexplicably abandoning the action, which, along with the statements of its inspector, led Mr. Nobles to believe, incorrectly, that no permit was required——Mr. Nobles likely would have applied for a permit,[6/] which the Department would have evaluated pursuant to the version of the grandfather

provision in effect at that time. This is significant, for the 2008 codification of the grandfather provision, which remained unchanged until July 1, 2014, did not preclude licensure in situations where a billboard had previously enjoyed on-premises status or some other recognized exemption from the permitting requirement. Further, the pre-July 1, 2014, grandfather provision was quite favorable in that it allowed a potential licensee to demonstrate that the billboard would have met the criteria for licensure in effect "[a]t any time during the period in which the sign has been erected." § 479.105(1)(e)2., Fla. Stat. (2013)(emphasis added).

18. The current version of the grandfather provision is quite a different animal. For one thing, grandfather status can only be granted if the billboard at issue "has never been exempt" from permitting. § 479.105(1)(c)2., Fla. Stat. (2014) (emphasis added). For another thing, the current grandfather provision looks not at "any" time in which the sign has been erected but, rather, at the criteria in effect during the initial seven years in which the sign was subject to the Department's jurisdiction. § 479.105(1)(c)2.b., Fla. Stat. (2014).

19. As Mr. Nobles readily acknowledges, his effort to obtain a permit for the "Exit Now" billboard is a nonstarter under the 2014 version of the grandfather provision, whose plain

language prohibits the issuance of a permit where, as here, the sign was previously exempt from licensure. This does not end the matter, however, for the undersigned finds that the Department's unjustified delay in pursuing removal——along with its agent's erroneous statement that the billboard was legal, upon which Mr. Nobles relied——requires that the "Exit Now" application be evaluated under the version of the grandfather provision that was in effect from 2008 until July 1, 2014.

20. Pursuant to the pre-2014 codification of section 479.105, "grandfathering" was authorized if the owner could demonstrate: 1) that the sign in question had been unpermitted, structurally unchanged, and continuously maintained at the same location for at least seven years; 2) that, at any time during the period in which the sign has been erected, the sign would have satisfied the criteria established in chapter 479 for issuance of a permit; 3) that the Department did not file a notice of violation or take other action to remove the sign during the initial seven-year period in which the sign was unpermitted, structurally unchanged, and continuously maintained at the same location; and 4) that the sign is not located on a state right-of-way and is not a safety hazard. § 479.105(1)(e), Fla. Stat. (2013). Upon such a showing, the Department was authorized to treat the sign as conforming or nonconforming and issue a permit.

21. Turing to the merits, the first prong is easily satisfied, as the "Exit Now" sign has been unpermitted, structurally unchanged, and continuously maintained at the same location for 39 years, far longer than the seven-year period the statute requires. The third prong is also met, for the record makes clear that the Department took no action to pursue removal during the initial seven-year period, i.e., 1976 through 1983, in which the sign was unpermitted, structurally unchanged, and continuously maintained. In addition, the Department stipulates that the sign neither poses a safety hazard nor is located upon a state right-of-way, thereby satisfying the fourth prong.[7/]

22. This leaves only the second prong, which asks if the sign would have met the criteria for licensure at any time after it was erected. The selection of any time period subsequent to 1993 would surely doom the application, as the sign would be unable to satisfy the minimum spacing requirement due to its close physical proximity to the double-stack billboard——which, as noted previously, was issued a permit in 1993 and remains licensed. Prior to 1993, however, there does not appear to be any spacing conflict that would preclude licensure in this instance.[8/]

23. With the spacing concern resolved (and the relevant period of inquiry narrowed to "any" time between 1976 and 1993), the undersigned turns to the only other criterion for licensure

that appears to be in dispute: section 479.111(2), Florida Statutes, which authorizes the issuance of a permit only if the sign is located in "commercial-zoned and industrial-zoned areas or commercial-unzoned or industrial-unzoned areas."

24. Unfortunately, this issue cannot be resolved on the instant record, for there is a dearth of persuasive evidence concerning the zoning designation of the third parcel (the location of the "Exit Now" sign) during the critical period of inquiry. Indeed, the record contains only the Department's speculative assumption that, because the area is presently unzoned, it therefore must have been unzoned at all times in the past.[9/] Further, even accepting the Department's assumption at face value, it is impossible to determine whether the business activities conducted on the parcel from 1976 until the mid-1990s——namely, the manufacture of candy and jelly and the sale of pecans——would satisfy the use test at any time between 1976 and 1993.[10/]

25. Under ordinary circumstances, such an absence of evidence would necessitate an adverse result for the permit applicant. Owing, however, to the unusual history and posture of this case, as well as the undersigned's conclusion that the pre-2014 grandfather provision should govern, it is recommended that the Department reevaluate Mr. Nobles' application to

determine if the third parcel could have satisfied the requirements of 479.111(2) at any point between 1976 and 1993.

D. Eligibility for Licensure – "Big O's"

26. The undersigned turns next to the "Big O's" sign, which, like the "Exit Now" billboard, is unable to satisfy current licensing criteria due, among other reasons, to its close proximity to the double-stack billboard.[11/] Further, as with the "Exit Now" billboard, the fact that the "Big O's" sign was previously exempt from licensure (owing to its on-premises status from 1976 through the mid-1990s) renders it ineligible for licensure under the 2014 codification of the grandfather provision.

27. However, in sharp contrast to the "Exit Now" billboard, the "Big O's" sign is positioned within 500 feet of an interstate exit ramp, thereby constituting a safety hazard. This distinction is fatal to Mr. Nobles, as every codification of the grandfather provision from the mid-90s (when the sign lost its on-premises status) onward has prohibited the licensure of billboards that present a safety issue. The short of it, then, is that the sign was no more eligible for licensure in the past than it is today, which obviates the need for any further analysis under the pre-2014 version of the grandfather provision.

28. For the reasons articulated above, Mr. Nobles has failed to prove that the "Big O's" sign is exempt from licensure by virtue of the "on-premises" exception. Further, the evidence conclusively demonstrates that, due to safety concerns, the sign would not have been eligible for licensure at any point in time. Accordingly, the undersigned is constrained to recommend the sign's removal pursuant to section 479.105.

II. DOAH Case No. 14-4928

29. As noted earlier in this Order, DOAH Case No. 14-4928 involves an allegation that Mr. Nobles engaged in——or benefitted from——the unpermitted removal, cutting, or trimming of vegetation. The relevant facts are recounted below.

30. On January 21, 2013, Mr. Nobles executed a lease agreement with Michael McDougal, who owns a parcel of land adjacent to the eastbound lanes of I-10, approximately .6 miles from County Road 257. In relevant part, the terms of the lease authorized Mr. Nobles to place on the property a pickup truck, attached to which was a billboard that advertised the I-10 Pecan House.

31. Shortly thereafter, in late January 2013, Mr. Nobles relocated the truck to a position on Mr. McDougal's property a short distance to the south of the fence line that separates the parcel from the Department's right-of-way. But trouble soon followed: in late February or early March, the Department

received several reports of unusual vegetation removal in the general area of Mr. Nobles' truck sign.

32. In response, the Department requested one of its contractors, Metric Engineering, Inc. ("Metric"), to conduct a field inspection of the area. The inspection was performed on or about March 12, 2013, by Bill Armstrong, a certified arborist employed by Metric.

33. During the course of his inspection, Mr. Armstrong observed, first, an area that the Department had previously cleared to facilitate the installation of a new fence, which had yet to be installed. This particular area, which ran along the length of the fence line and had been cleared within the preceding six months, had a width (as measured from the fence toward the roadway) of approximately 12 feet.

34. Immediately beyond this 12-foot zone, however, Mr. Armstrong noticed evidence of other activity that had occurred much more recently. Specifically, Mr. Armstrong observed, on the side of the fence immediately opposite Mr. Nobles' truck, an area 120 feet in length (parallel to the fence line) and approximately 25 feet in width that had been cleared of vegetation.

35. Within this 120 by 25 foot area, Mr. Armstrong discovered 30 tree stumps, which, upon close examination, exhibited signs of having been recently cut. Such indications

included the presence of sawdust; the fact that the stumps were bright in color and relatively clean; and the observation of fresh debris at both ends of the swath. These findings were recorded in a report dated March 25, 2013, which Metric promptly forwarded to Morris Pigott, the Department's Project Manager of Vegetation and Resource Management.

36. Several weeks later, Mr. Pigott conducted his own site visit, during which he examined the particular area that had concerned Mr. Armstrong. Consistent with the findings contained in Metric's report, Mr. Pigott observed, within the 120 by 25 foot area, numerous, freshly-cut tree stumps. Mr. Pigott further concluded, quite reasonably, that this activity had not been performed by the Department or one of its contractors, for the stumps had not been cut to ground level, the vegetation immediately to the east and west of the area was "very dense," and the area had not been "grubbed."[12/] (As explained during the final hearing, "grubbing" involves the removal of the top six inches of surface material, an action designed to prevent regrowth.) To cinch matters, Mr. Pigott observed that the selective clearing of the 120 by 25 foot area had enhanced the visibility of Mr. Nobles' truck-mounted billboard for eastbound traffic.

37. Thereafter, on April 14, 2013, Mr. Pigott cited Mr. Nobles for violating section 479.106(7), which provides that any person who engages in or benefits from the unauthorized removal of vegetation shall be subject to an administrative penalty. Mr. Pigott further notified Mr. Nobles that, pursuant to Florida Administrative Code Rule 14-10.057, the Department intended to assess mitigation in the amount of $8,304.25.

38. Mr. Nobles promptly denied any and all involvement in the removal, claiming that a road crew had cleared the vegetation two years earlier. In response, Mr. Pigott contacted Mr. Armstrong, disclosed Mr. Nobles' explanation, and asked that a follow-up inspection be performed.

39. Mr. Armstrong conducted his second inspection on August 8, 2013. At that time, Mr. Armstrong observed that Mr. Nobles' truck-mounted billboard was still present, and that the stumps within the 120 by 25 foot area had sprouted and grown to a height of two to three feet. Samples of the sprouts were collected, which Mr. Armstrong later examined for evidence of internodes——i.e., rings that denote growth, with one ring forming during each growing season. Due to the absence of internodes, Mr. Armstrong concluded that the stumps were in their first growing season, thereby eliminating any possibility that the vegetation had been cleared several years earlier.[13/]

40. Finding that the evidence proves clearly and convincingly that Mr. Nobles benefitted from the unauthorized vegetation removal, the undersigned turns finally to the question of mitigation. As noted above, the Department seeks mitigation in the amount of $8,304.25, a figure derived from Mr. Armstrong's use of the formula referenced in rule 14-10.057.

41. It is at this juncture that the Department's case falters. Although Mr. Armstrong offered credible testimony concerning the number and species of trees (water oaks, Florida maples, and the like) that were removed from the area, the record evidence regarding their market value consists entirely of hearsay. Indeed, the Department called no witness who possessed any firsthand knowledge as to the market value of the trees; instead, it presented only the testimony of Mr. Armstrong, who explained that he had telephoned three nurseries, obtained price quotes over the phone, averaged the three figures, and plugged the averages into the formula.

42. To be clear, the undersigned has no quarrel with either the formula or Mr. Armstrong's initial reliance upon the price quotes. The problem is that, in the absence of a stipulation from Mr. Nobles concerning the amount of mitigation, the Department was obligated to adduce at least some non-hearsay evidence of the market values——the starting point of the calculations. Inasmuch as the record is devoid of such

evidence, the Department's request for mitigation must be denied.

CONCLUSIONS OF LAW

I. Jurisdiction

43. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

II. DOAH Case Nos. 14-4926 & 14-4927

44. The undersigned returns now to the subject of the "Exit Now" and "Big O's" billboards, which the Department contends are subject to removal.

45. As a threshold matter, it is the Department's burden to prove that the signs fall within the ambit of chapter 479 and, thus, require a permit. See Young v. Dep't of Cmty. Aff., 625 So. 2d 831, 833 (Fla. 1993)("The general rule is that, apart from statute, the burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal.").

46. This question is easily resolved in the Department's favor, as the evidence conclusively demonstrates that both signs are visible from I-10 and located within a "controlled area." See § 479.07(1), Fla. Stat. (prohibiting, inter alia, a person from using or maintaining any sign that is visible from an interstate highway and located within a controlled area, unless a permit has been issued or the sign falls within one of the

exceptions enumerated in section 479.16); § 479.01(5), Fla. Stat. (defining controlled area as "660 feet or less from the nearest edge of the right-of-way of any portion of the State Highway System, interstate, or federal-aid primary highway system and beyond 660 feet of the nearest edge of the right-of-way of any portion of the State Highway System, interstate highway system, or federal-aid primary system outside an urban area").

47. With the Department having met its initial burden, it is necessary next to determine if the signs are exempt from the requirement that a permit be obtained. As to this issue, the burden of proof falls on Mr. Nobles. Walker v. Dep't of Transp., 352 So. 2d 126, 127 (Fla. 1st DCA 1977).

48. Although section 479.16 enumerates various exemptions from the permit requirement, only one——the "on premises" exemption——is potentially applicable to Mr. Nobles' signs. As the Department correctly observes, the relevant question is not whether the signs formerly satisfied the on-premises exemption (although they did, from 1976 through the mid-1990s) but, rather, whether the signs are presently exempt from licensure.

49. With this in mind, the current formulation of the on-premises exemption is set forth in section 479.16(1), which provides, in relevant part, that a permit is not required for:

> Signs erected on the premises of an establishment which consist primarily of the name of the establishment or identify the principal or accessory merchandise, services, activities, or entertainment sold, produced, manufactured, or furnished on the premises of the establishment . . . .

50. In turn, "premises" is defined as:

> [A]ll the land areas under ownership or lease arrangement to the sign owner which are contiguous to the business conducted on the land except for instances where such land is a narrow strip contiguous to the advertised activity or is connected by such a narrow strip, the only viable use of such land is to erect or maintain an advertising sign. If the sign owner is a municipality or county, the term means all lands owned or leased by the municipality or county within its jurisdictional boundaries.

§ 479.01(17), Fla. Stat. (emphasis added).

51. Mr. Nobles has failed to demonstrate that either of the billboards presently satisfies the on-premises exemption, for the record makes pellucid that the second and third parcels of land——the respective locations of the "Big O's" and "Exit Now" signs——are not contiguous to the first parcel, upon which Pecan House is situated. Indeed, the second and third parcels are completely separated from the first parcel (the location of Pecan House) by an intervening tract of land in which Mr. Nobles has no recorded ownership or leasehold interest.

52. Mr. Nobles resists this conclusion, arguing that the second and third parcels are contiguous to the first by virtue

of a "prescriptive easement"——which, according to Mr. Nobles, consists of a dirt path that begins at the first parcel, runs along the fence line of the interstate, extends over the intervening tract, and ends at the third parcel.

53. This contention is unpersuasive, as it is foreclosed by the plain language of section 479.01(17). First, even assuming that the elements of a prescriptive easement are satisfied,[14/] Mr. Nobles neither "owns" nor "leases" the dirt path that extends over the intervening tract; as such, the first parcel is not contiguous to the second or third. § 479.01(17), Fla. Stat. (defining "premises" as all the land areas "under ownership or lease arrangement to the sign owner which are contiguous to the business conducted on the land")(emphasis added). Moreover, a finding of contiguity is precluded by the fact that the dirt path serves no viable purpose except to facilitate Mr. Nobles' maintenance of the billboards. Id. (excluding from the definition of "premises" land areas connected by "a narrow strip, the only viable use of such land is to erect or maintain an advertising sign").

54. As a backup argument, Mr. Nobles contends that the "Exit Now" billboard satisfies the on-premises exemption because it is located on the same parcel (the third) as the concrete structure——a building utilized solely for storage since the mid-1990s. This contention likewise fails, for the billboard's

advertising copy is not directing the attention of passersby to the concrete structure on the third parcel but, rather, to the Pecan House's retail establishment on the first parcel. See People ex rel. Dep't of Transp. v. Maldonado, 104 Cal. Rptr. 2d 66, 70-71 (Cal. Ct. App. 2001)(concluding, under a statutory provision analogous to section 479.16(1), that lessee of billboard was not entitled to an on-premises exemption; advertising copy directed motorists not to the lessee's business activities conducted at the site of the sign, but instead to goods and services located on a different parcel).

55. Finally, Mr. Nobles seems to suggest that the "Big O's" billboard meets the on-premises exemption because, he claims, the second parcel (upon which the billboard is situated) "is combined under one parcel number" with the first parcel. See Resp't PRO, p. 15. However, the credible testimony of Mr. Nobles' own surveyor, William Poppell, establishes that the parcels were "separated in the deed" and, thus, constitute distinct tracts of land.[15/]

56. For the reasons expressed above, neither of the billboards at issue satisfies the on-premises exemption. As such, the billboards are subject to removal unless they meet either the current statutory requirements for a permit or the grandfather provision set forth in section 479.105. Each billboard is discussed separately below.

A. Eligibility for Licensure – "Exit Now"

57. As detailed in paragraph 15, supra, the "Exit Now" sign cannot satisfy the current requirements for licensure due, among other reasons, to its proximity (190 feet) to the licensed, double-stack billboard situated upon the same parcel. See § 479.07(9)(a)1., Fla. Stat. (providing that a sign may not be issued a permit unless it is located at least 1500 feet from any other permitted sign on the same side of an interstate highway).

58. Nor does Mr. Nobles fare any better under the current version of the grandfather provision——which took effect July 1, 2014——whose plain language excludes any sign, such as the "Exit Now" billboard, which has previously been exempt from the requirement that a permit be obtained. See § 479.105(1)(c)2., Fla. Stat.

59. Ordinarily this would end the matter, for the general rule is that an application should be evaluated pursuant to the law in effect at the time of the ultimate decision (i.e., the entry of a final order, which has not yet occurred), as opposed to the law as it existed at the time the application was filed. See Ag. for Health Care Admin. v. Mount Sinai Med. Ctr., 690 So. 2d 689, 691 (Fla. 1st DCA 1997)("No final decision has yet been rendered in the instant proceedings. Where there is a change in law in a licensure matter, the law at the time of the decision,

rather than when the application was filed, determines whether the license should be granted.").

60. But this rule, like virtually every other general rule, admits of exceptions. Significantly for present purposes, one such exception inures in cases of undue agency delay. See Atwood v. State, 53 So. 2d 101 (Fla. 1951). In Atwood, an out-of-state pharmacist petitioned the state for a reciprocal pharmacist's license. The State Board of Pharmacy neglected to act on the application for roughly 17 months, during which time the relevant statute was amended to delete the reciprocity provision. Id. The Supreme Court of Florida ultimately held that, in light of the agency delay, the application was properly evaluated pursuant to the law in effect at the time of filing. Id.; see also Petty-Eifert v. Dep't of HRS, 1983 Fla. Div. Adm. Hear. LEXIS 6088, *17-18 (Fla. DOAH May 5, 1983)(citing Atwood for the proposition that "the law in effect at the time of the license application may be applied in certain situations, if warranted by the particular facts of the case"), aff'd 443 So. 2d 266 (Fla. 1st DCA 1983); see generally Ft. Myers Real Estate Holdings, LLC v. Dep't of Bus. & Prof'l Reg., 53 So. 3d 1158, 1163 (Fla. 1st DCA 2011).

61. Returning to the facts at hand, it is evident that the Department's handling of the "Exit Now" billboard has been less than expeditious. First, as explained previously, the

Department inexplicably abandoned its initial enforcement action in 2008, only to revive the matter some four years later. To make matters worse, the Department employee who inspected the sign in 2008 advised Mr. Nobles, erroneously, that it "looked all right to her," a statement Mr. Nobles reasonably took to mean that the sign did not require a permit. But for this misadvice, Mr. Nobles likely would have applied for a permit at a much earlier time, which is significant given that the previous version of the grandfather provision did not preclude the licensure of formerly-exempt billboards. Finally, the record reflects that the instant enforcement action, which precipitated the filing of Mr. Nobles' permit application, was not referred to DOAH until October 2014, approximately 21 months after Mr. Nobles requested a formal hearing.

62. In view of the foregoing, the "Exit Now" application should be evaluated pursuant to the version of the grandfather provision in effect prior to July 1, 2014, which provided in relevant part:

> (1) Any sign which is located . . . 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.

* * *

> (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.

§ 479.105(1)(e), Fla. Stat. (2013)(emphasis added).

63. As detailed in paragraphs 21 through 24, supra, the only apparent impediment to licensure is section 479.111(2), which at all relevant times has limited the issuance of permits to signs located in "commercial-zoned and industrial-zoned areas or commercial-unzoned or industrial-unzoned areas." However, as also explained earlier, the record is insufficiently developed

to determine whether the billboard could have satisfied section 479.111(2) "at any time" from 1976 (when the sign was erected) forward. Although such an absence of evidence would ordinarily necessitate an adverse recommendation for the applicant, see Antel v. Department of Professional Regulation, 522 So. 2d 1056, 1058 (Fla. 5th DCA 1988)(holding that the license applicant bears the burden of proof), the unusual facts and posture of this case require that the Department reevaluate the "Exit Now" application. It is further recommended that the Department afford Mr. Nobles a reasonable opportunity to supplement his application with additional evidence, should he so desire.

B. Eligibility for Licensure - "Big O's"

64. The undersigned returns now to the "Big O's" sign, which, like the "Exit Now" billboard, is unable to satisfy current licensing criteria due, inter alia, to its proximity to the double-stack billboard. See § 479.07(9)(a)1., Fla. Stat. (establishing a minimum spacing requirement of 1500 feet for signs located on the same side of an interstate). Moreover, as with the "Exit Now" billboard, the fact that the "Big O's" sign was previously exempt from licensure renders it ineligible for licensure under the current version of the grandfather provision. See § 479.105(1)(c)2., Fla. Stat.

65. However, the evidence demonstrates that, unlike the "Exit Now" billboard, the "Big O's" sign is positioned within

500 feet of an interstate exit ramp and, thus, constitutes a safety hazard. See Fla. Admin. Code R. 14-10.006(4)(d). This distinction is absolutely fatal to the "Big O's" application, for every codification of the grandfather provision has prohibited the licensure of billboards presenting a safety issue. See, e.g., § 479.105(1)(e)4., Fla. Stat. (2013); § 479.105(1)(e)4., Fla. Stat. (2008); § 479.105(1)(e)5., Fla. Stat. (1995). Thus, the application would have fared no better even if the Department had moved forward expeditiously, which obviates any further analysis under the pre-2014 grandfather provision.

66. For the reasons articulated herein, the "Big O's" billboard requires a license; is not exempt from licensure; and is unable to satisfy either the current requirements for licensure or any version of the grandfather provision. As such, section 479.105 authorizes the Department to remove the sign.

III. DOAH Case No. 14-4928

67. The undersigned turns finally to DOAH Case No. 14-4928, wherein the Department alleges that Mr. Nobles engaged or benefitted from the unauthorized removal, cutting, or trimming of vegetation, contrary to section 479.106, Florida Statutes.

68. Inasmuch as an administrative fine is at issue, the Department must prove the allegations by clear and convincing

evidence. S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC, 139 So. 3d 869, 873 (Fla. 2014)("[T]he clear and convincing evidence standard is the requisite burden of proof in administrative proceedings where administrative fines are sought.").

69. Section 479.106 provides, in relevant part, as follows:

> (1) The removal, cutting, or trimming of trees or vegetation on public right-of-way to make visible or to ensure future visibility of the facing of a proposed sign or previously permitted sign shall be performed only with the written permission of the department in accordance with the provisions of this section.
>
> * * *
>
> (7) Any person engaging in removal, cutting, or trimming of trees or vegetation in violation of this section or benefiting from such actions shall be subject to an administrative penalty of up to $1,000 per sign facing and required to mitigate for the unauthorized removal, cutting, or trimming in such manner and in such amount as may be required under the rules of the department.

(Emphasis added).

70. As the foregoing language reflects, the Department was not required to prove that Mr. Nobles (or someone at his behest) removed the vegetation at issue; it was sufficient instead for the Department to demonstrate, as it did, that the unauthorized removal benefitted Mr. Nobles by improving the visibility of his

truck-mounted billboard. Mr. Nobles is therefore guilty of violating section 479.106(7).

71. As for the appropriate penalty, the undersigned agrees that $1,000, the maximum authorized by statute, is warranted under the circumstances.

72. Finally, the Department contends that Mr. Nobles should be ordered to pay mitigation costs of $8,304.25, a figured derived from Mr. Armstrong's use of the formula referenced in rule 14-10.057.

73. The undersigned declines this invitation, for as explained in paragraphs 41 and 42, supra, the Department failed to adduce any non-hearsay evidence concerning the market value of the trees removed——the very starting point of the mitigation calculations. Indeed, the record contains nothing more than Mr. Armstrong's hearsay testimony that he utilized price quotes obtained over the telephone from three commercial nurseries.[16/] See, e.g., Branker v. State, 650 So. 2d 195, 196 (Fla. 4th DCA 1995)(explaining that when witness had no personal knowledge concerning value of property, estimates obtained from experts were hearsay and could not be used to establish the value for purposes of restitution). Such testimony, which would not be admissible over objection in a civil action, is insufficient to support a finding concerning the value of the removed trees. See § 120.57(1)(c), Fla. Stat. (providing that hearsay evidence

is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action).[17/]

RECOMMENDATION

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

DOAH Case No. 14-4926

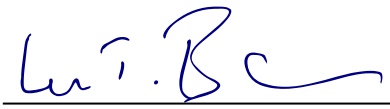
RECOMMENDED that the Department of Transportation enter a final order finding that the billboard identified in Notice of Violation 1487 ("Big O's") is illegal and subject to removal pursuant to section 479.105, Florida Statutes. It is further recommended that the Department enter a final order denying the related application for an outdoor advertising permit.

DOAH Case No. 14-4927

RECOMMENDED that the Department of Transportation take no further action on Notice of Violation 1352 until such time that it reevaluates (under the pre-July 1, 2014, codification of section 479.105) the related application for an outdoor advertising permit. If the application is granted, the Department should enter a final order dismissing Notice of Violation 1352. In the event, however, the application is once again denied, the Department should afford Respondent a point of entry into the administrative process.

RECOMMENDED that the Department of Transportation enter a final order finding Respondent guilty of violating section 479.106, Florida Statutes, and imposing an administrative fine of $1,000.00

DONE AND ENTERED this 4th day of May, 2015, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of May, 2015.

ENDNOTES

[1/] On the second day of hearing, Mr. Nobles introduced an affidavit prepared by Erma Jean Walker, which was received in evidence as Respondent's Exhibit 20. Feb. 13 Tr., p. 256. The undersigned later realized, however, that Mr. Nobles had previously introduced (during the first day of hearing) a series of photographs under the same exhibit number. Jan. 9 Tr., p. 269. To avoid such duplication, Ms. Walker's affidavit has been redesignated as Respondent's Exhibit 21.

[2/] Although the transcript of the February 13 proceedings comprises four volumes, the content of volumes III and IV is identical to volumes I and II. As such, all transcript references contained herein are to the first two volumes.

[3/] The definition of "premises" was amended in 1994 to add the requirement of contiguity. § 479.01(15), Fla. Stat. (1994) (defining premises as "all the land areas under ownership or lease arrangement to the sign owner which are contiguous to the business conducted on the land").

[4/] Feb. 13 Tr., p. 79. The Department employee also stated to Mr. Nobles that the billboards "looked all right to her." Id., p. 99. These statements have not been received for their truth (i.e., that the billboards actually satisfied the on-premises exemption), but instead to show that the statements, upon which Mr. Nobles relied, were actually made. See Charles W. Ehrhardt, Ehrhardt's Florida Evidence § 801.6, pp. 793-94 (2008 ed.)("When words have independent legal significance, evidence that they were said is not hearsay. . . . Testimony that the words were or were not spoken is offered to prove that the statements were made, rather than to prove their truth."); see also United States v. Valencia, 957 F.2d 1189, 1199 (5th Cir. 1992)(holding that statements were not hearsay because they were not offered to prove the truth of their content, but to show that certain conduct of the introducing party "was made in reliance on the statements irrespective of their truth").

[5/] Although the Department asserts that it possesses no records concerning the disposition of the 2008 notices, see Feb. 13 Tr., pp. 184-85, the fact that the signs were never removed allows for the reasonable inference that the Department abandoned its prosecution of the notices following its inspector's examination of the billboards.

[6/] Feb. 13 Tr., p. 99, ln 16-25.

[7/] Feb. 13 Tr., p. 114.

[8/] Feb. 13 Tr., p. 181.

[9/] Feb. 13 Tr., pp. 220; 229.

[10/] To further complicate matters, the definition of "unzoned commercial or industrial area" was substantially amended in 1984. Compare § 479.01(10), Fla. Stat. (1977)(defining "unzoned commercial or industrial area" as an unzoned area "in which there is located one or more industrial or commercial activities generally recognized as commercial or industrial by zoning authorities in this state")(emphasis added), with § 479.01(20), Fla. Stat. (1984)(defining the same term as an area "in which there are located three or more separate and distinct industrial

or commercial uses located within a 1,600 foot radius of each other and generally recognized as commercial or industrial by zoning authorities in this state")(emphasis added).

Under either version, certain activities are expressly excluded, including, inter alia, those that are not visible from the main-traveled way. This is problematic, as the record is silent concerning the visibility of the concrete structure (the site of the jelly and candy manufacture) during the relevant period.

[11/] Feb. 13 Tr., pp. 125-126.

[12/] Mr. Pigott also ruled out the possibility that the 120 by 25 foot area was part of the Department's "free zone"——the area immediately adjacent to the edge of the interstate, which the Department keeps clear of vegetation, loose impediments, and any other object that could pose a safety hazard. Jan. 9 Tr., pp. 53-55.

[13/] Jan. 9 Tr., pp. 156; 232.

[14/] To establish entitlement to a prescriptive easement, a claimant must prove: 1) actual, continuous, and uninterrupted use by the claimant or any predecessor in title for the prescriptive period (20 years); 2) that the use was related to a certain, limited, and defined area of land; 3) that the use has been either with the actual knowledge of the owner, or so open, notorious, and visible that knowledge of the use must be imputed to the owner; and 4) that the use has been adverse to the owner, i.e., "without permission (express or implied) from the owner, under some claim or right, inconsistent with the rights of the owner, and such that, for the entire period, the owner could have sued to prevent further use." Stackman v. Pope, 28 So. 3d 131, 133 (Fla. 5th DCA 2010).

Although it appears that the first three prongs are satisfied, Mr. Nobles has failed to prove that his use of the path on the intervening parcel was without the express or implied permission of that parcel's owner. Indeed, if any conclusion is to be drawn, it is that Mr. Nobles' use of the intervening parcel has been with the owner's permission. As Mr. Nobles readily admits, his access to the intervening parcel has, at all relevant times, been gained through a gate that features two locks (one belonging to Mr. Nobles, and the other

to the owner of the intervening parcel), the keys to which open both locks:

> Q For the last 20 years that you've been driving around the fence, have you ever had anybody tell you to not access it there?
>
> A No. They'll always come ask me could they go there, you know like – you know, to look around, you know, because the land next to me is for sale -- been for sale for a good while.
>
> Q And –
>
> A And I had – I had a key to the gate, and the man that had bought the land, he had a key. But we had – you know, we had two locks, his licked [sic] into mine, mine locked into his.

Feb. 13 Tr., pp. 76-77 (emphasis added).

[15/] Feb. 13 Tr., p. 39, ln 5.

[16/] It is of no moment that market values obtained over the telephone were later recorded in the mitigation report. See Harris v. Game & Fresh Water Fish Comm'n, 495 So. 2d 806, 808-09 (Fla. 1st DCA 1986)("[T]he fact remains that the report would still not fall within the [business records] exception because the relevant information contained in the report is itself hearsay.").

[17/] This result is required notwithstanding the absence of a hearsay objection. Scott v. Dep't of Bus. & Prof'l Reg., 603 So. 2d 519, 520 (Fla. 1st DCA 1992).

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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.