

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CRESTVIEW PAINT AND BODY, INC.,

Petitioner,

vs.

Case No. 17-2712

DEPARTMENT OF TRANSPORTATION,

Respondent.

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RECOMMENDED ORDER

On November 29, 2017, Administrative Law Judge Yolonda Y. Green, of the Division of Administrative Hearings ("Division"), conducted a duly-noticed final hearing in Crestview, Florida, pursuant to 120.57(1), Florida Statutes (2017).

APPEARANCES

For Petitioner: Dixie Dan Powell, Esquire  
Powell Injury Law, P.A.  
602 South Main Street  
Crestview, Florida 32536

For Respondent: Susan Schwartz, Esquire  
Department of Transportation  
Mail Station 58  
605 Suwannee Street  
Tallahassee, Florida 32399-0458

STATEMENT OF THE ISSUES

The issues to be determined are: a) whether Petitioner's sign for Crestview Paint and Body is located within Department of Transportation's ("Department" or "Respondent") right-of-way;

and b) whether the sign is entitled to an on-premises exemption from permitting.

PRELIMINARY STATEMENT

By letter dated February 7, 2017, the Department notified Crestview Paint and Body, Inc. ("Crestview Paint and Body" or "Petitioner"), that an outdoor advertising sign on its property on State Road 85, in Crestview, Florida, was displayed without a permit as required by section 479.07(1), Florida Statutes. On April 18, 2017, the Department issued a Notice of Violation- Illegally Erected Sign ("Notice") to Crestview Paint and Body directing removal of the sign.

On April 24, 2017, Petitioner timely filed a request for a formal administrative hearing to dispute the notice of violation. On May 11, 2017, the Department referred this case to the Division for assignment of an administrative law judge. The undersigned initially scheduled the hearing for July 20, 2017. On June 12, 2017, Petitioner filed an unopposed Motion for Continuance, which the undersigned granted. The hearing was rescheduled for September 26, 2017. On September 20, 2017, the Respondent filed an Agreed Motion for Continuance, which the undersigned granted. The hearing was rescheduled for November 29, 2017.

The hearing convened on November 29, 2017, as scheduled. Petitioner presented the testimony of four witnesses: Wayne

Thompson, an employee of Crestview Paint and Body; Lynda Anderson, a former customer of Crestview Paint and Body; Senida Oglesby, a code enforcement officer for the City of Crestview; and Glenn Edward Lowe, owner of Crestview Paint and Body. Petitioner offered into evidence Exhibits 1 through 10, which were admitted into evidence. Respondent presented the testimony of five witnesses: Robbie Collins, Department outdoor advertising inspector, District 3; Danny Deal, Department surveyor; George Massey, Department survey and right-of-way mapping manager; Billy Benson, Department outdoor advertising field administrator; and Michael Green, Department outdoor advertising control administrator. The Department offered into evidence Exhibits 1 through 18, which were admitted.

The parties stipulated to facts in the Joint Prehearing Stipulation which have been incorporated in the findings of fact below, to the extent relevant.

A one-volume Transcript of the proceedings was filed on December 22, 2017. The parties timely filed their Proposed Recommended Orders and both have been duly considered in the preparation of this Recommended Order.

All citations are to the 2017 Florida Statutes, except as otherwise indicated.

FINDINGS OF FACT

1. The Department of Transportation is the state agency responsible for regulating outdoor advertising along interstates and federal-aid primary roads in accordance with chapter 479, Florida Administrative Code Chapter 14-10, and a 1972 Federal-State Agreement.

2. Petitioner, Crestview Paint and Body, owns and operates an auto body repair shop on 956 West James Lee Boulevard in Crestview, Florida, and has maintained that location since 1988. In 2006, Petitioner bought property at 701 South Ferdon Boulevard in Crestview, Florida, including a pre-existing sign for Jet Muffler and a building with four units. Petitioner opened the business location in 2007, and replaced the Jet Muffler sign with one for Crestview Paint and Body.

3. One of the issues of dispute in this matter is whether Petitioner conducted business at the Ferdon Boulevard location. Mr. Lowe, owner of Crestview Paint and Body, testified that the Ferdon Boulevard location was operated as a concierge service for Crestview Paint and Body. Mr. Lowe maintains a business occupational license for the Ferdon location and the license was effective and valid when Respondent issued the Notice on April 17, 2017. While a tax collector print-out reflected the business was closed, the credible evidence supports that the concierge location maintained a valid business occupation

license. Mr. Lowe had business cards made with a photograph of the Ferdon Boulevard location showing Hertz and Crestview Paint and Body, and the words "Collision Concierge and Rental Car Center, 701 S. Ferdon Blvd, Crestview, Florida." Another card read "2 Locations to Serve You Better" with the addresses for Ferdon Boulevard and James Lee Boulevard.

4. The Crestview Paint and Body sign at issue here was located at the Ferdon Boulevard location. It was erected at the same spot as the predecessor sign that advertised the Jet Muffler business and installed under permit No. 2007-0430. Petitioner complied with all Crestview local ordinances required to erect the sign. As the sign was replacing an established sign, it is not clear if the City of Crestview required a survey of the location prior to installation. The sign has been owned and operated by Crestview Paint and Body in its current location for the past 10 years.

5. Wayne Thompson, an employee of Crestview Paint and Body, testified that he works at the Ferdon location periodically. He meets customers at the location as needed, an average of two times per month. An employee was initially assigned to work full-time at the concierge location, but the position was reduced to part-time, and eventually eliminated.

6. Senida Oglesby, a former customer of Crestview Paint and Body, testified that she received concierge service at the

Ferdon Boulevard location. She took her vehicle to the location and it was transferred to the main location for completion of service. However, Ms. Oglesby stated she was last at the business approximately 3 to 4 years ago.

7. Mr. Lowe testified that he completed an inspection of a vehicle at the concierge location on an undetermined date.

8. Respondent asserts that its investigator visited the Ferdon Boulevard location on February 7, 2017; April 17, 2017; and May 15, 2017, and observed no business activity and concluded there was no business being conducted on behalf of Crestview Paint and Body at the location.

9. The credible evidence demonstrates that there was no legitimate business activity being conducted on behalf of Crestview Paint and Body at the Ferdon Boulevard location.

10. Ferdon Boulevard is a federal-aid primary highway subject to Department permitting in accordance with chapter 479. Crestview Paint and Body has never requested or received a permit for the display of outdoor advertising at the Ferdon Boulevard location.

11. In 2015, Crestview Paint and Body leased Bay 101 of the Ferdon Boulevard location to a vape and smoke shop. The header signs positioned above the units numbered 101, 103, and 104 had signs for the vape and smoke shop. There was no header sign above unit 102.

12. Mr. Collins placed a Notice sticker on the Crestview Paint and Body sign located at Ferdon Boulevard. On April 18, 2017, a written copy of the Notice was sent to Crestview Paint and Body at the James Lee Boulevard location.

13. In preparing for the hearing, Billy Benson, a Department outdoor advertising field administrator, discovered that the sign appeared to be partially on the property owned by Crestview Paint and Body and partially on the Department's right-of-way.

14. The Department's right-of-way is defined in section 334.03(21), Florida Statutes, as land in which the Department owns the fee or has an easement devoted to or required for use as a transportation facility. At the sign's location, the right-of-way extended 50 feet to the right and 47 feet to the left of the centerline of Ferdon Boulevard.

15. Mr. Collins again visited the Ferdon Boulevard location along with Sam Rudd. Mr. Collins and Mr. Rudd located survey markers to the north and south of the sign establishing the Department's right-of-way line extending 10 feet beyond the edge of the sidewalk. The front edge of the sign began at two feet beyond the edge of the sidewalk and the back edge of the sign was 12 feet beyond the sidewalk.

16. A survey conducted by a Department survey crew in November 2017, confirmed that 7.8 feet of the sign was located

within the Department's right-of-way and 2.6 feet of the sign was on Petitioner's property.

17. On September 20, 2017, the Department issued an Amended Notice of Violation-Illegally Erected Sign, noting that in addition to being an unpermitted sign in violation of section 479.105, the sign was located within the Department's right-of-way in violation of sections 479.11(8) and 337.407.

18. On September 20, 2017, the parties filed an Agreed Motion for Continuance, based on the recently discovered information and the sudden death of Mr. Lowe's father. The motion provided:

This matter involves an unpermitted sign in Okaloosa County. The department recently surveyed the sign's location and determined the sign is within the Department's right of way. Consequently, the department is issuing an amended notice of violation citing section 337.407 and 479.107, Florida Statutes, in addition to the initial reason for the violation based on section 479.105, Florida Statutes. The Department believes it is in the interest of judicial economy to have all charges determined in a single hearing. The Petitioner has indicated additional time will be needed to respond to the notice of violation as amended.

19. Petitioner contends that it objected to the Department's amendment of the Notice initially filed in this matter. While the Department did not properly file a Motion to Amend its Notice, there was no showing that Respondent was prejudiced by the Department's failure to comply with all



requirements of the statute. Assuming arguendo there was prejudice, any prejudice alleged by Petitioner was cured.

20. Petitioner agreed to the continuance, which stated the amendment of the Notice as a basis for the continuance. Further, Petitioner had more than 60 days to conduct discovery regarding the new allegations and had sufficient time to prepare for the hearing.

#### CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this proceeding pursuant to sections 120.569 and 120.57(1).

22. The Department has the authority to regulate outdoor advertising and issue permits for signs located along interstate and federal-aid primary highways pursuant to chapter 479 and chapter 14-10.

23. Section 479.07(1) provides as follows:

Except as provided in ss. 479.105(1)(e) 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 incorporated 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. For purposes of this section, "on any portion of the State Highway System, interstate, or federal-aid primary system" shall mean a

sign located within the controlled area which is visible from any portion of the main-traveled way of such system.

24. Section 479.105(1) provides as follows:

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

25. The Department has charged Petitioner with maintaining a sign visible to a federal-aid primary road without a permit and bore the burden of proving that the signs were illegal. See Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1st DCA 1981) (the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal). Having presented evidence that the sign is visible to and within 660 feet of a federal-aid primary highway, the burden then shifted to Petitioner to demonstrate that the sign was entitled to an exemption from the permitting requirement. See Henderson Sign Serv. v. Dep't of Transp., 390 So. 2d 159 (Fla. 1st DCA 1980).

On-Premises Permitting Exemption

26. Petitioner contends that the Crestview Paint and Body sign is exempt from permitting as an on-premises sign in accordance with section 479.16(1), which provides as follows:

(1) 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 and which comply with the lighting restrictions imposed under s. 479.11(5), or signs owned by a municipality or a county located on the premises of such municipality or county which display information regarding governmental services, activities, events, or entertainment. For purposes of this section, the following types of messages are not considered information regarding governmental services, activities, events, or entertainment:

- (a) Messages that specifically reference any commercial enterprise.
- (b) Messages that reference a commercial sponsor of any event.
- (c) Personal messages.
- (d) Political campaign messages.

If a sign located on the premises of an establishment consists principally of brand name or trade name advertising and the merchandise or service is only incidental to the principal activity, or if the owner of the establishment receives rental income from the sign, the sign is not exempt under this subsection.

27. Petitioner's ownership of the parcel, maintenance of a business license for the location, and scheduling of

appointments to meet customers at the location does not constitute business activity of paint and body service conducted on the property sufficient to warrant an on-premises exemption for Crestview Paint and Body. See McDonald's Corp. v. Dep't of Transp., 535 So. 2d 323 (Fla. 2d DCA 1988) (where a parcel of land is being used solely for advertising purposes and the business activity is conducted more than 1,000 feet away, the sign is not entitled to an on-premises exemption).

28. The undersigned finds that while there may have been minimal business activity conducted on the premises, the business was not meaningful to warrant an exemption for an on-premises exemption. The more credible evidence demonstrates that to the extent any activities may have been conducted on behalf of the Crestview Paint and Body, the sign and any message displayed are not an integral part of any business being conducted by Petitioner on the premises.

#### Acknowledgment Sign

29. Petitioner also contends that its sign meets the requirements for an acknowledgment sign. The top portion of the sign consists of an LED electronic display that provides a message thanking individuals for their community support. Pursuant to section 479.01(19), a "sign" subject to permitting is "any combination of structure and message" to include "an automatic changeable facing, designed, intended, or used to

advertise or inform." Although section 479.16 lists a number of permitting exemptions, acknowledgment signs are not among the listed messages entitled to an exemption from permitting. Petitioner was, therefore, obligated to obtain a permit for the LED sign in accordance with chapter 479.

#### Right-of Way Encroachment

30. Section 337.407(1), Florida Statutes, provides "[n]o person shall erect any sign, as defined in Chapter 479, or light within the right-of-way limits of any road on the interstate highway system, the federal-aid primary highway system, the State Highway System, or the State Park Road System." Section 479.11(8) prohibits the maintenance of any sign "located upon the right-of-way of any highway on the State Highway System, interstate highway system, or federal-aid primary highway system." The evidence presented at hearing demonstrates that the sign is partially located on the Department's right-of-way.

31. Even if Petitioner's sign met the requirement for a on-premises sign, which was not the case here, the evidence demonstrates that it is partially located on the right-of-way and must be removed.

#### Estoppel

32. Petitioner does not dispute that the Ferdon Boulevard sign is located substantially on the Department's right-of-way, but suggests that the Department should be estopped from taking

any enforcement action as the sign was permitted by the City of Crestview over 10 years ago.

33. To establish equitable estoppel against a state agency, Petitioner would need to establish: 1) that a representation was made as to a material fact that is contrary to a later asserted position; 2) Petitioner relied on that representation; and 3) as a result, Petitioner changed its position to its detriment. Salz v. Dep't of Admin., Div. of Ret., 432 So. 2d 376, 378 (Fla. 3d DCA 1983). In the present case, Petitioner has not alleged that the Department made any affirmative statement authorizing erection of the sign or that Petitioner relied on Department statements to its detriment. The City of Crestview's permitting the sign does not negate the Department's authority to take enforcement action upon learning that a substantial portion of the sign is located on the Department's right-of-way.

Laches and Waiver

34. Similarly, Petitioner failed to demonstrate that the Department's action should be barred by the doctrines of laches or waiver. Laches is an equitable doctrine that is applied not based upon unreasonable delay in enforcing a right, coupled with a disadvantage to the person against whom the right is sought to be asserted. In re Biddiscombe Intern., LLC, 392 B.R. 909 (Bankr. M.D. Fla. 2008). The elements of laches are:

(1) conduct by the defendant, or one under whom he claims, giving rise to the situation of which complaint is made; (2) delay in asserting the plaintiff's rights, after the plaintiff has had notice or knowledge of the defendant's conduct, and an opportunity to institute suit; (3) lack of knowledge on the part of the defendant that the plaintiff would assert the right on which he bases his suit; and (4) injury or prejudice to the defendant in the event relief is accorded to the plaintiff. Van Meter v. Kelsey, 91 So. 2d 327, 332. (Fla. 1956). Petitioner has not established that the Department was aware of the violation and took no action or affirmatively waived its entitlement to take action upon learning of the violation.

#### Selective Enforcement

35. Petitioner argues that the Department's issuance of a violation on its sign, without investigating other signs along Ferdon Boulevard, constitutes selective enforcement. Petitioner relies on Florida Department of Transportation v. E.T. Legg & Company, 472 So. 2d 1336 (Fla. 4th DCA 1985), wherein the Court found competent substantial evidence in the record to support selective enforcement where the Department removed only one sign, despite having issued numerous citations to others for the same offense.

36. To establish that the government entity has selectively enforced its statutes, one must first demonstrate that the agency was aware of other violators, but chose to take no action. Meristem Valley Nursery v. Metro Dade Cnty., 428 So. 2d 728 (Fla. 3d DCA 1983). Petitioner presented photographs of signs that may be located on the Department's right-of-way, but a survey was not done to confirm this suggestion and the Department received no complaints or reports to alert it of the potential violations. Petitioner has not established that the Department was aware of other violators and elected to only pursue removal of its sign.

37. Selective enforcement is only prohibited when (1) an individual is singled out for prosecution although the government was aware others had violated the law; and (2) the decision on who to prosecute is based on an unjustifiable standard such as race, religion, or other arbitrary classification. State v. A.R.S., 684 So. 2d 1383, 1384 (Fla. 1st DCA 1996). Petitioner has not established that the Department imposed its regulation based on impermissible factors and thus, did not demonstrate the Department engaged in selective enforcement.

38. Moreover, the Department is not precluded from taking enforcement action against Petitioner merely because other signs may be in violation.



39. Based on the foregoing, the Crestview Paint and Body sign is located on the Department's right-of-way and does not qualify for an exemption as an on-premises sign.

RECOMMENDATION

Upon consideration of the above Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Department of Transportation enter a final order finding that Petitioner's sign was erected and maintained on the Department's right-of-way. Further, the final order should find that Petitioner is not entitled to an exemption for an on-premises sign.

DONE AND ENTERED this 1st day of February, 2018, in Tallahassee, Leon County, Florida.



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YOLONDA Y. GREEN  
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Filed with the Clerk of the  
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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.