STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KATHRYN HOGAN PEREDA AND
MARGARET HOGAN MARKER, d/b/a HFT
ADVERTISING,

Petitioner,

Case No. 15-0733

vs.

DEPARTMENT OF TRANSPORTATION,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on May 29, 2015, by video teleconference in Miami and Tallahassee Florida, before June C. McKinney, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Austin M. Hensel, Esquire
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For Respondent: William G. McCormick, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether the Department of Transportation ("Department") properly issued a Notice of Denied Outdoor Advertising Permit Application for the eastward face of the Monument Sign owned by Kathryn Hogan Pereda and Margaret Hogan Marker, d/b/a/ HFT Advertising ("Petitioner" or "HFT").

PRELIMINARY STATEMENT

On November 12, 2013, the Department issued HFT a Notice of Denied Outdoor Advertising Permit Application advising that HFT's applications were denied for the following reason:

> Sign does not meet spacing requirements (1500' for interstates, 1000" for FAP). In conflict with permitted sign(s), tag#(s): CG242/243. Held by: Clear Channel Outdoor-South Florida Division.
> [s. 479.07(9)(a), 1.,& 2, FS]

On December 17, 2013, HFT filed a Petition for Formal Proceedings, requesting a formal administrative hearing to challenge the Department's exercise of permitting jurisdiction and denial of the sign permit application.

On February 13, 2015, the Department referred the matter to the Division of Administrative Hearings ("DOAH"). The final hearing was scheduled for May 29, 2015, and proceeded as scheduled.

At the final hearing, HFT presented the testimony of two witnesses: Howard T. Hogan, Jr., and Daniel Blanton, a surveyor

who testified as an expert. Petitioner's Exhibits 1 through 10, 12 through 14, and 17 were received into evidence. The Department called two witnesses: Kenneth Pye, Department Outdoor Advertising Field Operations Supervisor, and Mark Johnson, a Regional Outdoor Advertising Inspector. The Department's Exhibits numbered 1 through 6 were received into evidence.

The proceedings were recorded and transcribed. On June 19, 2015, the two-volume Transcript was filed at DOAH. Petitioner requested an extension until August 7, 2015, to file Petitioner's proposed recommended order, which the Department opposed. The undersigned granted the extension.

On July 30, 2015, Petitioner filed a Motion to Reopen Evidence and Request for Judicial Notice, requesting the undersigned to receive into evidence the transcript of certain testimony given by Kenneth Pye and Mark Johnson in DOAH Case No. 13-0855 and the Final Order. On July 31, 2015, the Department filed Objection to Petitioner's Motion to Reopen Evidence and Request for Judicial Notice. On August 3, 2015, the undersigned denied HFT's Motion.

Both parties filed proposed recommended orders, which the undersigned considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. In 1979, Petitioner's family acquired the property at 2930 Southwest 30th Avenue, Pembroke Park, Florida. The family's parcel is part of a subdivision of several smaller parcels, which houses a number of different businesses. Subsequently, Petitioner's grandparents purchased the sign parcel, which was conveyed to Petitioner in 1989. The original sign on the sign parcel was the Coral Base Sign ("Coral Base Sign").

2. The Department is the state agency responsible, inter alia, for the regulation of outdoor advertising signs located within 660 feet of, and visible from, interstate highways.

3. In approximately 1991, Petitioner replaced the Coral Base Sign. HFT retained a contractor to construct the new sign ("Marquee Sign"). HFT made sign space available to other Southwest 30th Avenue businesses on the Marquee Sign.

4. The Marquee Sign was built as a free-standing sign that was 10 feet wide and 15 feet high and was permitted through the Town of Pembroke Park.

5. When the contractor built the Marquee Sign, he did not remove the footings from the original Coral Base Sign to build the new sign. Instead, footings for the new sign were placed immediately contiguous to the Coral Base Sign footings on the CSX railroad property.

6. In 1994, HFT went back before the Town of Pembroke Park and obtained approval through a variance proceeding for a permit to add another section to the Marquee Sign and made it with two faces 15 feet high and 20 feet wide. The expansion allowed more businesses in the subdivision to advertise.

7. In 2010, the Department notified Petitioner that the Marquee Sign was located within the Department's right-of-way. By letter dated May 28, 2010, the Department informed Petitioner "per Florida Statutes, signs are prohibited to be within the right-of-way and will need to be relocated onto property owned by Margaret Claire Hogan and Kathryn Anne Hogan."

8. Petitioner believed the Marquee Sign was on their family's sign parcel but found out after a survey that the sign was not on their property but on the right-of-way.

9. In 2011, Petitioner complied with the Department's request to relocate the sign. HFT obtained another permit from the Town of Pembroke Park and removed the Marquee Sign from the Department's right-of-way. Petitioner spent approximately $50,000.00 permitting, designing, and erecting the current HFT Monument Sign ("Monument Sign") back in the location east of the sign parcel where the Coral Base Sign had stood originally.

10. The only viable use of the parcel on which the Monument Sign is located is the operation and maintenance of the Monument Sign.

11. Space on the Monument Sign is leased by Petitioner to the owners/operators of the Southwest 30th Avenue businesses for the purpose of identifying the location of their respective businesses to their customers and potential customers. The Monument Sign does not identify any businesses other than the Southwest 30th Avenue businesses.

12. The Monument Sign is located within the controlled area of both Hallandale Beach Boulevard and I-95. I-95 is part of the interstate highway system. The eastward face of the Monument Sign is visible from the main-traveled way of I-95.

13. A Clear Channel Sign is on the same side of I-95 as the Monument Sign. The Clear Channel Sign was permitted by the Department in 1984. It is located approximately 250 feet to the south of the Monument Sign.

14. On August 2, 2013, Mark Johnson ("Johnson"), a Regional Outdoor Advertising Inspector with the Department, performed an inspection of the Monument Sign and determined that it is an illegal and unpermitted sign. Johnson posted a Notice of Violation on the Monument Sign stating the sign was in violation of the permitting requirements of section 479.07, Florida Statutes (2015).

15. On August 5, 2013, the Department issued four Notices of Violation-Illegally Erected Sign to the Town of Pembroke Park and the four businesses advertised on the Monument Sign. The

Notices of Violation apprised the owners that the Monument Sign was in violation of section 479.105 and that within 30 days the sign either needed to be removed or an outdoor advertising permit application needed to be filed with the Department. Administrative hearing rights and permit application instructions were also made available in the Notices of Violation. However, no request for an administrative hearing was received by the Department.

16. On September 4, 2013, HFT submitted two outdoor advertising permit applications numbers 59865 and 59866 for the eastward and westward faces of the Monument Sign, which was erected in 2011. On September 6, 2013, the Department returned HFT's applications as incomplete.

17. On October 15, 2013, HFT submitted two outdoor advertising permit applications numbers 60016 and 60017 for the eastward and westward faces of the Monument Sign.

18. On November 12, 2013, the Department denied Petitioner's applications for permit. The Notice of Denied Outdoor Advertising Permit Application provided the following basis for denial:

> Sign does not meet spacing requirements (1500' for interstates, 1000" for FAP). In conflict with permitted sign(s), tag#(s): CG242/243. Held by: Clear Channel Outdoor-South Florida Division.
> [s. 479.07(9)(a), 1.,& 2, FS]

19. On December 17, 2013, HFT timely filed a Request for Formal Administrative Hearing contesting the Department's exercise of permitting jurisdiction and the denial notice. HFT does not dispute that: (i) I-95 is an interstate highway within the Department's permitting jurisdiction; (ii) the HFT Monument Sign is within 660 feet of the nearest edge of I-95; or (iii) the HFT Monument Sign is located within 1500 feet of another permitted sign on the same side of I-95.

20. On January 6, 2014, the Department determined the westward face of the Monument Sign was not visible from I-95 and met the spacing requirement for Hallandale Beach Boulevard. The Department issued permit number 56688 for the westward face of the Monument Sign but did not permit the eastward face.

CONCLUSIONS OF LAW

21. DOAH has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015).

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

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

24. 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). Accordingly, Petitioner HFT, 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.

25. Section 479.07(1) provides in pertinent part:

> (1) Except as provided in ss. 479.105(1) and 479.16, a person may not erect, operate, use, or maintain, or cause to be erected, operated, used, or maintained, any sign on the State Highway System outside an urban area or on any portion of the interstate or federal-aid primary highway system without first obtaining a permit for the sign from the department and paying the annual fee as provided in this section. As used in this section, the term "on any portion of the State Highway System, interstate highway system, or federal-aid primary system" means a sign located within the controlled area which is visible from any portion of the main-traveled way of such system.

26. The Department's determination regarding the Notice of Denied Outdoor Advertising Permit Application is based on section 479.07(9)(a), which provides in pertinent part:

> (a) A permit may not be granted for any sign for which a permit had not been granted by the effective date of this act unless such sign is located at least:
>
> 1. One thousand five hundred feet from any other permitted sign on the same side of the highway, if on an interstate highway.
>
> 2. One thousand feet from any other permitted sign on the same side of the highway, if on a federal-aid primary highway.
>
> The minimum spacing provided in this paragraph does not preclude the permitting of V-type, back-to-back, side-to-side, stacked,

> or double-faced signs at the permitted sign site. If a sign is visible to more than one highway subject to the jurisdiction of the department and within the controlled area of the highways, the sign must meet the permitting requirements of all highways and be permitted to the highway having the more stringent permitting requirements.

27. The definition of "controlled area" in section 479.01(5) provides in pertinent part:

> (5) "Controlled area" means 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.

28. The term "visible sign" in section 479.01(27) is defined as "the advertising message or informative contents of a sign, whether or not legible, can be seen without visual aid by a person of normal visual acuity."

29. "Main-traveled way" is defined in section 479.01(12) and provides in pertinent part:

> (12) "Main-traveled way" means the traveled way of a highway on which through traffic is carried. In the case of a divided highway, the traveled way of each of the separate roadways for traffic in opposite directions is a main-traveled way. The term does not include such facilities as frontage roads, turning roadways which specifically include on-ramps or off-ramps to the interstate highway system, or parking areas.

30. In the instant matter, the greater weight of the evidence,[1/] including the parties' videos, establishes that the eastward face of the Monument Sign is visible from I-95. Therefore, the eastward face of the Monument Sign falls within the permitting requirements of the Department's jurisdiction because the sign is visible to and within 660 feet of I-95.

Grandfathering

31. Petitioner addressed the grandfather exemption at hearing based on the Monument Sign having been "in roughly the same location since the late 1970s without any Department permits."

32. The Florida Legislature set up parameters for the Department to permit a sign by the grandfathering method in section 479.105(1)(c)2., which provides in pertinent part:

> 2. If the sign does not meet the current requirements of this chapter for a sign permit and has never been exempt from the requirement that a permit be obtained, the sign owner may receive a permit as a nonconforming sign if the department determines that the sign is not located on state right-of-way and is not a safety hazard, and if the sign owner pays 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, and attaches to the permit application package documentation that demonstrates that:
>
> a. The sign has been unpermitted, structurally unchanged, and continuously

> maintained at the same location for 7 years or more;
>
> b. During the initial 7 years in which the sign has been subject to the jurisdiction of the department, the sign would have met the criteria established in this chapter which were in effect at that time for issuance of a permit; and
>
> c. The department has not initiated a notice of violation or taken other action to remove the sign during the initial 7-year period in which the sign has been subject to the jurisdiction of the department.

33. Grandfathering is not an option for HFT under the law since the Monument Sign does not even meet the first prong of the requirements. Even if HFT can easily satisfy the initial element of never having been permitted, the structure changed in 2011 when the Marquee Sign was removed and constructed, not restored as the Monument Sign on the original Coral Base Sign foundation. Additionally, since the latest construction occurred in 2011, the seven-year requirement for maintaining the sign in the same location is not met. Accordingly, Petitioner's failure to establish the aforementioned requirements ends any further inquiry regarding the Monument Sign being permitted under the grandfather provision.

Equitable Estoppel

34. Petitioner's contention that the Department is estopped from denying the eastward face sign permit is not persuasive. HFT's position that it detrimentally relied on the May 28, 2010,

letter as a demand by the Department for Petitioner to move the sign without any notice regarding permitting is rejected. In the letter, the Department only informed HFT they had to "relocate [the sign] onto property owned," which did not mean that such a relocation would not have to be permitted. Additionally, when relocating the sign, HFT had the responsibility to do so in a legally permissible manner complying with any and all requirements. Moreover, Petitioner's assertion of unjust and inequitable treatment as grounds to estop the Department because HFT spent approximately $50,000.00 to construct the Monument Sign is not compelling since the westward face of the Monument Sign was also constructed with those same funds and is being fully utilized as a permitted sign by the Department.

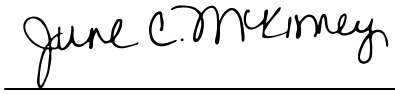
35. In sum, the greater weight of evidence established that the eastward face of the Monument Sign is visible to I-95 and requires a Department permit. However, section 479.07 prohibits a permit from being issued as the eastward face is less than 1,500 feet from the existing Clear Channel Sign on the same side of I-95. Petitioner failed to meet its burden of proof in this proceeding and to establish that the eastward face is exempt from permitting and that the eastward face can be permitted under the grandfather provision of section 479.105, or that the Department is equitably estopped from denying Petitioner's permit application.

RECOMMENDATION

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

RECOMMENDED that the Florida Department of Transportation enter a final order upholding Petitioner HFT's Notice of Denied Outdoor Advertising Permit Application for the eastward face of the Monument Sign.

DONE AND ENTERED this 14th day of September, 2015, in Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of September, 2015.

ENDNOTE

[1/] The undersigned finds that Petitioner's visibility argument regarding the Carter proceeding is unpersuasive.

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.