

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

Case No. 17-0947

ANN W. COMBEE,

Respondent.

_____ /

RECOMMENDED ORDER

D. R. Alexander, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted a hearing in this case on April 18, 2017, in Bartow, Florida.

APPEARANCES

For Petitioner: Richard E. Shine, Esquire
Department of Transportation
Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0458

For Respondent: David W. Holloway, Esquire
David W. Holloway, P.A.
13100 Park Boulevard, Suite B
Seminole, Florida 33776-3539

STATEMENT OF THE ISSUES

The issues are (1) whether a driveway connection on Respondent's property in Auburndale, Florida, is subject to closure because it poses safety concerns, and (2) whether a second driveway connection on Respondent's property should be

modified because it fails to meet current access management standards.

PRELIMINARY STATEMENT

In a Notice of Intent to Modify Driveway Connection (Notice) served on December 27, 2016, the Department of Transportation (Department) proposes to close a driveway connection to State Road 544 on Respondent's property on the ground it poses a potential safety condition. A construction plan attached to the Notice informed Respondent that the Department also intends to modify a second driveway connection on the property by reducing its width. Respondent timely requested a hearing and the matter was referred by the Department to DOAH to schedule a formal hearing.

At the hearing, the Department presented the testimony of three witnesses. Department Exhibits 1, 2, 4, 5, 6 (pages 3 through 7 only), and 9 through 15 were accepted in evidence. Exhibit 8 was accepted on a proffer basis only. Respondent presented the testimony of three witnesses. Respondent's Exhibits 2 through 4, 7 through 9, and 11 were accepted in evidence.

A one-volume Transcript of the hearing was prepared. Proposed findings of fact and conclusions of law were filed by the parties, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. Background

1. The Department is the state agency responsible for regulating access between state roads and private property abutting those roads. See §§ 335.18 through 335.188, Fla. Stat. State Road 544 is a part of the state highway system.

2. Since 1998, Respondent has owned a small, irregularly shaped parcel of property located at 502 Havendale Boulevard (State Road 544), Auburndale. The 0.46-acre parcel lies on the southeast corner of the intersection of State Road 544 and 42nd Street Northwest. Commercial establishments are located on the other three corners.

3. In December 1998, Respondent leased the property to a tenant who operates Townsend Motors, a used car lot. The business has operated continuously at that location since that time. Aerial photographs reflect the lot has a capacity of around 30 or so vehicles. Most vehicles are displayed where the triangle-shaped lot comes to a point at the intersection and along the side of the lot facing State Road 544. Other vehicles are parked throughout the middle or rear of the lot. They are rearranged from time to time to enhance sales. To replace cars that are sold, the tenant typically buys a few cars at a time, which are delivered by a tow truck. Auto carriers and large trucks with trailers are not used to deliver vehicles. On the

"rare" occasion in the past when a "big transport" made deliveries, the truck used the parking lot in a nearby Publix store to the east.

4. State Road 544 is classified as a class 7 road. See Fla. Admin. Code R. 14-97.003(1), Table 2. That classification is assigned to roads where adjacent land is developed to the maximum feasible intensity and roadway widening is limited. See Fla. Admin. Code R. 14-97.003(2). The regulation provides that a driveway connection on a class 7 road must be at least 125 feet from an intersection and at least the same distance from other connections. This amount of spacing reduces driver confusion and the potential for rear-end collisions.

5. Respondent's parcel has two driveway connections, less than 125 feet apart, facing State Road 544. The first connection is approximately 60 feet east of the intersection and is known as the western connection. The second connection lies further east and is known as the eastern connection. A third driveway connection is located on the western side of the parcel facing 42nd Street Northwest.

6. Driveway connections on state roads must be permitted or grandfathered. See § 335.1825, Fla. Stat.; Fla Admin. Code R. 14-96.011(3)(a). Neither connection on State Road 544 is permitted. A driveway is grandfathered if it was in existence prior to July 1, 1988, when access permits were first required.

See Fla. Admin. Code R. 14-96.011(3)(a). Because the driveway connections were in place before 1988, they qualify for that status. To retain that status, however, a driveway must be consistently used by the owner. If use is discontinued for a period of one year or more, the use is considered abandoned. See Fla. Admin. Code R. 14-96.005(2)(c).

7. If a driveway loses its grandfathered status through abandonment, the owner must apply for an access permit; otherwise, the driveway is subject to closure. A connection that retains its grandfathered status may still be modified if safety or operational issues exist. See Fla. Admin. Code R. 14-96.011(4)(b) (the Department may modify a grandfathered connection "if such modification is determined to be necessary because the connection would jeopardize the safety of the public or have a negative impact on the operational characteristics of the state highway"). The parties agree the eastern driveway is grandfathered and has been consistently used by the tenant since 1998. There is a dispute over the status of the western driveway.

8. The Department must allow owners of private properties adjoining a state road to have "reasonable access" to and from their property. See § 335.18(2)(a), Fla. Stat. As a general rule, limiting the number of driveway connections promotes

better traffic movement and an increased level of safety and mobility for the system as a whole.

9. To determine the number of connections necessary to establish reasonable access, the Department considers the projected connection and roadway traffic volumes, the type and intensity of the land use, the access management classification of the state road, and the standards for that classification. See Fla. Admin. Code R. 14-96.002(25).

B. The Intersection Project

10. The genesis of this dispute is a safety project (Project) at the intersection of State Road 544 and 42nd Street Northwest adjacent to Respondent's property. The Project was initiated after the Department received pedestrian complaints concerning safe travel across the intersection to access retail and food stores and a lack of crosswalks that comply with the Americans with Disabilities Act (ADA). The Project is only 0.038 miles in length and is limited to improvements at the intersection and the installation of sidewalks adjacent to Respondent's parcel and the three other corner commercial properties. There will be minimal impact to current vehicular patterns, and no increase in capacity is expected.

11. Part of the design effort for the Project included an evaluation of existing driveway connections for potential modifications that will improve traffic safety or traffic

operations on the roadway. This evaluation was limited to driveways on State Road 544, as the Department has no jurisdiction over driveways on 42nd Street Northwest, a local road.

12. During the planning process, the Department noted that the western driveway is less than 125 feet from the intersection, violates spacing requirements, and raises safety concerns. Accordingly, the Department proposes to remove it, "saw it over," and install type F curb and gutter along the roadway. To comply with access management standards for class 7 roads, the Department also proposes to narrow the width of the eastern driveway from around 60 feet to 36 feet and "widen the wings somewhat" to allow larger vehicles to swing into and out of the car lot. (Wings are the sides of the driveway that slope down from the top of the curb to the street level.) No changes to the driveway facing 42nd Street Northwest are proposed, and no other driveways on State Road 544 near the intersection will be modified. The Department determined that no other practical alternatives to this action exist.

13. Based on its evaluation of the property, the Department concluded that one direct connection on State Road 544 and an indirect connection on 42nd Street Northwest, a local road, provide reasonable access to the property.

14. The Department intends to install new pedestrian signal poles and increase access to a nearby bus stop. The Project includes connected sidewalks for the four commercial properties on the corners of the intersection and enhanced special emphasis crosswalks that are designed to comply with the ADA and connect to the existing Publix sidewalk to the east. The high-visibility crosswalks, pedestrian signalization improvements, and removal of the western driveway will improve traffic movement through the intersection and enhance motorist, bicycle, and pedestrian safety.

15. A Department Safety Office Benefit Cost Analysis revealed there were a total of 60 rear-end or angle crashes at the intersection during the five-year period 2010 through 2014 and that some could have been prevented with better signage and signals. The study projects 11 crashes will be avoided over the upcoming five-year period once the Project is completed. Besides reducing angle and rear-end crashes at the intersection, the proposed modifications will improve safety and operational conditions for pedestrians and motorists who will have greater connectivity to adjacent commercial properties.

C. Respondent's Objections

16. Respondent raises a number of objections to the Department's proposed action. She contends the western driveway is not abandoned, and even though it fails to meet current

spacing requirements, it should not be closed; the proposed modification to the eastern driveway is not warranted by safety or operational concerns; the Department violated a number of statutory provisions during the process leading up to the issuance of the Notice; the proposed action will deny her and the tenant reasonable access to the property; and the changes will reduce the value of the property.

a. The Western Connection

17. To comply with insurance requirements, in 1998 the tenant erected bollards (short vertical posts embedded in the driveway) around most of the parcel to restrict access to the premises. Among other locations, bollards were placed along the entire back side of the western connection, blocking off vehicle access through that driveway. Bollards were also placed on roughly half of the back side of the eastern connection, leaving less than 30 feet open to allow vehicles to enter and exit the premises. Even though the bollards remained in place for almost 20 years, Respondent considers them nothing more than temporary fixtures, as they could be removed at any time by sawing them off at ground level or pulling them out of the concrete.

18. The bollards remained in place until shortly after the Notice was received by Respondent in early January 2017. They were then removed by the tenant from the western driveway (and other areas). The tenant denies the Notice triggered their

removal and maintains they were removed to provide "extra room for the FedEx and stuff like that to get in." He added that his current insurance company no longer requires bollards for security purposes.

19. The Department contends the western driveway connection was abandoned because bollards blocked vehicle access through the driveway from December 1998 until January 2017. The tenant's testimony confirms this assertion.

20. The tenant admits he has "not frequently [been] using the westernmost driveway," but maintains the connection was never abandoned, as Fedex trucks and the mail carrier regularly parked on the driveway apron, which lies between the roadway and the bollards. Emergency responders also use the apron when responding to accidents at the intersection, and disabled vehicles traveling eastbound on State Road 544 are pushed onto the apron. The bottom line is that even though the apron may have been used, the driveway itself was not, and the connection was basically used as a "pull-off." In fact, the tenant acknowledged that until January 2017, except for customers who used the parking lots of adjacent businesses located south of the parcel, all other customers used the eastern connection to access the property.

21. The evidence supports a finding that, even if the car lot has remained in business continuously, and Respondent did

not intend to abandon the driveway, for the reasons stated above, it was effectively abandoned for more than one year.

22. Because the western driveway is only 60 feet from the intersection and violates spacing standards, it is subject to closure based on safety concerns. Without closure, additional traffic will enter and exit the car lot, there will be less driver reaction time for vehicles to stop, and it will increase the potential for more pedestrian injuries and vehicle crashes.

b. The Eastern Connection

23. The eastern driveway is 58 feet wide when measured at the back of the property line. Until January 2017, less than 30 feet were usable because bollards blocked the remainder of the connection.

24. The maximum width for a class 7 driveway connection is determined by the number of vehicle trips per day that enter a property and whether the connection is in a rural or urban location. Under current design standards for urban locations, a 24-foot driveway connection is typically allowed. See Dep't Ex. 15. Assuming a large volume of traffic entering or exiting the driveway, a maximum of 36 feet may be permitted. Id. Although there is no evidence that a large volume of traffic enters or exits the premises, after speaking with the owner's representative, Mr. Combee, the Department agreed to increase the width from 24 feet to 36 feet and widen the sides (wings) to

make the driveway more accessible by customers and vehicles making deliveries. By comparison, the nearby Publix store has a 24-foot connection to State Road 544, although it also has several indirect connections on the local streets. The modified connection is of sufficient length and size for vehicles to enter and exit the premises.

c. Other Objections

i. Notice

25. Respondent contends the Department did not comply with section 335.199(1), Florida Statutes, before issuing the Notice.

That subsection provides as follows:

Whenever the Department of Transportation proposes any project on the State Highway System which will divide a state highway, erect median barriers modifying currently available vehicle turning movements, or have the effect of closing or modifying an existing access to an abutting property owner, the department shall notify all affected property owners, municipalities, and counties at least 180 days before the design of the project is finalized. The department's notice shall provide a written explanation regarding the need for the project and indicate that all affected parties will be given an opportunity to provide comments to the department regarding potential impacts of the change.

Subsection (3) of the statute also requires at least one public hearing in the jurisdiction where the project is located.

26. The Department has always construed this provision as applying only to large projects that involve an expenditure of

"upward of a million dollars" and take out or block medians, remove turn lanes, or reconfigure intersections in conjunction with a modification or closure of a driveway connection. Because the Project entails the expenditure of \$119,936.00, and only new curbs, sidewalks, striping, and pedestrian signals are contemplated, the Department considers it a "very limited scope" project and one that does not implicate the statute.

27. For small projects such as this, the Department provides preliminary notification to the property owner and tenant, if any; a written notice setting forth the proposed agency action and the reason for the changes; an opportunity for the owner to meet with Department representatives to express concerns; notice to the affected local governments; and ultimately an administrative hearing, if one is requested. This process complies with section 335.1825(3), which only requires "reasonable notice" to the owner before closing an unpermitted connection.

28. Before the Notice was issued, oral notice regarding the Project was given to the tenant by a Department representative. During the meeting, the tenant told the representative that he "didn't mind" if the western driveway was removed. Also, a Department representative spoke by telephone with Mr. Combee before the Notice was issued, but Mr. Combee says he was under the impression the Department was only seeking

to close the connection on 42nd Street Northwest. An on-site meeting with Mr. Combee and his counsel was conducted in February 2017. Based on concerns expressed by Mr. Combee, the Department agreed to increase the width of the eastern driveway from 24 to 36 feet and widen the wings to provide greater accessibility into and out of the lot.

29. Besides meeting with the tenant and Mr. Combee, the Department informed the City of Auburndale and Polk County about the intersection project and asked them whether any comments had been received from the public regarding the intersection.

30. Assuming arguendo that section 335.199 applies to every project involving the closure or modification of a driveway connection, regardless of its size, there was no showing that Respondent was prejudiced by the Department's failure to comply with all requirements of the statute.

ii. Lack of an Engineering Study

31. Respondent contends the Department violated Florida Administrative Code Rule 14-96.011(4)(b) by failing to conduct a formal engineering study to substantiate the safety and operational concerns for closing and modifying the connections.

32. In lieu of a signed and sealed engineering study, the Department performed a Safety Cost Benefit Analysis documenting the five-year crash history at the intersection. The study also includes an engineer's estimate of the type and cost of specific

improvements planned to improve the safety of motorists and pedestrians at the intersection. See Resp. Ex. 5.

33. Nothing in rule 14-96.011(4) or (5) requires that a formal engineering study be conducted before closing an unpermitted connection or modifying a grandfathered connection. In fact, the rule cited by Respondent provides the "problem may be substantiated by an engineering study signed, sealed, and dated by a professional engineer registered in the State of Florida." (emphasis added). Therefore, both driveways are subject to removal or modification without any type of formal study being conducted. Here, the Department relied on a study of the crash history at the intersection, access management standards for connections on class 7 roadways, and safety concerns expressed by members of the public. These measures are adequate to support the Department's proposed action.

iii. Reasonable Access

34. Respondent contends the Department's proposed action leaves her without "reasonable access" to the property. To support this contention, her engineering expert opined that both driveways on State Road 544 are necessary in order for large trucks making deliveries to enter and exit the lot. The engineer assumed incorrectly, however, that semi-trucks and trailers now access the property to make deliveries, and a 36-foot driveway will be too small to accommodate that type of

vehicle. He also opined that large trucks cannot access the property through the 42nd Street Northwest connection because a building is located in the middle of the parcel and prevents them from being driven across the lot and exiting through the eastern connection.

35. The expert agrees a 36-foot driveway provides reasonable access for automobiles and small trucks. The evidence shows that replacement vehicles are normally delivered by a tow truck hauling no more than one or two at a time and large semi-trucks and trailers do not make deliveries at the property. Assuming that the mail carrier or FedEx wish to continue parking where the apron now sits while they deliver the mail or a package, they can do so by pulling over the six-inch curb and parking on the grass.

36. The evidence supports a finding that one direct access point on State Road 544 and one indirect access point on 42nd Street Northwest provide reasonable access to the property and result in safer and more efficient access to the state highway system.

iv. Economic Concerns

37. Respondent contends the value of her property will be diminished as a result of the closure of the western connection. However, economic injury is not a statutory consideration for

closing or modifying connections, and redress for that type of injury, if any, lies in another forum.

v. Management of Project

38. The Department routinely allows construction project administrators who are not professional engineers to manage the day-to-day work on intersection projects such as this. While the project plans were signed and sealed by a professional engineer, who is the project engineer of record, a construction project administrator, Mr. Freeman, will take the plans and "make it a reality in the field." Respondent contends Mr. Freeman is violating section 471.003(1) by performing certain investigative, evaluating, planning, and designing activities without an engineering license. Assuming arguendo this is true, jurisdiction over that issue lies with the Florida Board of Professional Engineers and not the Department.

CONCLUSIONS OF LAW

39. The Department initiated this action by issuance of a Notice, with an attached construction plan sheet, alleging that the eastern and western driveways are nonconforming connections and must be modified or closed. Therefore, the Department has the burden of proving, by a preponderance of the evidence, the allegations in the Notice and plans. See Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

40. Section 334.044(14) provides that the Department has the following power and duty:

(14) To establish, control, and prohibit points of ingress to, and egress from the State Highway System . . . as necessary to ensure the safe, efficient, and effective maintenance and operation of such facilities.

41. Section 335.181 of the State Highway Access Management Act establishes the broad framework for regulating access to state roads. It provides in relevant part:

(1)(a) Regulation of access to the State Highway System is necessary in order to protect the public health, safety, and welfare, to preserve the functional integrity of the State Highway System, and to promote the safe and efficient movement of people and goods within the state.

* * *

(2)(a) Every owner of property which abuts a road on the State Highway System has a right to reasonable access to the abutting state highway but does not have the right of unregulated access to such highway. The operational capabilities of an access connection may be restricted by the department. However, a means of reasonable access to an abutting state highway may not be limited by the department, except on the basis of safety or operational concerns as provided in s. 335.184.

(b) The access rights of an owner of property abutting the State Highway System are subject to reasonable regulation to ensure the public's right and interest in a safe and efficient highway system. This paragraph does not authorize the department to deny a means of reasonable access to an

abutting state highway, except on the basis of safety or operational concerns as provided in s. 335.184.

42. Section 335.182 requires that the Department adopt rules for closing or modifying nonconforming connections. In accordance with this responsibility, the Department has adopted rules in chapters 14-96 and 14-97. To resolve this dispute, reference to the following rules is necessary.

43. Rule 14-96.015 prescribes certain requirements that must be met when modifying unpermitted and grandfathered connections in conjunction with a Department safety project. It reads in relevant part as follows:

14-96.015 Department Design and Construction Projects.

When existing connections are modified by a Department project, access will be provided to abutting properties, subject to reasonable regulation as referred to in Section 335.181(2)(b), F.S. To the maximum extent feasible, this new access will be consistent with adopted Department connection standards.

(1) Corridors will be examined during the preliminary engineering and design phases to determine if existing connections, median openings, and signals spacing and design standards are in conformance, or can be brought into conformance, with adopted Department standards.

* * *

(3) Where connections are to be modified as part of a Department construction project, and the Department is not planning to

acquire any portion of the property for the project, the Department will provide notice and opportunity for an administrative proceeding pursuant to Rule 14-96.011(1)(d), F.A.C., construction plans for a Department project signed, sealed, and dated by a Professional Engineer registered in the State of Florida shall substantiate a connection's non-conformance with Department standards or potential safety or operational problem, and a separate engineering study shall not be required.

* * *

(5) The Department shall bear the cost of modification of existing approved connections, necessitated solely by Department construction projects. When a permitted or grandfathered

44. The Department has also adopted rule 14-96.011, which establishes standards for modifying unpermitted connections. It reads in relevant part:

14-96.011 Modification of Connections.

* * *

(3) Unpermitted Connections.

(a) Grandfathered Connections to the State Highway System. Connections permitted or in existence prior to July 1, 1988, use of which have never been discontinued as described in subparagraph 14-96.005(2)(c)3., F.A.C., are considered "grandfathered" and shall not require the issuance of a permit and may continue to provide connection to the State Highway System except as provided in subsection (4).

(b) Unpermitted/Non-Grandfathered Connections. All other unpermitted

connections are subject to closure in accordance with paragraph (5) (b).

(4) Modification of Grandfathered Connections.

* * *

(b) The Department will modify a connection if such modernization is determined to be necessary because the connection would jeopardize the safety of the public or have a negative impact on the operational characteristics of the state highway. The problem may be substantiated by an engineering study signed, sealed, and dated by a professional engineer registered in the State of Florida. Such engineering study shall consider the following:

1. Analysis of accidents or operational analysis directly involving the connection or similar connections, or a traffic conflicts analysis of the site.
2. Analysis of the impact modification of the connection will have on maintenance or safety on the public road system.
3. Analysis of the impact modification of the connection will have on traffic patterns and circulation on the public road system.
4. The principles of transportation engineering as determined by generally accepted professional practice.

(c) If the Department acts to modify a connection, the Department shall offer an opportunity to meet on site with the property owner or designated representative. The Department will take into consideration the following:

1. Documents, reports, or studies obtained by the property owner or lessee and provided to the Department.

2. Alternative solutions proposed by the property owner.

(5) Notification Process for Modification of Unpermitted Connections. Notice of the Department's intended action will be provided in accordance with Rule Chapter 28-106, F.A.C.

(a) The Department shall give written notice to the property owner, with a copy to the occupant, for a grandfathered connection if significant changes have occurred or if the connection is found to cause a safety or operational problem (as specified in this rule chapter). The notice will identify the specific information regarding the safety or operational problem and request that the problem be corrected or that a written agreement on a schedule for the correction be approved by the Department within 30 days of receipt of the notice.

* * *

2. If the reason for the modification is a safety or operational problem, the notice will state the basis of the Department's determination and describe the changes necessary to reduce the hazard or correct the situation.

* * *

(6) Responsibility for Costs of Correcting Deficiencies. The property owner and current user of the connection shall be responsible for the costs of modifications required pursuant to actions taken in accordance with the procedure in Rule 14-96.011, F.A.C.

45. In this case, the Department has fully complied with the requirements of the law and applicable regulations set forth above. The evidence clearly establishes that closure of the

abandoned, nonconforming western connection will improve vehicular and pedestrian safety. Also, reducing the width of the nonconforming eastern driveway is required in order to meet class 7 access standards. The eastern driveway and the driveway on 42nd Street Northwest provide reasonable access to Respondent's property. There are no reasonable alternatives that would improve safety and provide reasonable access to the parcel.

RECOMMENDATION

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

RECOMMENDED that the Department of Transportation enter a final order approving the closure of Respondent's western driveway and modification of the eastern driveway, as part of the Department's State Road 544 Safety Project.

DONE AND ENTERED this 9th day of June, 2017, in Tallahassee, Leon County, Florida.



D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of June, 2017.

COPIES FURNISHED:

Michael J. Dew, Secretary
Department of Transportation
Mail Station 57
605 Suwannee Street
Tallahassee, Florida 32399-0450
(eServed)

Andrea Shulthiess, Clerk of Agency Proceedings
Department of Transportation
Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0450
(eServed)

Tom Thomas, General Counsel
Department of Transportation
Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0450
(eServed)

Richard E. Shine, Esquire
Department of Transportation
Mail Station 58
605 Suwannee Street
Tallahassee, Florida 32399-0458
(eServed)

David W. Holloway, Esquire
David W. Holloway, P.A.
13100 Park Boulevard, Suite B
Seminole, Florida 33776-3539
(eServed)

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.